Neutral Citation Number: [2005] IEHC 477

THE HIGH COURT

2002 No. 1183 P

BETWEEN/

FYFFES PLC

PLAINTIFF

AND
DCC PLC
S & L INVESTMENTS LIMITED
JAMES FLAVIN
AND LOTUS GREEN LIMITED

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 21st December, 2005.

I. Introduction

The Claim
1. In these proceedings the plaintiff seeks the following reliefs against the defendants:

A. a declaration that the sale by the first and second named defendants of in excess of 31 million ordinary shares in the plaintiff between 3rd February, 2000 and 15th February, 2000 constituted an unlawful dealing within the meaning of Part V of the Companies Act 1990 (the Act of 1990);

B. an order pursuant to section 109(1)(b) of the Act of 1990 requiring the defendants and each of them to account to the plaintiff for any profit accruing to the defendants from those sales;

C. an account in equity of all profit accruing to the defendants or each or either of them from those sales; and

D. damages and/or compensation for breach of fiduciary duty on behalf of the third named defendant. The reliefs referred to at A and B are founded on alleged breaches of Part V of the Act of 1990 and the remedy sought at B is a statutory remedy. I will refer to these aspects of the claim as the statutory claim. The statutory claim is dealt with in Part II of this judgment.

2. The reliefs sought at C and D are founded on alleged breaches by the third named defendant of his fiduciary duties as a director of the plaintiff. The remedy sought at C is an account in equity and the remedy sought at D is damages or compensation pursuant to the court's common law jurisdiction. I will refer to these elements of the claim as the non-statutory claim. The non-statutory claim is dealt with in Part III of this judgment.

3. The provisions of Part V of the Act of 1990 have been repealed by s. 31 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 (the Act of 2005) with effect from 6th July, 2005, so far as they relate to a regulated market (Investment Funds, Companies and Miscellaneous Provisions Act (Commencement) Order, 2005 (S.I. No. 323 of 2005)). However, the repeal does not affect the claims in these proceedings.

The Parties
4. In referring to the plaintiff as a litigant in these proceedings I propose calling it the plaintiff; otherwise I will refer to it as Fyffes. Fyffes is a public company, the shares of which are listed on both the London Stock Exchange and the Irish Stock Exchange. It is involved in the fresh produce trade, bananas being the core of its business. From its flotation in 1981 to 2003 Neil McCann was its chairman. Other members of the board and management of Fyffes in 1999 and 2000 who will feature in this judgment are Carl McCann, who was deputy chairman from 1988 until 2003 when he became chairman, David McCann, who became chief executive in 1995, and Frank Gernon, who was appointed as group finance director in January, 1998, all of whom were executive directors of Fyffes in the period which is relevant to these proceedings. Another executive director at the relevant time was John Ellis, who was involved in Fyffes' operations in the United Kingdom and based there. The non-executive directors included the third defendant and Gerry Scanlan. The company secretary was Philip Halpenny. Fyffes' advisers at the relevant time who feature in this judgment were its solicitors, Arthur Cox, and its Irish stockbrokers, J. & E. Davy (Davy).

5. In referring to the defendants in this judgment individually I propose to refer to the first defendant as DCC, to the second defendant as S&L, to the third defendant as Mr. Flavin and to the fourth defendant as Lotus Green. DCC is a public company. Its shares are listed on both the Irish Stock Exchange and the London Stock Exchange. DCC was originally incorporated as Development Capital Corporation Limited in 1976. At that stage it was primarily a venture capital company and its functions included the provision of corporate finance advice to investee companies through a subsidiary. Later in the 1990s it changed direction and developed into an industrial group. It was floated as a public company in 1994. Alex Spain has been the chairman of DCC since 1976. Mr. Flavin has been chief executive for the same period and he is deputy chairman. Morgan Crowe was an executive director and Tony Barry and Paddy Gallagher were non-executive directors of DCC in the relevant period. The company secretary, who also filled the role of compliance officer, was Michael Scholefield. The chief financial officer was Fergal O'Dwyer. The advisers to DCC at the relevant time who feature in this judgment were its auditors and tax advisers, PricewaterhouseCoopers (PwC), formerly Coopers & Lybrand, its solicitors, William Fry and its Irish stockbrokers, Davy.

6. S&L and Lotus Green are Irish registered companies which are part of the DCC group of companies (DCC Group). S&L is a wholly-owned subsidiary of DCC. Mr. Flavin at the relevant time was a director of S&L. The relationship of Lotus Green to DCC will be considered in depth later in this judgment. Mr. Flavin was not at any time a director of Lotus Green.

The factual background in outline

DCC'S Shareholding in Fyffes
7. The DCC Group's shareholding in Fyffes dated back to January, 1981, when Development Capital Corporation Limited acquired a 9.46% stake in that company, which was then known as Fruit Importers of Ireland Limited. On foot of that acquisition, Mr. Flavin joined the board of Fyffes in 1981 as a non-executive director. In 1981 a subsidiary of DCC sponsored the public flotation of Fyffes on the Dublin and London Stock Exchanges. Through the 1980s DCC and S&L made additional investments in Fyffes, as a result of which the DCC Group's stake increased to approximately 10.5%.

8. Following the flotation of DCC in May 1994 its holding in the plaintiff, another public company, was perceived as being anomalous. Its strategy from 1996, and probably from 1995, was to exit from Fyffes when a suitable opportunity arose. With a view to mitigating its tax liability, in particular, liability for capital gains tax, on a future disposal of the holding, in August, 1995 DCC and S&L, which held part of the holding, agreed to sell the shares in Fyffes of which they were respectively the owners to Lotus Green. The agreed purchase price was paid by Lotus Green, but legal title was not transferred, so that DCC and S&L remained the registered owners of the shares. Just over a fortnight after the agreement, Lotus Green became resident for tax purposes in the Netherlands. The transactions and processes by which this happened will be considered in greater depth later. It was acknowledged by DCC in these proceedings that what happened was wholly tax driven.

9. There was an accretion to the holding in March, 1998 through the medium of a scrip dividend. The new shares allocated at that time were registered in the names of DCC and S&L.

10. Thereafter there was no change in the ownership of the holding, which comprised ordinary shares and preference shares, until February, 2000 when all of the ordinary shares were sold in three tranches – on 3rd February, 8th February and 14th February. The three sales (the Share Sales) grossed in excess of €106 million, resulting in the accrual of a substantial profit to the DCC Group. In broad outline, the basis of the statutory claim is that the Share Sales were unlawful because, the plaintiff alleges, they were effected by Mr. Flavin who at the time was in possession of price-sensitive information by reason of his directorship of Fyffes.

11. After the Share Sales Mr. Flavin, who had been a member of the Audit Committee and the chairman of the Compensation Committee of Fyffes, resigned from the board of Fyffes with effect from 9th February, 2000.

Fyffes' preliminary results for financial year 1999

12. Up to the year 2000 Fyffes' financial year extended from 1st November in one year to 31st October in the following year. In common with other Irish public companies it announced its results at half-yearly intervals.

13. Fyffes reported its preliminary results for the financial year ended 31st October, 1999 on 14th December, 1999 (the Preliminary Announcement). In the "highlights" section of the Preliminary Announcement Fyffes reported that profit before tax and exceptional items in that year had increased over the previous financial year by 5.1% to €82.9 million. It also reported that, while turnover for the period decreased marginally, the total operating profit was €80 million, up 3.8%. In the outlook section, which I will consider in greater depth later, having recorded that the results for the year had maintained the Group's record of continuous growth, it was stated that the board believed that 2000 would be "another year of further growth for Fyffes".

Fyffes' budget for financial year 2000

14. Fyffes' budget for the financial year 2000 had been considered at a board meeting held on 29th October, 1999. Mr. Flavin attended the budget meeting. The document entitled Budget Presentation which was before the meeting contained a table which showed the anticipated spread of profits (excluding exceptionals and amortisation) for the financial year 2000 as follows:

Pre-Tax Profits Quarter	Budget 2000 Cumulative - €m
1	7.8
2	39.4
3	65.8
4	84.1

15. At that time, just two days short of the end of financial year 1999, it was anticipated that the pre-tax profit for that year would be €79.8 m. In fact, the outturn, as announced in the Preliminary Announcement, was €82.9 m.

16. Subsequent to that meeting Mr. Gernon changed the spread of profits and reduced the budgeted profit for the first quarter from €7.8 m. to €4.7 m., and the budgeted profit for the first half-year to €37.9m, to reflect more accurate information in relation to Fyffes' recently acquired interest in Capespan, the South African fresh produce group. The acquisition by Fyffes of 50% of Capespan International Holdings, the exclusive European supplier of the Capespan and Outspan brands, together with 10% of the South African parent company, Capespan Group Holdings, which had been announced in December, 1998, was completed in November, 1999.

The alleged price-sensitive information

17. Between board meetings, the board members of Fyffes were furnished with monthly management accounts accompanied by some narrative commentary.

18. The management accounts for November, 1999 which, adopting the terminology used by counsel for the plaintiff, I will refer to as the November Trading Report, were circulated to board members on 6th January, 2000. This is the first of the two documents which the plaintiff alleged contained information which was price-sensitive.

19. The commentary on the management accounts for November opened as follows:

> "**Sales** of €122.0 million are €10.1 million below budget and €1.7 million lower than last year.
>
> **Losses** of €2.6 million are €2.3 million worse than budget, and €4.1 worse than last year, and are due primarily to weaker Banana prices."

20. The commentary on the trading of the banana division disclosed the following:

> "The loss for the month was €2.7 million compared to a budget profit of €1.2 million, and last years profit of €2.8 million, was due to weaker banana pricing in the UK and European markets, low market value for licence, and the weaker exchange rate of the Euro vis a vis the US Dollar.
>
> Prices for UK multiple customers have been consistently below prior years for many months now, but the November/December prices are also well below the budget levels. 130,000 boxes of Suriname fruit were diverted to Portugal to ease the pressure on the market."

21. There followed commentary on Capespan in the following terms:

"The accounts do not include any Capespan figures as we are looking at the possibility of treating the November and December losses as preacquisition, under the matching concept, since they relate largely to the completion of the previous season.

The loss for the month of €1.6 million compares to a budget loss of €1.2 million due mainly to a disimprovement in the Sterling / Euro rate from budget. There is very little sales in November (€9 million) and December, and the loss is all overhead."

22. That commentary reflected the fact that the agreement with Capespan had been completed in November, 1999.

23. Looking forward to December, it was commented as follows:

"The banana market has improved a little in December although the UK was affected by snow this week. December losses are still expected to be €1.6 million which would be €1.6 million worse than budget, and €4.9 million worse than last year.

Cumulative losses at end December are expected to be €4.2 million which is €3.9 million worse than budget, and €9 million worse than last year."The commentary concluded as follows: "There is some optimism that the banana market will improve from January due to cutbacks in production by the major producers. This should not in theory impact on the EU Market but it is expected to improve sentiment."

24. The management accounts for December, 1999, the second document which the plaintiff alleged contained price-sensitive information, which I will refer to as the December Trading Report, was circulated to board members on 25th January, 2000.

25. The commentary on the management accounts opened as follows:

"**Sales**:

26. Total sales of €149 million were €11.3 million lower than budget due to the non consolidation of Capespan and €6.1 lower than last year due to lower UK produce throughput and the disposal of Swithenbanks.

Net Profit:

27. The pre goodwill loss for the month is €1.3 million compared to a breakeven budget and last year's profit of €3.3 million, bringing the cumulative pre goodwill loss to €4 million compared to last year's profit of €4.8 million. This can be analysed as follows:-

MONTH CUMULATIVE

Variance on Variance on

	Profit/Loss	Budget	Last Year	Profit/Loss	Budget	Last Year
Bananas	(2.6)	(2.1)	(4.2)	(5.0)	(5.6)	(9.4)
Partners	1.2	(0.2)	(0.2)	1.5	(0.4)	0.1
Produce	0.5	(0.2)	0.4	0.2		1.1
Other	0.2	(0.1)	(0.2)	0.3	(0.2)	(0.1)
Capespan	-	1.2	-	-	2.4	-
Group Exps	(0.8)	(0.1)	(0.2)	(1.4)	(0.1)	(0.2)
W.O. Fruit	(0.2)		0.2	(0.3)	0.2	(0.3)
Interest	0.4	0.1	(0.2)	0.7	0.2	(0.2)
Total:	(1.3)	(1.3)	(4.6)	(4.0)	(3.7)	8.9

28. The document actually depicted the cumulative total variance against the previous year as a profit of 8.9 million, but it would have been obvious even to the most casual reader that the brackets had been inadvertently omitted.

29. In relation to Capespan, the following commentary was included:

"The commencement date for the consolidation is under review as we are looking at the possibility of treating the November/December losses as pre acquisition under the matching concept as they relate largely to the completion of the previous season.

The Capespan loss for November/December is €3 million compared to a budget of €2.5 million. The variance is due mainly to lower volumes."

30. In relation to the performance of the banana division, it was commented as follows:

"December showed very little improvement in market prices or sentiment with a multiple price war effecting an already over supplied market. The UK result was very disappointing even after the diversion of fruit to Europe.

Urgent contract renegotiations are required with ACP suppliers to correct the imbalance in the supply/demand curve which occurs in November/December in the absence of autumnal natural disasters.

The European market has improved quickly in January with prices at budget levels going into February but the UK market continues to be affected by competitors seeking to increase their multiple market share."

The final paragraph of the document was headed "January 2000" and contained the following commentary:

> "Current forecast is for a profit of €1.3 million compared to a budget of €5 million and €6.3 million last year. The shortfall is mainly due to weaker UK banana pricing."

Fyffes' internet venture

31. In the autumn of 1999 Fyffes embarked on an internet initiative which was called worldoffruit.com (wof.com). When it was publicly announced on 1st November, 1999 the project was explained as follows in the press release:

> "Fyffes plc, the leading European fresh produce company, today launches worldoffruit.com. This new venture is developing an Internet portal for the fresh produce industry including FruitXchange, a business-to-business (B2B) on-line trading system.
>
> worldoffruit.com will combine B2B on-line trading with trade news, views and other services. Through this dedicated industry website, businesses will have access to on-line trading and other services which will add value to their operations. Additional investor partners will be sought around the world from inside and outside the industry to fully develop worldoffruit.com as the leading industry-wide portal."

32. From early November, 1999 Fyffes were in discussions with Goodbody Corporate Finance, part of Goodbody Stockbrokers (Goodbody) in relation to how the venture should be financed. Over a period of about three months the thinking on that topic swung from procuring investment from major international venture capital companies to an initial public offering (IPO). The commentary in the December Trading Report explained that up to the end of December, 1999 all staff and overhead costs in relation to wof.com had been expensed, but development expenditure of €540,000 had been capitalised and depreciation policy had not been decided on.

33. As wof.com is central to one of the principal issues in these proceedings, I consider it useful to record at this juncture the information Fyffes announced publicly in relation to the venture up to 20th March, 2000, which was as follows:

> · In the Preliminary Announcement of 14th December, 1999, it was stated that it was envisaged that Fyffes would invest €10 m. in the initial development of the venture. Third party investment partners would be sought from inside and outside the produce and technology sectors to fully develop wof.com into the leading e-commerce portal for the fresh fruit industry. In the outlook segment, wof.com, which was described as the Group's "exciting e-commerce initiative", was stated to have –
>
>> "… substantial potential in the context of the revolutionary impact that electronic trading is having on business."·
>
> On 13th January, 2000, a strategic partnership with Computer Sciences Corporation, which was described as the leading developer of internet marketplaces, was announced to the Stock Exchange.
>
> In Fyffes' annual report for 1999, which was circulated to shareholders in mid-February, 2000, after the Share Sales, the chairman's statement included the following paragraph in relation to wof.com.
>
>> "The launch of the Group's e-commerce initiative worldoffruit.com, has received a very positive reaction from within the produce industry and looks set to dramatically change the way in which fresh fruit and vegetables are traded across the globe. We can expect to see significant developments in this company throughout the coming year."·
>
> On 2nd March, 2000, again after the Share Sales, a press release was issued announcing the appointment of two "high-level" appointments to the management team of wof.com.

34. In late January and into February, 2000 Fyffes' executives conducted investor presentations in London (19th and 20th January and 1st and 4th February), Edinburgh (21st January), Dublin (26th and 31st January), Chicago and Milwaukee (7th February), San Diego and San Francisco (8th February), Boston (10th February) and New York (11th February). The presentations in Boston and New York were organised by Goodbody and the other presentations, except that on 26th January, were organised by Davy. Mr. David McCann testified that at the time there was unprecedented interest in Fyffes' activities, to which Fyffes responded. That particular interest was in the wof.com initiative. The investor relations activity, referred to by some of the witnesses as a "road show", continued into March, with a presentation in Frankfurt on 15th March organised by Goodbody.

Fyffes' AGM March 2000

35. Fyffes' Annual General Meeting was held on 20th March, 2000. On that day the chairman made a statement at the AGM and Fyffes issued a stock exchange announcement which was, in effect, a profit warning which, adopting the terminology used by counsel for the plaintiff, I will refer to as, which I will refer to as the March 2000 Trading Statement. It was headed "Fresh produce trading" and stated as follows:

> "The trading environment in the early part of the current financial year has been difficult. In particular, market conditions in the last two months of calendar 1999 were significantly below expectations. The usual recovery in the first month of calendar 2000 has been slower than anticipated, particularly because of the continuing weakness of the Euro against the dollar. As a result, we expect that the performance for the first half of the year, on a like for like basis, will be below that achieved during the same period last year. Present trading is slightly improved but, at this stage, it is too early to predict whether the shortfall can be recovered in the second half.
>
> Despite the exceptional market conditions so far this year, we remain confident about the future prospects of the fresh produce sector and of the Fyffes business in particular. The Group's strategy remains the active pursuit of further opportunities for consolidation in our industry."

36. At the AGM David McCann gave an update in relation to wof.com. He stated that it was expected that up to €20 m., to be expensed as incurred, would be invested during 2000 on further technical developments and marketing spend. He stated that the Fyffes Group was working closely with its financial advisers to determine the optimal ownership and funding structures that would

maximise shareholder value from its traditional fresh produce business and from its new e-commerce division. He also stated that €100 million was earmarked for new e-commerce businesses. The contemporaneous stock exchange announcement quoted David McCann as having stated:

> "The Group is willing to consider investing up to EUR 100 million over the next two years in alliances and joint ventures with key participants in other sectors for the purpose of developing internet marketplaces for their industries."

Fyffes' share price post 14th December, 1999

37. Following the Preliminary Announcement on 14th December, 1999, Fyffes' share price was on a upward trajectory for about two months, peaking on 18th February, 2000, when it closed at €3.98. Thereafter it fell back. It closed on the London Stock Exchange at €3.16 on 17th March. The Irish Stock Exchange was closed on that day. Following the profit warning in the March 2000 Trading Statement it closed on 20th March at €2.70. By the end of March it was at €2.20 and by the end of April it had fallen to €1.85. wof.com was undoubtedly the main driver of the share price increase after 7th January, 2000. The potential of Fyffes' internet venture was the focus of two tip sheets in early January, 2000 – a Citywire note of 5th January and a Techinvest note of 11th January. As was commented in the media at the time, this attention triggered active buying of Fyffes' shares both in Dublin and in London.

Stock exchange investigations

38. In the wake of the March 2000 Trading Statement two stock exchange investigations commenced.

39. On 7th April, 2000, the London Stock Exchange informed Fyffes, through its London stockbrokers, that it was "conducting an investigation into dealings in securities of Fyffes plc … ahead of the announcement of 20th March, 2000, which stated that the Company expected that performance in the first half of the year would be below that of the same period in the prior year". Information was sought in relation to, *inter alia*, the events leading up to the announcement, encompassing the key events, including internal discussions, board meetings and briefings of external advisers. The information sought was furnished by Fyffes in the format which the London Stock Exchange had stipulated. The timetable of events leading to the announcement furnished by Fyffes started on the evening of Friday, 10th March, 2000. Fyffes' involvement in this investigation seems to have terminated at the end of April, 2000. There was no communication from the London Stock Exchange to DCC.

40. On 14th April, 2000, the Irish Stock Exchange informed Fyffes that it was investigating certain dealings in its shares and, in particular, the share disposals made by DCC and Lotus Green on 3rd and 8th February, 2000. Information was sought in relation to Mr. Flavin's involvement with Fyffes. It was stated that the information was required pursuant to Part V of the Act of 1990. That investigation continued through 2000 and into 2001. Information was sought from DCC initially on 1st September, 2000 and also from Davy and Goodbody. At some stage towards the end of 2001 the Irish Stock Exchange, under its statutory powers contained in Part V of the Act of 1990, reported the matter to the Director of Public Prosecutions. There the matter rests.

The Proceedings

41. The first intimation given to the defendants that the plaintiff was contemplating proceedings under Part V on the basis that Mr. Flavin had price-sensitive information at the beginning of February, 2000 was contained in a letter dated 26th October, 2001 from Arthur Cox to the defendants.

42. These proceedings were initiated by an originating notice of motion returnable for 28th January, 2002. Section 109(4) of the Act of 1990 provides for a limitation period of two years for commencement of an action under s. 109 for recovery of a loss or profit. The proceedings were initiated about a week before the limitation period in relation to the first share sale expired.

43. The hearing commenced on 2nd December, 2004, and action was at hearing for 87 days, concluding on 18th July, 2005.

44. The primary focus of these proceedings is on events which occurred in the period from December, 1999 to March, 2000. Five years intervened between the occurrence of the events and the taking of evidence of fact in these proceedings in relation to them. In the intervening period the facts and the surrounding circumstances had been the subject of much media comment (an article in the Sunday Independent of 9th July, 2000, in particular, seems to have been a major catalyst for internal analysis), the two Stock Exchange investigations referred to earlier, as well as intensive pre-trial procedures. In consequence, much of what was presented as evidence of fact from each side, and this applies primarily to the two principal witnesses as to fact, Mr. David McCann for the plaintiff, and Mr. Flavin for the defendants, was overlaid with what was variously referred to by opposing counsel as *ex post facto* rationalisation and retrospective analysis. At times, the evidence of witnesses of fact verged on advocacy. At times, I believe that rationalisation veered towards revisionism. While, in assessing the evidence of fact, I have had to peel away the layers of hindsight and retrospection, I think it is only fair to record that I did not get the impression that the witnesses as to fact did not have a belief in the veracity of the position they were presenting.

45. I have endeavoured, in this judgment, to cover all of the issues of law and fact which were raised, although some of them became irrelevant to the final outcome.

II. THE STATUTORY CLAIM

A. Relevant legislation/regulation

Introduction

46. The statutory provisions which Fyffes invokes are the provisions of Part V of the Act of 1990.

47. Part V implements the State's obligations under Council Directive of 13th November, 1989 co-ordinating regulations on insider dealing (89/592/EEC) (the Directive).

48. It is convenient at this juncture to outline certain provisions which regulate listed companies and their directors, which featured in the evidence and submissions and were represented by the defendants as being relevant to the issues which the court has to decide. These are the rules contained in Chapter 9 (Continuing Obligations) and in the Appendix to Chapter 16 (the Model Code) of the Listing Rules of the London Stock Exchange and the Irish Stock Exchange. The regulatory authority of the Irish Stock Exchange originated in the European Communities (Stock Exchange) Regulations, 1984 (S.I. No. 282 of 1984), which implemented the provisions of certain EEC Stock Exchange Directives and which designated the Irish Stock Exchange as the competent authority.

The Directive
49. The recitals in the Directive disclose its objective, which, in the context of the provisions of the Treaty directed to the establishment and functioning of the internal market, is to provide assurance to investors that they are placed on equal footing and that they will be protected against improper use of inside information, thus obviating the undermining of confidence in, and the smooth running of, the market. To achieve that objective the Directive requires each Member State to prohibit certain activities which constitute insider dealing. Further, in article 13 the Directive requires that each Member State shall determine the penalty to be applied for infringement of the measures taken pursuant to the Directive, the penalties to be sufficient to promote compliance with those measures. However, article 6 of the Directive empowers each Member State to adopt provisions more stringent than those laid down by the Directive or additional provisions, provided that such provisions are applied generally. Specifically, a Member State is empowered to extend the scope of the prohibition laid down in article 2 and to impose on persons referred to in article 4 the prohibitions laid down in article 3.

50. The obligations imposed by the Directive which are most pertinent to the issues in this case are those imposed by articles 2, 3 and 4. Article 1 defines, for the purposes of the Directive, the following expressions:

> (a) "inside information" which is defined as meaning –
>
> > "… information which has not been made public of a precise nature relating to one or several issuers of transferable securities or to one or several transferable securities, which, if it were made public, would be likely to have a significant effect on the price of the transferable security or securities in question.", and
>
> (b) "transferable securities" which is defined as including various categories of securities, including shares when –
>
> > "… admitted to trading on a market which is regulated and supervised by authorities recognised by public bodies, operates regularly and is accessible directly or indirectly to the public."

51. Article 2 provides –

> "1. Each Member State shall prohibit any person who:
>
> > - by virtue of his membership of the administrative, management or supervisory bodies of the issuer,
> >
> > - by virtue of his holding in the capital of the issuer, or
> >
> > - because he has access to such information by virtue of the exercise of his employment, profession or duties, possesses inside information from taking advantage of that information with full knowledge of the facts by acquiring or disposing of for his own account or for the account of a third party, either directly or indirectly, transferable securities of the issuer or issuers to which the information relates."
>
> 2. Where the person referred to in paragraph 1 is a company or other type of legal person, the prohibition laid down in that paragraph shall apply to the natural persons who take part in the decision to carry out the transaction for the account of the legal person concerned."

52. Article 3 provides –

> "Each Member State shall prohibit any person subject to the prohibition laid down in article 2 who possesses inside information from:
>
> > (a) disclosing that inside information to any third party unless such disclosure is made in the normal course of the exercise of his employment, profession or duties;
> >
> > (b) recommending or procuring a third party, on the basis of that inside information, to acquire or dispose of transferable securities admitted to trading on its securities market as referred to in article 1(2) in fine." Article 4 provides – "Each Member State shall also impose the prohibition provided for in article 2 on any person other than those referred to in that article who with full knowledge of the facts possesses inside information, the direct or indirect source of which could not be other than a person referred to in article 2."

Part V of the Act of 1990
53. Although Part V is headed "Insider Dealing", and s. 108 is headed "Unlawful dealings in securities by insiders", the text of the provisions in Part V does not refer to "inside information", "insider dealing", or "insiders". The structure of Part V, insofar as it is relevant to the issues here, is to render certain activities unlawful (sub-ss. (1), (2), (3), (4), (5) and (6) of s. 108), subject to certain exceptions, compliance with which prevents activity which would otherwise be unlawful from so being. The exceptions are either general to all activities declared unlawful (sub-ss. (9) and (10) of s. 108) or specific to a particular activity (sub-ss. (7) and (8) relating to sub-s. (6)). Part V then creates civil liability (s. 109) and criminal liability (s. 111) in relation to proscribed activity.

54. The first substantive provision is s. 108 which declares an activity unlawful is sub-s. (1), which provides as follows:

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

55. Words and expressions used in Part V are assigned particular meanings in Part V.

56. Sub-section (11) of 108 provides that, for the purposes of that section, a person is connected with a company if, being a natural person, inter alia, he is an officer of that company. It is common case that, by reason of the reference to a natural person in that provision, the prohibition contained in sub-s. (1) is directed to a natural person, not to a company. In s. 107, officer, in relation to a company, is defined in broader terms than elsewhere in the Companies Acts. Relevant to the issues here is that it includes, *inter alia*, a director. Further, s. 107 provides that director "includes a shadow director within the meaning of s. 27" of the Act of 1990. In

accordance with s. 27(1) a shadow director is –

> "… a person in accordance with whose directions or instructions the directors of a company are accustomed to act … unless the directors are accustomed so to act by reason only that they do so on advice given by him in a professional capacity."

57. The definition of "dealing", which is also contained in s. 107, is of particular significance in this case. It is provided that, except where the context otherwise requires, "dealing" in relation to securities means –

> "… (whether as principal or agent) acquiring, disposing of, subscribing for or underwriting the securities, or making or offering to make, or inducing or attempting to induce a person to make or to offer to make, an agreement –
>
> > (a) for or relating to acquiring, disposing of, subscribing for or underwriting the securities; or
> >
> > (b) the purpose or purported purpose of which is to secure a profit or gain to a person who acquires, disposes of, subscribes for or underwrites securities or to any of the parties to the agreement in relation to the securities." In s. 107 "securities" is also defined as meaning, inter alia – "(a) … shares … issued or proposed to be issued, whether in the State or otherwise, for which dealing facilities are, or are to be, provided by a recognised stock exchange."

58. The definition extends to any option in respect of any such shares (para. (b)).

59. In construing Part V the provisions of the Interpretation Act, 1937 are applicable. Section 11 of that Act provides that the word "person" shall, unless the contrary intention appears, be construed in an Act of the Oireachtas as importing a body corporate, including a corporation aggregate, as well as an individual. A contrary intention appears in s. 108(11), in that when used in the context of "a person connected with a company", person means a natural person. Apart from that, *prima facie*, reference to a person in Part V includes a company.

60. The other substantive provisions of s. 108 which have been invoked by the plaintiff are the following:

> (1) Sub-section (3) which provides –
>
> > "Where a person is in possession of any such information as is mentioned in sub-section (1) or (2) that if generally available would be likely materially to affect the price of securities but is not precluded by either of those sub-sections from dealing in those securities, it shall not be lawful for him to deal in those securities if he has received the information, directly or indirectly, from another person and is aware, or ought reasonably to be aware, of facts or circumstances by virtue of which that other person is then himself precluded by sub-section (1) or (2) from dealing in those securities."

61. This provision gives rise to what is generally referred to a tippee liability, the person liable, the tippee, being the recipient of a tip.

> (2) Sub-section (4) which provides –
>
> > "It shall not be lawful for a person at any time when he is precluded by sub-section (1), (2) or (3) from dealing in any securities, to cause or procure any other person to deal in those securities."
>
> (3) Sub-section (5), an infraction of which was pleaded by the plaintiff although it was not pursued in the final submissions, which provides –
>
> > "It shall not be lawful for a person, at any time when he is precluded by sub-section (1), (2) or (3) from dealing in any securities by reason of his being in possession of any information, to communicate that information to any other person if he knows, or ought reasonably to know, that the other person will make use of the information for the purpose of dealing, or causing or procuring another person to deal, in those securities."; and
>
> (4) Sub-section (6) which provides –
>
> > "Without prejudice to sub-section (3), but subject to sub-sections (7) and (8), it shall not be lawful for a company to deal in any securities at any time when any officer of that company is precluded by sub-section (1), (2) or (3) from dealing in those securities."

62. Of the exceptions to the proscriptions on dealing contained in sub-ss. (1), (3), (4) and (6) provided for in sub-ss. (7), (8), (9) and (10) of s. 108, only the exception contained in sub-s. (9), was relied on by the defendants as a defence. Sub-section (9) provides as follows:

> "This section does not preclude a person from dealing in securities, or rights or interests in securities, of a company if –
>
> > (a) he enters into the transaction concerned as agent for another person pursuant to a specified instruction of that other person to effect that transaction; and
> >
> > (b) he has not given any advice to the other person in relation to dealing in securities, or rights or interests in securities, of that company that are included in the same class as the first-mentioned securities."

63. Notwithstanding the foregoing provision, agents are subject to s. 113(1) which provides –

> "A person shall not deal on behalf of another person if he has reasonable cause to believe or ought to conclude that the deal would be unlawful, within the meaning of s. 108."

64. In broad terms, subject to the exceptions provided for, s. 108 renders dealing by an insider while in possession of information of the type stipulated in s. 108, information which is not generally available but, if it were, would be likely materially to affect the share price, which is, for the sake of brevity but, perhaps, not entirely accurately, generally referred to in this judgment as "price-sensitive

information”, unlawful.

65. One of the consequences of engaging in activity which is unlawful by virtue of s. 108 is that criminal liability may be incurred. Section 111 provides that a person who deals in securities in a manner declared unlawful by s. 108 shall be guilty of an offence. Sub-section (2) of s. 113 provides that a person who contravenes that section shall be guilty of an offence. It is common case that activity which is declared unlawful by virtue of sub-s. (4) of s. 108, causing or procuring another person to deal, does not incur criminal liability under Part V. The penalties on conviction of an offence under Part V are dealt with in s. 114.

66. Another consequence is that civil liability may be incurred. Section 109(1) provides as follows:

> “Where a person deals in or causes or procures another person to deal in securities in a manner declared unlawful by section 108 or communicates information in any such manner, that person shall, without prejudice to any other cause of action which may lie against him, be liable –
>
> > (a) to compensate any other party to the transaction who was not in possession of the relevant information for any loss sustained by that party by reason of any difference between the price at which the securities were dealt in in that transaction and the price at which they would have been likely to have been dealt in in such a transaction at the time when the first-mentioned transaction took place if that information had been generally available; and
> >
> > (b) to account to the company that issued or made available those securities for any profit accruing to the first-mentioned person from dealing in those securities.”

67. As has been stated at the outset, one of the remedies which the plaintiff seeks in these proceedings, in addition to a declaratory order that the Share Sales were unlawful dealings within the meaning of Part V, is an account under para. (b) of s. 109(1). As the parties have agreed that the court should determine first whether the Share Sales were in breach of s. 108 and whether, in principle, liability to account arises, the question of the quantum of profit which the defendants or any of them is liable to account for to Fyffes does not fall for consideration at this juncture. Four counterparties to the Share Sales have issued proceedings against the defendants. Prior to the commencement of the hearing of this action the court ruled that, if it were to hold that any of the defendants is liable to the plaintiff under s. 109(1)(b), the counterparties whose proceedings are pending would be heard in connection with the quantification of the amount of profit to which the plaintiff would be entitled under para. (b) of s. 109(1). Accordingly, it is unnecessary to refer at this juncture to the detail of sub-s. (2) of s. 109, which addresses the amount of compensation or profit to which liability under sub-s. (1) gives rise.

68. Further, the court has deferred an issue as to whether s. 109(1)(b) is invalid having regard to the provisions of the Constitution, which would arise if the court were to find that any of the defendants was liable to account for profit under that provision, and that, as contended for by the plaintiff, such profit should be calculated as the difference between the historical cost of acquisition of the shares the subject of the Share Sales and the price at which the shares were sold by the corporate defendants. The deferment of this issue has been with the consent of the Attorney General on whom notice has been served under Order 60 of the Rules of the Superior Courts, 1986.

Listing Rules, Chapter 9

69. The provisions of chapter 9 of the Listing Rules which were adverted to in evidence and argument were the provisions which outline the general obligation of disclosure for companies, particularly Rules 9.1, 9.2 and 9.3A, as contained in the January, 2000 version. The regulatory objective of the continuing obligations is discernible in the following statement in the introduction in chapter 9, which explains its scope:

> “Observance of continuing obligations is essential to the maintenance of an orderly market in securities and to ensure that all users of the market have simultaneous access to the same information.”

70. That objective is similar to the legislative intent of the Directive and of Part V of the Act of 1990 in that it seeks to have all market users placed on an equal footing in relation to information.

71. Rule 9.1, in part, provides as follows:

> “A company must notify the Company Announcements Office without delay of any major new developments in its sphere of activity which are not public knowledge which may:
>
> > (a) by virtue of the effect of those developments on its assets and liabilities or financial position or on the general course of its business, lead to substantial movement in the price of its listed securities … .”

72. Rule 9.2, which was introduced in the January, 2000 version provides:

> “A company must notify the Company Announcements Office without delay of all relevant information which is not public knowledge concerning a change:
>
> > (a) in the company’s financial condition;
> >
> > (b) in the performance of its business; or
> >
> > (c) in the company’s expectation as to its performance; which, if made public, would be likely to lead to substantial movement in the price of listed securities.”

73. Rule 9.3A, which was also introduced in the January, 2000 version, provides:

> “A company must take all reasonable care to ensure that any statement or forecast or any other information it notifies to, or makes available through, the Companies Announcements Officer is not misleading, false or deceptive and does not omit anything likely to affect the import of such statement, forecast or other information.”

The Model Code

74. The January, 2000 version of the Listing Rules provides in chapter 16, which deals with directors' obligations, that a company must require its directors and any employee who, because of his office or employment in the company is likely to be in possession of unpublished price-sensitive information in relation to the company, to comply with a code of dealing in terms no less exacting than those of the Model Code (set out in the appendix to chapter 16) and must take all proper and reasonable steps to secure such compliance.

75. Paragraph 4 of the Model Code provides that a director must not deal in any securities of the listed company at any time when he is in possession of unpublished price-sensitive information in relation to those securities, or otherwise where clearance to deal is not given under para 7.

76. Paragraph 6 provides that a director must not deal in any securities of the listed company without advising the chairman in advance and receiving clearance.

77. Paragraph 7, insofar as it was represented as being relevant by the defendants, provides that a director must not be given clearance, as required by paragraph 6, to a deal in any securities of the listed company during a prohibited period, which is defined as including:

> "(b) any period when there exists any matter which constitutes unpublished price sensitive information in relation to the company's securities (whether or not the director has knowledge of such matter) and the proposed dealing would (if permitted) take place after the time when it has become reasonably probable that an announcement will be required in relation to the matter; or
>
> (c) any period when the person responsible for the clearance otherwise has reason to believe that the proposed dealing is in breach of this code."

78. In the January, 2000 version of the Model Code, as applied by the Irish Stock Exchange, "unpublished price-sensitive information" is defined as meaning –

> "… information which:
>
> > (i) relates to particular securities or to a particular issuer or to particular issuers of securities and not to securities generally or issuers of securities generally … ;
> >
> > (i) is specific or precise;
> >
> > (ii) is not generally available within the meaning of s. 108 of the Companies Act, 1990; and
> >
> > (iv) if it were generally available would be likely materially to affect the price of any securities and, without prejudice to the generality of the above, it should be considered whether any unpublished information regarding transactions require to be notified to the Company Announcements Office in accordance with chapter 10 or chapter 11 of the listing rules and unpublished information of the kind referred to in the paragraphs of the listing rules set out below is price-sensitive: 9.1 and 9.2: general obligation of disclosure …"

79. The continuing obligations of a listed company itself are tied into the provisions of the Model Code by Rule 9.38 of the Listing Rules which provides:

> "No dealings in any securities may be affected by or on behalf of the company or any other member of its group at a time when, under the provisions of the Model Code, a director of the company would be prohibited from dealing in its securities, unless such dealings are entered into:
>
> > (a) in the ordinary course of business by a securities dealing business; or
> >
> > (b) on behalf of third parties by the company or any other member of its group."

B. Outline of the plaintiff's allegations and the defendants' responses

80. In outline, the allegations made by the plaintiff to ground the statutory claim and the defendants' responses thereto were as follows:

> (1) The plaintiff alleged that, by being in possession of the November and December Trading Reports, Mr. Flavin had price-sensitive information at the time of the Share Sales. The defendants denied that the information contained in those documents was price-sensitive.
>
> (2) The plaintiff alleged that Mr. Flavin dealt while in possession of price-sensitive information, which was in his possession by reason of his connection with the plaintiff and that, in the circumstances, the dealing was unlawful by virtue of sub-s. (1) of s. 108. The defendants deny that Mr. Flavin dealt.
>
> (3) The plaintiff alleged that Mr. Flavin dealt as agent for DCC, S&L and, if it were the beneficial owners of the shares, for Lotus Green. He acted as agent for them so each of those corporate defendants dealt in a manner that was unlawful by virtue of s. 108(1). It followed that the corporate defendants were liable to account under s. 109(1). The defendants denied that any principle of agency, attribution or imputation relied on by the plaintiff had any application in the context of s. 108. They further denied that any liability to account under s. 109 could accrue independently of s. 108.
>
> (4) The plaintiff also alleged that DCC and S&L dealt unlawfully by virtue of s. 108(6) because Mr. Flavin was an officer of each corporate defendant, being a director of each, within the meaning of Part V. The defendant admitted that DCC and S&L dealt, in that those corporate defendants transferred their legal title in the shares to the purchasers. However, they denied that such dealing was unlawful. In particular they asserted that, having regard to the nature of the transactions, those corporate defendants were not precluded from dealing by virtue of the provisions of s. 108(9). The plaintiff joined issue on that last proposition and contended that the dealings effected by those corporate defendants did not come within the provisions of s. 108(9).
>
> (5) The plaintiff alleged that Lotus Green dealt and did so unlawfully by virtue of s. 108(6) because –

(a) Mr. Flavin was a shadow director of Lotus Green and, as such, an officer of Lotus Green and he was precluded from dealing by virtue of s. 108(1), and

(b) DCC was a shadow director and thus an officer of Lotus Green and it was precluded from dealing by virtue of s. 108(3).

The defendants denied that DCC was precluded from dealing by virtue of s. 108(3). Further, the defendants denied that either Mr. Flavin or DCC was a shadow director of Lotus Green.

(6) The plaintiff alleged that either –

(a) Lotus Green held, or should be treated as having held, the DCC Group stake in Fyffes as an agent for DCC and S&L or

(b) Lotus Green and DCC/S&L should, as a matter of law, be treated as a single entity for the purposes of Part V.

In either case, it was asserted, Lotus Green was subject to the same restrictions in relation to dealing as DCC and thus precluded from dealing. The defendant denied each of those propositions in relation to Lotus Green.

(7) The plaintiff alleged that, if Mr. Flavin did not deal, he caused or procured DCC, S&L and Lotus Green to deal in contravention of s. 108(4). The defendants denied that Mr. Flavin caused or procured the corporate defendants to deal.

(8) The plaintiff alleged that Lotus Green caused or procured DCC and S&L to deal in breach of s. 108(4). The defendants denied that Lotus Green caused or procured the dealings by DCC and S&L. The defendants submitted that this allegation was misconceived because a contravention of sub-s. (4) only arises when the causing or procuring was effected by a person precluded from dealing by virtue of sub-s. (1), (2) or (3) of s. 108. The defendants' submission is clearly correct and I do not propose to consider this allegation further. In the absence of a sustainable allegation that Lotus Green was precluded from dealing by sub-s. (3), and there is none, no liability could be incurred by Lotus Green for causing or procuring. This was ultimately acknowledged by counsel for the plaintiff.

(9) As a consequence of dealing in a manner declared unlawful by s. 108, each of the defendants is liable to account to the plaintiff for the profit accruing from dealing in accordance with s. 109. The defendants contend that no profit accrued to either Mr. Flavin, DCC or S&L from dealing.

(10) As a consequence of causing or procuring DCC, S&L and Lotus Green to deal in a manner declared unlawful by s. 108, Mr. Flavin is liable to account for any profit accruing from dealing. The defendants contended that the reference in para. (b) of sub-s. (1) to "any profit accruing … from dealing" means profit accruing to the person who caused or procured. No profit accrued to Mr. Flavin they submitted.

81. In summary, the key points which the defendants made in relation to each defendant are as follows:

(i) Mr. Flavin did not have price-sensitive information at the date of the Share Sales.

(ii) Mr. Flavin did not deal within the meaning of Part V, nor did he cause or procure dealing. No profit accrued to him.

(iii) DCC and S&L dealt and the dealing was prima facie caught by s. 108(6) but it was lawful by virtue of s. 108(9). In any event, no profit accrued to either company.

(iv) Lotus Green dealt but it dealt lawfully. A profit did accrue to Lotus Green.

82. Before addressing the issues of construction raised by, and the legal principles applicable to, the foregoing propositions, I propose dealing with some general issues of construction in relation to Part V which were in controversy.

83. Then I propose considering the legal principles which govern the determination of the issues raised by the propositions referred to at (2) to (8) above. The legal principles which fall to be considered relate to the following –

(a) the proper construction of s. 108(3) and the doctrine of attribution in the context of that sub-section;

(b) the doctrine of agency or attribution in the context of the question whether dealing by Mr. Flavin in contravention of s. 108(1), if it occurred, could be attributed to the other defendants so as to render the corporate defendants liable under s. 109;(c) the meaning of "dealing" in Part V;

(d) the circumstances in which a transaction comes within sub-s. (9) of s. 108;

(e) the criteria for identifying a shadow director in Irish law;

(f) the doctrine of agency insofar as it is applicable to the issue whether Lotus Green was, or should be treated as, an agent of DCC and S&L;

(g) the circumstances in which the concept of single entity may be invoked in relation to two or more companies as a matter of law in this jurisdiction; and

(h) the meaning of causing and the meaning of procuring in Part V.

84. The propositions referred to at (9) and (10) above raise very difficult questions of construction in relation to s. 109(1). I propose addressing those questions next.

85. Finally, all of the propositions advanced by the plaintiff referred to at (2) to (10) above were premised on the first proposition, namely, that Mr. Flavin had price-sensitive information by reason of his connection with the plaintiff at the time of the Share Sales. I will consider that overriding proposition, the price-sensitivity issue, on its own following consideration of the other propositions and their application to the facts.

86. Most of the difficult issues, other than the price-sensitivity issue, which I have to address in the succeeding portions of this opinion are stateable and arise only because of a combination of the following circumstances:

> (i) the decision of the DCC Group to hive off its stake in Fyffes' to Lotus Green but not to transfer the legal title from DCC and S&L to Lotus Green;
>
> (ii) the line of defence adopted by the defendants that DCC and S&L made no profit from the Share Sales; and
>
> (iii) the stance the defendants adopted in relation to the proper construction of s. 109(1)(b).If DCC and S&L had remained the beneficial as well as the legal owners of the DCC Group stake in Fyffes, this action would have been much less complicated and the plaintiff would not have had to resort to some of the strained interpretations of ss. 107 to 109 which were advanced or to the invocation of legal principles such as agency, attribution and such like which are dealt with later.

C. Construction of Part V: General Propositions

87. Before considering the specific issues of construction to which the provisions of Part V give rise, I propose commenting on two general propositions made on behalf of the defendants in relation to the proper approach to the construction of Part V.

88. Referring to the provisions of s. 111, it was submitted by the defendants that, given that a contravention of s. 108 gives rise to criminal liability and a criminal sanction (up to ten years imprisonment as provided in s. 114), the provisions of s. 108 must be construed strictly. In this connection they cited the decision of the Supreme Court in *D.P.P. v. Tivoli Cinema Limited* [1999] 2 I.R., 260 and the decision of this court (O'Hanlon J.) in *C.W. Shipping Limited v. Limerick Harbour Commissioners* [1989] I.L.R.M. 416. In reliance upon the strict construction proposition, the defendants submitted that s. 108 is not open to the construction that the dealing of an agent is to be treated as the dealing of a principal unless there is an express provision to that effect. In other words, such a provision cannot be implied. As I understand the submission, it is that for the purpose of imposition of a criminal sanction under Part V, in the absence of an express provision, an unlawful dealing by an agent cannot be deemed to be the unlawful dealing of the principal.

89. I will be returning to the question of agency later at E. and F. below.

90. However, as regards the general proposition advanced by the defendants, it is important to stress that in these proceedings the court is not construing s. 108 in the context of an allegation that an offence has been committed. What the court is concerned with is whether civil liability arises under s. 109 by reason of an activity which has been declared unlawful in s. 108.

91. The second proposition advanced by the defendants is that the Directive should inform the proper construction of Part V. That proposition, with which the plaintiff agreed, is undoubtedly correct, in the sense that the court must approach the construction of Part V in the light of the decision of European Court of Justice in *Marleasing S.A. v. La Commercial International de Alimentación S.A.* [1990] E.C.R. I-4135, and in particular, the following passage from the judgment of the court at para. 8:

> "… the Member States' obligations arising from a directive to achieve the result envisaged by the directive and their duty under article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of article 189 of the Treaty."

92. In this jurisdiction the Supreme Court recognised and gave effect to the foregoing imperative in *Nathan v. Bailey Gibson Limited* [1998] 2 I.R. 162 and it was applied more recently by Kelly J. in this Court in *SIAC Construction v. National Roads Authority* (Unreported, High Court, 16th July, 2004).

93. The second proposition was advanced by the defendants in the context of their submissions that proof of knowledge that information is price-sensitive and an intention to use it to his advantage on the part of the insider are necessary ingredients for a breach of s. 108 to give rise to civil liability under s. 109. The plaintiff contended that, as a matter of construction, there is no such requirement. I will deal with that issue of general construction next.

D. Construction of Part V: knowledge/use of

price-sensitivite information

The defendants' submissions

94. What the defendants contended was that for civil liability to arise for a breach of sub-s. (1) of s. 108 two requirements must be fulfilled, which are not spelt out in the provision: first, the connected person must know that the information is price-sensitive; and, secondly, he must act to his advantage by using that information. The defendants advanced a number of arguments in support of that contention.

95. First, they pointed to the language of Part V. The language of s. 108, as a matter of construction, is not the language of strict liability, it was suggested. The unlawful behaviour referred to in the section is made a criminal offence by s. 111. On the true construction of Part V knowledge is a requirement. Sub-section (3) of s. 108, which extends a prohibition on dealing to a tippee with inside information, specifically provides that the dealing prohibition is not applicable unless the tippee "has received the information directly or indirectly from another person and is aware, or ought reasonably to be aware, of facts and circumstances by virtue of which that other person is then himself precluded from dealing". It would be extraordinary, it was submitted, if a primary insider, the

connected person who is caught by sub-s. (1), could commit an unlawful act without having knowledge, whereas a tippee could not without the requisite degree of knowledge.

96. Secondly, the defendants supported their argument by reference to the Directive and the policy considerations underlying it. Recognising that article 6 allows a Member State to adopt provisions more stringent than those laid down in the Directive, it was submitted that the requirement that the more stringent provisions are applied generally means that they are to be applied in like manner to primary insiders and tippees. The Directive requires "full knowledge of the facts" in the case of both primary insiders (article 2.1) and tippees (article 4). For the State to adopt a more stringent basis of liability for primary insiders than for tippees, it was submitted, would be contrary to Community law. However, having regard to what they contended is the proper construction of the provisions, that is to say, implying knowledge on the part of the primary insider, the defendants submitted that they were not contrary to Community law. In this connection, the defendants referred to a decision of the European Court of Justice on a reference from a Belgian Court for a preliminary ruling on questions in relation to the interpretation of the Directive and, in particular, article 6: *Verdonck & Others* (Case C-28/99) [2001] E.C.R. I-3399. The Belgian legislative provision by which the Directive had been transposed contained a definition of "inside information" very similar to the definition contained in the Directive but it went on to exclude certain information in the possession of holding companies. The Court of Justice characterised the exclusion as additional elements which concerned only information held by a particular category of participants in the financial markets, holding companies (para. 32). Such a provision could bring about a regime specific to a particular category of participants contrary to article 6, unless the additional elements merely clarified the general definition of inside information for that category of participants without in any way altering the scope of that definition (para. 33). The court held that it was for the national court to determine whether that was the case.

97. Thirdly, the defendants submitted that, given, as they contended, that Part V uses the same criteria for unlawful dealing for both criminal and civil liability, in construing the word "possession" the court should have regard to the approach adopted in the criminal law when the concept of possession is in issue. Reference was made to a ruling by Judge Dominic Lynch in a criminal trial under Part V in the Dublin Circuit Court (*D.P.P. v. Byrne, Bill* 640/01, 24th January, 2002) to the effect that, as it appeared that *mens rea* was an essential element to be proved, it was an essential proof that the accused knew that he had price-sensitive information at the relevant time. Reference was also made to the decision of the Court of Criminal Appeal in *D.P.P. v. Byrne* [1998] 2 I.R. 417, where the application of s. 29 (2)of the Misuse of Drugs Act, 1977 was in issue. There the court was concerned with the concept of possession in relation to something capable of physical possession, a controlled drug, and was concerned with the construction of a statutory provision which expressly provided that absence of knowledge and absence of reasonable grounds for suspicion on the part of the accused that he had the thing in his possession or that it was a controlled drug was a defence where it is proved that he had in his possession a controlled drug. The court held that, before the onus shifted to the accused to bring himself within the defence, the prosecution not only had to prove physical possession, in that case of a package which contained the proscribed substance, but also *animus possidendi*, the mental element being knowledge that he had a package and that it had something in it. That decision, in my view, is of no assistance in construing s. 108(1), which is wholly silent on the question of knowledge.

98. In support of the argument that for liability to arise under s. 108(1), the connected person must act to his advantage by using the price-sensitive information, the defendants pointed to the recital in the Directive, which I have referred to earlier, that one of the factors which inspires investor confidence in the market is protection against the improper use of inside information and also to the obligation imposed in the operative part of the Directive that national legislation must prohibit a primary insider who possesses inside information "from taking advantage of that information" by dealing (article 2.1). The Directive clearly identifies the mischief against which national parliaments are obliged to legislate: the insider using price-sensitive information to his advantage. As a matter of principle, Part V must be construed with regard to the mischief it was designed to prevent: the mischief identified in the Directive which Part V seeks to implement.

99. The defendants acknowledged that the text of Part V does not expressly address the "use" of price-sensitive information except in s. 108(5), where there is a specific knowledge requirement on the part of the insider communicator in relation to the use which the recipient will make of the information. However, they submitted that what Part V is designed to do is to prevent the use of inside information through dealing.

100. The defendants also relied on the terms of sub-s. (10) of s. 108 as supporting the proposition that to make an insider liable for breach of the insider dealing prohibition it must be proved that he used the price-sensitive information by taking advantage of it. That sub-section provides that s. 108 does not preclude a person from dealing in securities, if certain stipulations as to giving notice to the stock exchange, the publication of such notice and the timeframe within which the dealing is executed by reference to the publication of the company's interim or final results are complied with, and subject to the person "not otherwise taking advantage of his possession" of the price-sensitive information.

The plaintiff's submissions

101. The plaintiff's response to the defendants' contention that a requirement of knowledge of the price-sensitivity of the information on the part of the insider and an intention on his part to act to his advantage by using the information must be implied into the provisions of Part V in order to give rise to civil liability was that, as regards the statutory remedy, the terms of the relevant provisions of Part V are exhaustive and there is no room for such implication. The language of sub-ss. (1) and (6) of s. 108 is the language of strict liability. If the legislature intended that these provisions should be qualified by a requirement of knowledge, it could easily have done so. The fact that the provisions of sub-ss. (3) and (5) of s. 108 and s. 113 expressly import the requirement of knowledge, suggests that it was not the intention of the legislature to do so in the remainder of the provisions. Further, it was submitted that the provisions of sub-s. (7) are included to relieve the otherwise harsh consequences of the strict liability provided for in sub-s. (6). Sub-s. (7) provides that a company is not precluded from entering into a transaction by reason only of information in the possession of an officer of that company if it has put "Chinese wall" arrangements in place to immure that officer and the information he possesses from the decision maker in the dealing transaction and, in fact, the information is not communicated to the dealer. Similarly, the inclusion of sub-s. (9), which, on the plaintiff's interpretation, enables an execution only agent to deal, is inconsistent with the proposition that knowledge and intention to act in a particular way on the part of the insider is implicit in the substantive provisions of s. 108 invoked by the plaintiff. A similar argument was advanced in relation to the inclusion of the sub-s. (8) exemption.

102. In advocating that the foregoing is a correct analysis of s. 108, the plaintiff submitted that it is instructive to consider the approach adopted to the similar issues of construction in the context of similar legislation in other jurisdictions. In particular, reference was made to the decision of the New Zealand Court of Appeal in *Haylock v. Southern Petroleum N.L.* [2003] 2 N.Z.L.R. 175. The New Zealand court, in a type of procedure which is unknown in this jurisdiction, an application for leave to bring insider trading proceedings, was concerned with the construction of a section imposing liability on an insider for tipping about securities of a public issuer in terms providing that "an insider … who has inside information … and who [tips] … is liable …". The issue of construction for the court, as outlined in the judgment (at p. 180), was whether the legislation was intended to give rise to liability only for using or taking advantage of inside information when dealing or tipping or whether liability arose upon dealing or tipping by an insider merely in

possession of inside information though it was not used in the tipping. The court found (at p. 185), in the words and the scheme of the provision imposing liability, no requirement for proof of use of inside information linking its possession to the conduct giving rise to liability. It found that the scheme operated effectively on the basis of absolute liability. Persons in possession of inside information generally could avoid liability by refraining from dealing or tipping. That might not always be the case but the legislature had made specific provision for avoiding liability in the statutory exceptions, for example, an exception designed to protect those acting where "Chinese wall" arrangements were in place. Construing the provision in this way avoided the complexities inherent in proof of motivation or influence.

103. The plaintiff submitted that the confluence of criminal and civil liabilities for the same actions as is provided for in Part V is a regular feature of modern statute law. The defendants' assertion that, where such confluence occurs, civil liability necessarily imports all the elements required by the general law for criminal liability is not supported by any authority and is wrong. On the contrary, the plaintiff submitted, such authority as has considered the question has concluded that there is no difficulty in imposing different standards of civil and criminal liability. The authority relied on by the plaintiff was The *Queen v. Saskatchewan Wheat Pool* [1980] 1 C.F. 407; 104 D.L.R. (3d) 392, a decision of the Federal Court of Canada at first instance. That case concerned a claim for damages at common law which was founded, not on negligence, but simply on breach of statutory duty. There was an issue as to whether the statutory provision created a right enforceable by civil action by individuals who alleged that they had been aggrieved by breach of some specified duty or duties. At first instance it was held that such a cause of action did lie, but an appeal against that decision was allowed by the Court of Appeal (117 D.L.R. (3d) 70), which decision was affirmed by the Supreme Court of Canada ((1983) 143 D.L.R. (3d) 9). The aspect of the decision at first instance, which was not addressed by either superior court, which the plaintiff called in aid was the finding that, while the taking of reasonable care might possibly be a defence to a criminal charge under the statute, it did not follow that it would be a defence to a civil breach. Put another way, the possibility of a good answer to a criminal charge did not reduce the civil onus of an absolute duty to one of a qualified duty. Collier J. quoted from and adopted the advice of Lord Wright in *Potts (or Riddell) v. Reid* [1943] A.C. 1 at pp. 24 – 25 to the effect that in the case of a statute such as the Factories Act, 1937, *prima facie*, qualifying words in the statute which are directed to affording a defence against criminal responsibility do not affect civil liability to answer for damages caused by a breach of the duty to the workman. Of course, as Lord Wright pointed out, civil liability in that situation was derived from a common law duty which was superimposed on criminal liability created by the statute.

104. The plaintiff also controverted the defendants' assertion that interpreting Part V in a manner compatible with the Directive necessarily gives rise to the implication of knowledge and intention to use to his advantage on the part of the primary insider. There is a logical and rational basis for distinguishing between the connected person, the primary insider, and the tippee, the plaintiff argued. By its very nature the position of a primary insider differs from that of the tippee. The distinction was recognised by the legislature in importing the requirement as to knowledge on the part of the tippee into sub-s. (3) of s. 108. That same distinction is inherent in the Directive itself, it was argued. In particular, it is inherent in article 6 which provides that a Member State may, or may not, impose the prohibitions laid down in article 3 on the tippee.

105. The plaintiff also referred the court to legal text books in which Part V is being considered, which support the plaintiff's contention that knowledge and use of the information are not essential ingredients of civil liability. Reference was made to Cahill on Corporate Finance Law (Round Hall Limited, 2000) at paras. 4-47 and 4-48 and to Clarke on Takeovers and Mergers Law in Ireland (Round Hall Sweet & Maxwell, 1999) at para. 13-20.

Conclusions

106. While I have outlined in some detail the arguments advanced by the parties for and against the construction contended for by the defendants, it seems to me that this issue falls to be determined by answering three questions:

> (1) Applying ordinary canons of statutory construction, what do the provisions of Part V which create civil liability require the plaintiff to prove in relation to knowledge and intention to use to advantage to establish civil liability?
>
> (2) Is the outcome any different if one interprets Part V in the light of the wording and purpose of the Directive in order to achieve the result pursued by the Directive?
>
> (3) Does the fact that most of the same activities declared unlawful in Part V which give rise to civil liability also give rise to criminal liability vary the outcome? The starting point in addressing the first question is s. 109(1). That section creates civil liability in the following situations:
>
> > (i) where a person deals in securities in a manner declared unlawful by s. 108,
> >
> > (ii) where a person causes or procures another to deal in securities in a manner declared unlawful by s. 108, or
> >
> > (iii) where a person communicates information in a manner declared unlawful by s. 108.

107. While the nature of the civil liability created by s. 109 has given rise to considerable debate and is the subject of issues which will be dealt with later, what the plaintiff must prove to establish civil liability is determined by reference to s. 108. In s. 108, dealing is declared to be unlawful by sub-ss. (1), (2), (3) and (6), where the factual circumstances stipulated in each sub-section exist. Sub-s. (3) stipulates a requirement of specific knowledge, unlike the other sub-sections which are silent as to knowledge. In treating a person connected with the company who has price-sensitive information, a primary insider, differently from a person not so connected, by imposing a knowledge requirement in the case of the latter before liability arises, is both logical and rational. In my view the intention of the legislature was to so differentiate. I can see no basis for implying a requirement of knowledge as to the price-sensitivity of the information into sub-s. (1) or sub-s. (6), nor can I see any basis for implying a requirement as to motivation in using the information.

108. That conclusion is enforced by taking an overview of the legislative scheme in which the civil liability is created. Where knowledge is not expressly made a requirement, the legislative scheme is that a person deals while in possession of price-sensitive information on pain of illegality unless the factual circumstances come within one of the exceptions, thereby obviating illegality.

109. The fact that the legislature included the exceptions suggests that its intention was that the preceding provisions should be interpreted without any implied qualification as to knowledge or motivation. The interaction of sub-s. (6) and sub-s. (7) illustrates this. If the proper interpretation of sub-s. (6) is that dealing is only unlawful so as to give rise to civil liability if the plaintiff proves that the company has knowledge of the price-sensitivity of the relevant information and its motivation is to use it to its advantage, the elaborate "Chinese wall" structure envisaged in sub-s. (7) to effectively isolate the dealer from the influence of the insider and the price-sensitive information would, as the New Zealand court in the Haylock case observed about a similar provision in New

Zealand, seem unnecessarily cumbersome.

110. Turning to the second question, in my view, the outcome is no different when one interprets the provisions having regard to the Directive. There are undoubtedly a number of respects in which, prima facie, the provisions of Part V are more stringent than the Directive. That is permitted by article 6 of the Directive provided the extra degree of stringency is applied generally. As the plaintiff submitted, there is discernible within the Directive a difference of treatment of the primary insider and the tippee, although in relation to the knowledge requirement they are treated in exactly the same way. In relation to the mental element, what the Act does is to eliminate the requirement altogether in the case of the primary insider and to impose a less rigorous criterion than "full knowledge of the facts", which is the Directive criterion, in relation to the tippee, but it does so generally in the sense that, while the primary insider and the tippee is treated differently, all primary insiders are treated the same way, as are all tippees. This approach to transposing a Directive, in my view, is not incompatible with the Directive. Interpreting the provisions in the light of the Directive does not require a different outcome to interpretation in accordance with the normal canons of construction.

111. Finally, in relation to the third question, in Part V the legislature has created two separate and distinct sanctions, a criminal sanction and a civil sanction which, in the case of a civil sanction doubles as a remedy, in relation to the same proscribed activity. Emphasising that whether *mens rea* is an ingredient of an offence under s. 111 is not an issue in these proceedings and, therefore, is an issue on which it would be inappropriate to express a view, even if it is reasonable to infer that the legislature intended that the common law principles applicable to offences created by statute should apply to the offence created by s. 111, there is no basis for inferring that it was the intention of the legislature to apply those principles to the civil sanction and remedy. The civil liability created by s. 109 in conjunction with ss. 107 and 108 is wholly statutory. The jurisprudence which has developed in this jurisdiction and in other jurisdictions in relation to the common law action for damages for breach of statutory duty, in my view, is neither apposite nor helpful in the construction of the provisions of Part V governing civil liability. The ascertainment of the intention of the Oireachtas as to the factors which give rise to the civil liability are to be found within the four corners of the statute.

112. Therefore, the defendants' submissions as to the necessity for knowledge of, and intention to use, price-sensitive information are rejected. The defendants' submissions were made in the context that they contended that the information in issue was not price-sensitive in any event. That issue will be considered later. They were also made in the context of the defendants' contention that, in any event, Mr. Flavin did not know the information was price-sensitive and did not use or intend to use the information to his advantage or to the advantage of the corporate defendants. No issue now arises on the statutory claim on the those factual circumstances, but I will return to this aspect of the matter when dealing with the non-statutory claim.

113. In U.S. federal law, there is a requirement of *scienter*, that is to say, knowing or intentional misconduct. Many of the authorities to which I will refer later when dealing with the price-sensitivity issue restate the *scienter* requirement. In the *Haylock* case, the New Zealand Court of Appeal considered two recent decisions of the United States Court of Appeals which stipulated that the Securities and Exchange Commission should prove that the insider used the insider information, i.e. that the inside information had a causal connection to a particular trade. The New Zealand Court of Appeal concluded that the substantive provisions of the U.S. Federal Securities Law, which focuses on intent to deceive, manipulate or defraud, represented a quite different and more compelling statutory basis for reading a requirement of liability of "use" or "taking advantage of" insider information than the provision of New Zealand law under consideration by it. I mention this merely to record that I have taken it into account in considering the extent to which it is appropriate for a court in this jurisdiction to have regard to decisions of the U.S. Federal Court in applying Part V.

E. Construction/Legal Principles: Section 108

(3)/Attribution

114. The argument which I am addressing here is the plaintiff's argument that DCC was precluded from dealing by s. 108(3), which is an essential plank of the fifth proposition set out at B. above. This issue is primarily a question of the proper construction of s. 108(3), but a fundamental aspect of the argument is the plaintiff's reliance on the doctrine of attribution, as enunciated by Lord Hoffman in *Meridian Global Funds Management Asia Limited v. Securities Commission* [1995] 2 BCLC 116, in the interpretation of s. 108(3).

115. The *Meridian* case, which was an appeal from the Court of Appeal of New Zealand to the Privy Council, was concerned with duties of disclosure under a New Zealand statute of the type imposed in this jurisdiction by s. 67 of the Act of 1990. The statute required a person who had become a substantial security holder in a public issuer to give notice of that fact to the public issuer and the stock exchange as soon as the person knew or ought to have known of that fact. The issue with which the Privy Council was concerned was the attribution of knowledge to the corporate appellant, Meridian. Having referred to the "directing mind and will" test, which comes from the speech of Viscount Haldane L.C. in *Lennards Carrying Company Limited v. Asiatic Petroleum Company Limited* [1915] A.C. 705, which was applied by the Supreme Court in *Superwood Holdings Plc. v. Sun Alliance and London Insurance Plc.* [1995] 3 I.R. 303, Lord Hoffman analysed the basis on which acts are attributed to a company. He identified primary rules of attribution which are generally found in the company's constitution, typically in its articles of association. The primary rules are augmented by general rules of attribution, which are equally available to natural persons, for example, principles of agency, vicarious liability and such like. He then went on to consider the exceptional cases in which those rules will not provide an answer

> – when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability, yet the court considers that the law was intended to apply to companies. In such cases, insistence on the primary rules of attribution (normally via the board of directors) would in practice defeat that intention. A solution to that problem was identified by Lord Hoffman in the following passage at p 122:
>
> > "In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy."

116. (Emphasis in original)

117. The application of the principle is illustrated by the manner in which Lord Hoffman interpreted the provision of the New Zealand statute under consideration in the following passage at p. 126:

> "The policy of s. 20 of the 1988 Act is to compel, in fast-moving markets, the immediate disclosure of the identity of

persons who become substantial security holders and public issuers. Notice must be given as soon as that person knows that he has become a substantial security holder. In the case of a corporate security holder, what rule should be implied as to the person whose knowledge for this purpose is to count as the knowledge of the company? Surely the person who, with the authority of the company, acquired the relevant interest. Otherwise the policy of the Act would be defeated. Companies would be able to allow employees to acquire interests on their behalf which made them substantial security holders but would not have to report them until the board or someone else in senior management got to know about it. This would put a premium on the board paying as little attention as possible to what its investment managers were doing."

118. The plaintiff submitted, on the facts of this case, that the information in the possession of Mr. Flavin which is alleged to be price-sensitive should be attributed to DCC in accordance with the *Meridian* principle and, if it is, DCC was precluded from dealing as a tippee under s. 108(3).

119. I did not understand the defendants to question the appropriateness of applying the principles of attribution enunciated by Lord Hoffman generally in this jurisdiction. Therefore it is not necessary to express any view on that. They argued that they cannot be properly applied in the manner suggested by the plaintiff to the construction of s. 108(3) and that the effect of attempting to do so is to warp the statutory provision. In my view, that argument is well founded.

120. As regards tippee liability, the ingredients of unlawful dealing under s. 108(3) are that –

(i) a non-connected person (a person not precluded from dealing by virtue of sub-s. (1) or sub-s. (2)) has price-sensitive information in relation to the company,

(ii) that person, the tippee, has received information, directly or indirectly from another person whom I will call the source, and

(iii) the tippee is aware, or ought reasonably to be aware, of facts and circumstances by virtue of which the source is then himself precluded from dealing under sub-s. (1) or sub-s. (2).

121. It is not disputed that theoretically the tippee may be a body corporate. However, the source must be a natural person to come within sub-s. (1) or (2). The knowledge which the tippee must have is of the facts and circumstances by virtue of which the source is in possession of the price-sensitive information by reason of his connection with the company. Looked at in the abstract, the plaintiff's thesis was that, for the purpose of the operation of sub-s. (3), the information in the possession of the source can be attributed to the body corporate tippee, if the role of the source *vis-à-vis* the body corporate tippee and the policy of the statute so require. The defendants' answer was that, unlike liability under sub-ss. (1) and (2) which is based on connection status, liability under sub-s. (3) is receipt based. By its terms, sub-s. (3) requires that a body-corporate tippee must receive the information through its human agent who is not connected with the company.

122. In my view, the application of the plaintiff's thesis to the interpretation of sub-s. (3) would have the effect of eliding an essential element of the basis of liability under that sub-section – that the tippee is not precluded from dealing under sub-ss. (1) or (2) – and result in a distortion of the intention of the legislature in enacting sub-s. (3). On the plaintiff's thesis, Mr. Flavin's inside information is intended to count as the information of DCC for the purposes of Part V. But, if the principle of attribution could be applied in that manner, the effect would be to give DCC some type of quasi insider status and render the knowledge requirement superfluous. In my view, that is not what the legislature intended.

123. Taking a broader view of s. 108, the defendants characterised sub-s. (6) as statutory scheme of attribution. The significance of sub-s. (6) for present purposes is that it precludes a company from dealing when any one of its officers is precluded from dealing by virtue of sub-ss. (1), (2) or (3). In so doing, it provides an effective means for ensuring that the policy of Part V is not defeated, particularly, given the broad definition of "officer" contained in s. 107, which includes an employee. It is clear that the legislature was conscious of the necessity, subject to the exceptions it provided for, to bind a company where an officer of the company was bound by sub-ss. (1), (2) or (3). I do not think one can ascribe to the legislature an intention that sub-s. (3) would have the meaning which the plaintiff suggests, which is at variance with the express terms of the provision and not apposite to the particular type of activity which it was designed to outlaw.

124. Accordingly, in my view, the plaintiff has not established that, on the facts, DCC would be liable as a tippee under s. 108(3), so that one limb of the fifth proposition on which the plaintiff sought to peg liability under s. 108(6) on Lotus Green is not sustainable.

F. Construction/Legal Principles:

Sections 107 to 109/ agency/attribution

125. The argument which I am addressing here is the plaintiff's proposition, which is the third proposition set out at B above, that DCC and S&L, and if it was the beneficial owner of the shares, which was not conceded by the plaintiff, Lotus Green are liable to account under s. 109(1) independently of any liability those companies have by virtue of s. 108(6). This issue is primarily a question of construction of ss. 107 to 109, but also involves consideration of principles of agency and attribution invoked by the plaintiff.

126. The starting point for that proposition was the allegation that Mr. Flavin dealt unlawfully in contravention of s. 108(1). The plaintiff argued that the act of dealing was undertaken by him on behalf of the companies, including Lotus Green, if it was the beneficial owner of the shares, so that his dealing was their dealing. The companies dealt and, because the dealing was unlawful by virtue of Mr. Flavin's position and the information he possessed, the companies are liable to account under s. 109(1). As I understand the argument, the unlawful dealing by Mr. Flavin is to be attributed to the company; the act of the agent, Mr. Flavin, was the act of the principal, each company. In other words the *maxim qui facit per alium facit per se* applies. The plaintiff referred the court to the commentary on the maxim contained in Bennion on **Statutory Interpretation**, (4th Ed., Butterworths, 2002) at p. 983.

127. The defendants' response to that proposition was simply that it was wrong. There is no principle of attribution of unlawful dealing to be found in Part V. The implication of such a principle applying the reasoning underlying the judgment in the *Meridian* case – the rationale in that case being that without the special rule of attribution the policy of the Act would be defeated – is not necessary. It is not necessary because Part V makes agents and principals separately liable in different circumstances. Further, it was submitted that the proposition advanced by the plaintiff would significantly expand the Act and would do so in circumstances which might give rise to a criminal sanction. It was urged that the court should be slow to expand the words of a statute in such circumstances.

128. The plaintiff's proposition, in my view, is not correct. What sub-s. (1) of s. 108 does is to render unlawful dealing by a natural person in shares of a company where, by reason of his connection with that company, the natural person has price-sensitive information. The natural person may deal as agent or principal. In either event the dealing is not lawful. In my view, sub-s. (1) is not open to the construction which it must be given if the plaintiff's proposition is correct: that a body corporate which is the principal of a natural person who deals as agent in contravention of sub-s. (1) by implication is liable under s. 109. That construction is not open because the legislature expressly confined liability under sub-s. (1) to natural persons and provided in sub-s. (6) a mechanism for rendering unlawful dealing by a body corporate in situations where it is likely that the body corporate is the principal of a natural person who is in the position envisaged in sub-s. (1), that is to say, has price-sensitive information by reason of his connection with the company. The definition of officer, which includes a director and an employee, would seem to be sufficiently broad to cover most, if not all, of those persons whose acts or knowledge could be intended to count as the acts or knowledge of the company in the context of Part V. It is, of course, conceivable that every possible circumstance is not covered by the definition of officer but, in my view, that is not a basis for displacing what I believe to be the clear intention of the legislature.

129. Section 109 does not provide for any free-standing civil liability. Liability under s. 109(1) only arises where a person has dealt or caused or procured another to deal or communicated information in a manner declared unlawful by s. 108. Therefore, each of DCC, S&L and Lotus Green could only have incurred civil liability under s. 109(1) if it was involved in an activity declared to be unlawful by s. 108. On the facts of the case, as regards the activity of dealing, aside from sub-s. (6) of s. 108, having regard to what I consider to be the proper construction of sub-s. (3), neither DCC nor S&L nor Lotus Green could have been involved in an unlawful activity.

130. While, as will be clear from what I will say later, as regards the nature of the liability created thereby, s. 109 presents considerable construction difficulties, in my view, ss. 107, 108 and 109 do not present any construction difficulty in identifying which of the defendants may be liable and on what basis. In summary, the position is as follows:

> (i) Section 107, in defining dealing, makes it clear that a person may deal as principal or agent. Section 107 does not identify the proscribed activity. That is done in s. 108.
>
> (ii) The only provisions of s. 108 which proscribe activity which come into play on the case made by the plaintiff on the facts are sub-ss. (1), (4) and (6). A finding could be made that Mr. Flavin engaged in activity which was unlawful under sub-s. (1), but a finding could not be made that any of the corporate defendants contravened that sub-section, because it only applies to natural persons. A finding could be made that Mr. Flavin engaged in activity which was unlawful under sub-s. (4). A finding could be made that any of the corporate defendants engaged in activity declared unlawful by sub-s. (6), if Mr. Flavin was an officer, as defined, of the corporate defendant subject, in the case of DCC and S&L, to those corporate defendants not being able to avail of the defence contained in sub-s. (9).
>
> (iii) The only basis on which liability under s. 109 could arise is if it is established that Mr. Flavin contravened sub-s. (1) or sub-s. (4) of s. 108 or any of the corporate defendants contravened sub-s. (6).

131. Finally, by way of general observation, in my view, it is fallacious to apply the reasoning in the *Meridian* judgment to support the proposition that any of the corporate defendants is liable to account as principal of Mr. Flavin. In the *Meridian* case, the statutory duty of disclosure was the company's duty and at issue was the circumstances in which knowledge that the duty had arisen would be attributed to the company. In the case of Part V, the statutory obligation to desist from dealing provided for in sub-s. (1) of s. 108 is the obligation of a natural person, whether acting as agent or principal; it is not the obligation of a company. A company's obligation is provided for in sub-s. (6).

132. It is equally fallacious to rely on the principle of imputation applied by Buckley L.J. in *Belmont Finance v. Williams Furniture* (No. 2) [1980] 1 All E.R. 393, which I will consider in depth when dealing with the non-statutory claim. One aspect of the judgment of Buckley L.J. which arises in connection with the non-statutory claim is his finding that, where the officers of the companies involved were aware that a transaction into which a company and a wholly-owned subsidiary were about to enter was illegal or tainted with illegality, the knowledge of the officers must be imputed to the companies, because the officers were under a duty of disclosure. That finding was made in the context of an allegation that the companies had committed a tort, that they conspired with others to carry out an unlawful transaction. In s. 108(6) the legislature has provided for a statutory wrong which, subject to exceptions, is committed by the company if it deals when any officer of the company is precluded from dealing by virtue of, *inter alia*, sub-s. (1). Therefore, it is not necessary to resort to the *Belmont Finance* principle of imputation. There is in-built in Part V a much more effective method of binding the company.

G. Dealing

133. What constitutes "dealing" for the purposes of Part V is primarily a question of the construction of the definition of the word contained in s. 107. The plaintiff, commenting on the breadth of the definition, submitted that, on analysis, it can be seen to embrace no less that thirty-two distinct actions. Be that as it may, the plaintiff did not assume the burden of proving that one or more of the several defendants engaged in all thirty-two actions. In particular, the plaintiff did not undertake the burden of proving the matters dealt with in para. (b) of the definition. That element of the definition is not part of the plaintiff's case. I agree with the observations in Cahill on Corporate Finance Law at para. 4-08 that the wording and the physical layout of s. 107 present difficulties and I agree with the approach to the interpretation of the provision advocated there. On the basis of that approach, paras. (a) and (b) do not relate to the first four activities, namely, "acquiring, disposing of, subscribing for or underwriting the securities".

134. An aspect of the definition which was pointed to as being significant by the plaintiff is that an action or an activity encompassed within the definition may be performed by a person in the capacity of either principal or agent. This is something I have been cognisant of in reaching the conclusions I have reached at E and F above.

135. On my reading of the case made by the plaintiff, the pertinent actions here are actions in relation to the shares the subject of the Share Sales constituting –

> (i) disposing of them,
>
> (ii) making an agreement to dispose of them,
>
> (iii) offering to make an agreement to dispose of them,
>
> (iv) inducing another person to make an agreement to dispose of them, and (v) inducing another person to offer to make an agreement to dispose of them, and

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

136. Generally, what the foregoing actions entail, in the context of the disposal or acquisition of shares, is readily understood. However, two matters gave rise to debate at the hearing: the meaning of "making an agreement" and the meaning of "inducing".

137. There was some degree of consensus between the plaintiff and the defendants as to what inducement means. The defendants submitted that it requires a positive act which influences or persuades the person to whom it is addressed.

138. The plaintiff accepted that inducement involves some form of persuasion or encouragement. However, the defendants went further: in the context of the definition of dealing, not only must the act in question be capable of amounting to an inducement, but, in order to actually induce someone to do an act, the inducement must be a material factor leading to the execution of that act. In this connection, the defendants referred the court to an Australian insider dealing case*: Ryan v. Triguboff* [1976] 1 N.S.W.L.R. 588. In that case the Supreme Court of New South Wales was concerned with a statutory definition of "dealing in securities" (quoted at p. 599) quite similar to the definition under consideration here in that it described the expression as meaning "(whether as principal or agent) making or offering to make with any person, or inducing or attempting to induce any person to enter into or to offer to enter into any agreement … – (a) for or with a view to acquiring, disposing of … securities …". One of the issues in that case was whether a submission made on behalf of the Commissioner of Corporate Affairs (Ryan) that when the defendant, Triguboff, with his three co-directors, joined in the resolution that a public company, Meriton, the four being sole directors of Meriton, should dispose of a substantial number of shares it held in another public company, Kimberley, of which the four were the sole directors and in which they were shareholders with Meriton, it being the largest single shareholder, and then executed an agreement for the sale of the shares, the defendant and the other directors had induced the company to enter into the agreement to dispose of the shares so as to come within the definition of dealing was correct. Speaking for the Supreme Court, Lee J. stated at p. 600:

> "It is not permissible, in my view, to make the word 'inducing' synonymous with 'causing', when one is seeking to determine whether one person has induced another to enter into an agreement, whether that other is a real person or a company. It seems to me that it is not a proper use of the word 'induce' to say that the directors of the company induced the corporation, meaning the soulless entity to enter into a contract when they pass a resolution that the corporation enter into a contract. I am not prepared to uphold Mr. Porter's submission. Nor do I think that, on the evidence, it could be held that the defendant induced the other directors to join in the resolution for the sale of the shares in Meriton. There was a dearth of evidence from which one could conclude that any director induced another to join in the resolution. The whole of the evidence indicated that the four directors were actively – it may have been equally – involved in the overall transaction, which resulted in 44% of the shares in Kimberley being disposed of, and which required a disposal of Meriton's shares in Kimberley."

139. That decision, it was argued, illustrates the point that the persuasion or encouragement must be a material factor leading to the execution of the act of agreeing or offering to make an agreement.

140. The defendants' contention that, in order to prove that a person induced the making of an agreement, it must be proved that the person persuaded or exerted influence over the contracting party in a manner which materially contributed to the outcome, the making of the agreement, in my view, is correct. Therefore, in my view, in determining whether there was an inducement, it is necessary to consider the degree of impact the person who is alleged to have induced had on the contracting party.

141. The plaintiff relied on a different aspect of the decision of the Supreme Court of New South Wales in *Ryan v. Triguboff* in the context of the definition of "dealing". The issue also arose as to whether Triguboff had dealt. The substantive provision under consideration by the court, s. 75A of the Securities Industry Act, 1970, which dealt with insider trading, had many of the features of s. 108(1) of the Act of 1990: the concept of a connected person and the concept of possession of price-sensitive information through the connection. However, it differed in other respects. Of particular relevance for present purposes is that the phraseology in which the unlawful activity was expressed was – "deals, directly or indirectly". In considering whether Triguboff dealt, Lee J. stated at p. 601:

> "The word 'deals', in relation to securities, is a word in constant use and its meaning is not in doubt. It would, in my view, in any event, even if there were no definition, include all the circumstances in fact set out in the definition of 'dealing with securities' in section 4, but the addition of the words 'directly or indirectly' shows a clear intention, in my view, to cover every involvement by a director … in a transaction with securities which can be said, as a matter of ordinary English, to be a dealing in those securities."

142. Later, referring to the allegation made against Triguboff, Lee J. said at p. 602:

> "When a charge under section 75A involves the assertion that the defendant dealt in the shares of A company by participating in the disposal by B company of its shares in A company, then if the defendant, as a director of B company, is shown to have participated in a resolution of the board of B company to sell the shares, that, in my view, can be treated as evidence, to be considered with all of the other evidence, on the question of whether there has been a dealing or not by that director. In this case, the defendant, on the evidence, was active in arranging and bringing about the ultimate transaction involving 44 per cent of the shares in Kimberley, and which necessitated a resolution by the board of Meriton to sell most of its holdings in Kimberley. He was a party to the resolution by which Meriton agreed to sell a substantial part of its holding in Kimberley and he executed the agreement under which Meriton … agreed to sell the shares … . In my opinion, the evidence amply supported the conclusion that the defendant dealt 'indirectly' in those shares of Kimberley which Meriton owned."

143. The plaintiff submitted that the distinction between the statutory provision under consideration by the Supreme Court of New South Wales and s. 108(1) does not affect the analysis the court conducted or the conclusion it reached. That may be so, but in the final analysis it is a question of fact for this court whether any of the defendants dealt, having regard to the definition of "dealing" in s. 107, as it was a question of fact for the Supreme Court of New South Wales whether the defendant before it had dealt, directly or indirectly. That comment is equally applicable to the submission made on behalf of the defendants that the position here is distinguishable on the facts from the situation with which the Supreme Court of New South Wales was concerned. It was emphasised that the Supreme Court of New South Wales analysed the facts by reference to three aspects of the involvement of Triguboff – negotiation, joining in the resolution of Meriton and then executing the agreement.

144. As to the meaning of "an agreement", in the context of making or offering to make an agreement in the definition of "dealing", it was submitted on behalf of the defendants that those words denote an agreement as a whole or the entire of an agreement, in the sense of all of the essential elements. I accept the correctness of that proposition. However, in the case of the sale of shares in a

listed company, as a general proposition, the essential elements will be the identity of the purchaser, the number of shares, the price and, perhaps, the type of shares.

H. Application of Section 108(9)

145. The issue which I am addressing here is what are the legal principles which are relevant to identifying the circumstances in which a dealing comes within s. 108(9), so that effecting the transaction is not precluded by Part V. The relevance of this issue is that it goes to the defence of DCC and S&L that the admitted dealing by each was lawful, which is the defendants' answer to the fourth proposition set out at B above.

146. There was some degree of consensus between the parties on this issue. First, the defendants accepted that the onus is on them to establish the defence under s. 108(9). Secondly, it was acknowledged that a person who is caught by s. 113 cannot avail of the defence provided by s. 108(9). Section 113(1) renders dealing by an agent unlawful if the agent has reasonable cause to believe or ought to conclude that to deal would be unlawful. Thirdly, it was agreed that there are three components in s. 108(9), which, broadly speaking, are:

(a) dealing as agent;

(b) dealing pursuant to a specified instruction; and

(c) absence of advice.

147. Whether the defendants have established the three components so as to enable DCC and S&L to avail of the defence is primarily a question of fact. There is a serious factual dispute in relation to each component, which I will deal with later.

148. The parties diverged as to the legislative intent given effect to in s. 108(9). Counsel for the plaintiff referred the court to academic commentary on insider dealing and, in particular, on Part V in this context. It was submitted that the following passages from Cahill on **Corporate Finance Law** at paras. 4-66 and 4-68 represent a correct statement of the law:

> "4-66. An agent who remains within the parameters set out in section 108(9) by merely executing a transaction without any deeper involvement is known as an 'execution-only' agent. Such an agent will normally be exempt from liability for insider dealing should it eventually turn out to be the case that the principal was an insider dealer …
>
> 4-68. Where an agent is more than a mere 'execution-only' agent, the agent cannot invoke section 108(9) as a defence as that sub-section is only available to execution-only agents."

149. Counsel for the plaintiff also referred to the commentary in Clarke on **Takeovers and Mergers Law in Ireland** in para. 13-31 and, in particular, the observation that the conditions on which the defence provided for in section 108(9) is available are consistent with a recital in the Directive in the following terms:

> "Whereas insider dealing involves taking advantage of inside information; whereas the mere fact that market makers, bodies authorised to act as contrepartie, or stockbrokers with inside information confine themselves, in the first two cases, to pursuing their normal business of buying or selling securities or, in the last, to carrying out an order should not in itself be deemed to constitute use of such inside information …"

150. Counsel for the defendants submitted that s. 108(9) is not open to the narrow construction suggested by the plaintiff. The provision does not speak of execution-only agents. Praying in aid the Directive does not call for a narrow interpretation, it was argued. It was not suggested by the plaintiff that the Act had failed to transpose the Directive. If the scope of the provision is broader than the Directive, then it must be construed as such. Essentially, counsel for the defendants submitted that the provision should be construed having regard to the natural and ordinary meaning of the words used.

151. There was also a divergence between the parties, in that the plaintiff argued that DCC and S&L could not avail of s. 108(9) if the defendants' contention that at the material times Lotus Green was the equitable or beneficial owner of the shares (which contention the plaintiff did not accept), so that DCC or S&L, as the case may be, was a constructive trustee, was correct. The plaintiff's contention was that the defence is not available to a person who is the registered owner of shares selling on the instructions of the beneficial owner, because such person does not merely act as an agent; he disposes of his own legal interest in the shares, which is an act undertaken on his own behalf, whether pursuant to a specified instruction or not. Further, the plaintiff pointed to the distinction, well established in law, between a person owning a legal interest in shares and a mere agent. To illustrate the distinction, the plaintiff referred to a passage from the judgment of Lord Hoffman in *Ingram v. IRC* [1999] 1 All E.R. 297, a tax case in which an issue arose as to the validity of leases made by a landowner in favour of her solicitor to be held by him as her nominee. The leases were held to be valid. The passage in question is to be found at p. 305 and is in the following terms:

> "A trustee in English law is not an agent for his beneficiary. He contracts in his own name, with a right of indemnity against the beneficiary for the liabilities he has incurred. Of course the law will not allow a beneficiary to sue to enforce obligations in respect of which the trustee would have a cross-claim for indemnity. But this is a procedural bar, based upon avoiding circularity of action. On the other hand, if a beneficiary who has granted a lease to a nominee for himself were to convey the freehold, the trustee's liabilities under the lease would become enforceable and he would be dependent on the value of his claim for indemnity against the beneficiary. The prospect of this happening means that one cannot say that a lease from an owner to his nominee requires no 'meeting of minds'; the nominee is incurring what may be real obligations and cannot be regarded as a mere puppet."

152. The first and last sentences in that passage were cited and applied by this court (Smyth J.) in Bayworld v. McMahon O'Brien Downes (Unreported, High Court, 19th June, 2003). The decision of Smyth J. was subsequently upheld by the Supreme Court on appeal. The dictum of Lord Hoffman in the Ingram case was not, however, referred to in the judgment delivered by McCracken J., with whom the other two judges of the Supreme Court concurred (reported at [2004] 2 I.R. 199). However, the plaintiff referred to a passage from the judgment of McCracken J. as illustrating the status of a trustee. Before coming to that passage I think it is helpful to refer to an earlier passage which puts the later passage in context. McCracken J. stated at p. 218:

> "The plaintiff was set up solely for the purpose of acting as a bare trustee of lands, and it is not in dispute that it never had any beneficial interest in those lands. Both under the terms of the declaration of trust, and indeed on general principles, it was bound to act in accordance with all lawful instructions given by the partnerships, who were beneficially

entitled to the various lands. However, that does not mean that as trustee the plaintiff has no rights in relation to the lands, or documentation dealing with the lands, independently of the beneficiaries. It is acknowledged in this case that, as far as the world at large was concerned, the plaintiff was the owner of various properties. It signed contracts to purchase and sell properties, it borrowed money for the purpose of completing sales and it undertook obligations with vendors or purchasers of the properties. As far as third parties dealing with the plaintiff were concerned, obligations were owed to them by the plaintiff, and they owed obligations to the plaintiff. For example, the primary obligation to repay monies borrowed from the bank was that of the plaintiff, as was the obligation to discharge stamp duties on the transactions which it carried out. No doubt it was fully indemnified financially by the partnerships, but in many instances it would still retain its primary liability to third parties. In law, the plaintiff, as a trustee, must be considered as a separate legal entity from the partnerships which were the beneficiaries of the trusts."

153. The passage to which the plaintiff referred is in the following terms and is to be found at p. 220:

> "The position of the plaintiff is undoubtedly that it must obey all lawful instructions from the partnerships, but I would emphasise the word 'lawful'. A trustee is not bound to comply with unlawful or fraudulent instructions from its beneficiary, and while I am not for a moment suggesting that any unlawful or fraudulent instructions have actually been given in the present case, the right of a trustee to inquire as to the lawfulness of its instructions and to determine for itself whether it ought to carry out those instructions cannot be questioned."

154. The fact that the legal owner must itself determine that, in any given circumstance, it is proper to enter into a transaction at the direction of the beneficial owner, of itself demonstrates that the provisions of s. 108(9) are not applicable to such a legal relationship, the plaintiff submitted.

155. The defendants rejected the plaintiff's analysis, suggesting that it ignored completely the position of nominee companies of stockbroking firms, investment banks and so forth which, it was suggested, manifestly fell within the protection of s. 108(9). It was suggested that the flaw in the reasoning advanced by the plaintiff may be a failure to distinguish between general agency, on the one hand, and specific agency, on the other hand, arguing that DCC and S&L acted as specific agents of Lotus Green in relation to the transfer of legal title to the shares.

156. The defendants acknowledged that DCC and S&L dealt. In relation to the shares of which it was registered owner, each company furnished a duly executed stock transfer form in the prescribed form, handed over the share certificates and gave notice to Fyffes under s. 67 of the Act of 1990 and DCC made a stock exchange announcement. However, that is part only of the story, as will become clear when I outline the facts later. The conclusion I have come to on this aspect of the case is that I must apply s. 108(9) to all of the relevant facts, and, in doing so I must adopt a purposive approach to the construction of s. 108(9) in the light of the mischief which the Directive was aimed at remedying. One of the facts to be determined is the capacity in which DCC and S&L entered into the relevant transactions and, in particular, whether, if each company was a constructive or bare trustee as contended by the defendants, it entered into the relevant transaction as agent rather than as principal. Speculating about what precisely an execution-only agent does or how s. 108(9) impacts on a nominee company of a firm of stockbrokers or of an investment bank may be of some limited assistance but it does not in any way answer the questions which s. 108(9) raises on the specific facts of this case, which is the court's task.

157. The plaintiff submitted that the words "cause" and "procure", which are not defined in Part V, in s. 108(4) demonstrate that the legislature intended that a broad category of behaviour should fall within the ambit of the provision. The term "cause" as ordinarily used, it was submitted, implies an action which brings about an intended or probable result, citing the decision of the House of Lords in *Alphacell Limited v. Woodward* [1972] A.C. 824, the decision of this court (O'Sullivan J.) in *Wicklow County Council v. Fenton* (No. 2) [2002] 4 I.R. 44, and the decision of this court (Lynch J.) in *Maguire v. Shannon Regional Fisheries Board* [1994] 3 I.R. 580. The verb "procure", it was submitted, imports an element of persuasion, inducing or influencing and implies effort, care, management or contrivance towards a desired end. As authority for this proposition the plaintiff cited the decision of the Court of Appeal of *New South Wales in R v. Castiglione* [1963] N.S.W.R. 1, an authority which seems to me not to be particularly apt, in that at issue there was the meaning of penal statute which created the offence of procuring a female under the age of 21 years, whether with her consent or not, with intent that some other person might have carnal knowledge of her. The distinction between procuring and causing, the plaintiff submitted, was that the former implies an act driven by an objective or intention, whereas the latter can occur in a more passive way in that the result can be caused by a negligent or careless act without the specific objective or intention that the result would follow.

158. The defendants took issue with the plaintiff's interpretation of "to cause" and, in particular, the suggestion by the plaintiff that it implies no more and no less than the steps which result in a particular action occurring. That suggestion, it was submitted, is too imprecise and too wide. While not accepting that the authorities cited by the plaintiff supported the proposition advanced by the plaintiff, the defendants made the point that the issue in those cases was a simple one: whether, in respect of offences of strict liability, the discharge of effluent or other pollutants through media owned and controlled by the relevant defendant was the cause of pollution. That is certainly an accurate characterisation of the *Alphacell and Maguire* cases, although it is not of the *Wicklow County Council* case. In any event, the defendants pointed to the dictum of Lord Wilberforce in the *Alphacell* case at p. 834, in which he recognised that the case was comparatively simple and that in that case "causing", should be given a common sense meaning without the introduction of refinements such as *causa causans*, effective cause or *novus actus*. Indeed, the defendants could have pointed to similar comments by Lynch J. in the Maguire case to the effect that, in the context of issue in that case, to enter into esoteric discussions as to the proximate cause, *causa causans* and *causa sine qua non* was to depart from common sense reality. The thrust of the defendants' argument was that the issue raised in relation to the interpretation of the expression "to cause" in s. 108(4) is not a simple one. The correct test, it was submitted, is whether the person whose activity is proscribed by s. 108(4), the "causer" to coin a phrase, was the direct cause of the other party's dealing. The meaning of "to … procure" proffered by the defendants was not essentially different from the meaning proffered by the plaintiff: the test is whether the person whose activity is proscribed by s. 108(4), the procurer, produced the other party's dealing by endeavour, it was submitted by the defendants. However, the defendants submitted that there was a requirement for intent in s. 108(4) and that this should inform construction of s. 108 generally with regard to the requirement for intent.

159. In my view, in construing the expression "to cause or procure" in s. 108(4) it is important to identify the context in which the expression is used. It only comes into play if the person whose activity is proscribed by that provision, the causer or procurer, is precluded from dealing by virtue of sub-s. (1), (2) or (3). Accordingly, it only comes into play in relation to a primary insider whose circumstances fall within the ambit of sub-s. (1) or (2) and in relation to a tippee whose circumstances fall within the ambit of sub-s. (3). In a civil claim founded on Part V it is for the plaintiff to prove the existence of the relevant circumstances having regard to the proper construction of sub-s. (1) or (2) in the case of the primary insider and of sub-s. (3) in the case of the tippee. The plaintiff then has to prove that the primary insider or the tippee, as the case may be, "caused or procured". However, consistent with the

views I have expressed in relation to the issue of knowledge and intention, as a matter of construction of sub-s. (4) the plaintiff does not have to prove intention or knowledge in relation to the act of causing or procuring in order to establish civil liability under s. 109.

160. The activity which is rendered unlawful by sub-s. (4) is causing or procuring another person to engage in the activity which the causer or procurer is precluded from engaging in himself by virtue of sub-ss. (1), (2) or (3). In my view, given the context, determining whether an alleged causer or alleged procurer has caused another to deal does not entail any complexity. It is a matter of common sense. Therefore, I do not think that the test is whether that person was the direct cause of the dealing, whatever the epithet "direct" is intended to imply. I also think that, insofar as it is to be inferred from the plaintiff's submission that intention or reasonable foreseeability in relation to the result is a requirement, it is misconceived. In my view, the test in relation to "causing" is whether the alleged causer brought about the dealing engaged in by the other person. The test in relation to "procuring" is whether the alleged procurer, through effort or endeavour on his part, brought about the result. I would respectfully adopt the passage from the judgment of Lord Widgery C.J. in A-G's reference (No. 1) of [1975] 2 All E.R. 684, at p. 686 referred to by the defendants:

> "To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking appropriate steps to produce that happening."

J. Shadow directorship

161. The issue of shadow directorship arose from the fifth proposition set out at B. above. The plaintiff, with a view to establishing that Lotus Green was liable under s. 109 on the basis that it dealt unlawfully under s. 108(6), contended that –

> (a) Mr. Flavin, whom it was alleged was precluded from dealing by virtue of s. 108(1), was an officer of Lotus Green, being a shadow director thereof, and
>
> (b) DCC, which it was alleged was precluded from dealing by virtue of s. 108(3), was also a shadow director.

162. Notwithstanding that, having regard to the conclusion I have reached on the construction of s. 108(3) at E. above, as regards DCC this issue is redundant, lest that conclusion is incorrect, I propose to consider whether a company can, as a matter of law, be a shadow director. The plaintiff argued that it can, relying on a recent decision of this Court in *Re Worldport (Ireland) Limited (in liquidation)* (O'Leary J., unreported, 16th February, 2005). The defendants pointed out that the decision is under appeal. The position they adopted was that they reserved the right to argue that the decision was not correct if this matter were to go elsewhere.

163. The issue whether a body corporate can be a shadow director arose in the *Worldport* case in the context of an application by a liquidator for a restriction order under s. 150 of the Act of 1990, which is contained in Part VII of that Act, as amended, against a body corporate incorporated outside the jurisdiction. Section 176(1) of the Act of 1963 provides that a company shall not have as a director of a company a corporate body. It was argued by the body corporate against whom the restriction order was sought that, as it was disqualified from appointment as a director of the company, it could not be a shadow director because such status was only attainable by a person with the capacity to be appointed a director.

164. While the manner in which the concept of shadow director is incorporated in Part VII differs from the manner in which it is incorporated in Part V, for the purposes of both parts the meaning of shadow director is to be found in s. 27, which I have quoted earlier. I respectfully agree with and adopt the reasoning of O'Leary J. as to the significance of the manner in which the legislature has established the status or office of shadow director in s. 27, the use of the formula that a person who falls within the definition "shall be treated … as a director" for the purposes of the legislation. The language is highly suggestive of an intention on the part of the legislature that the concept of shadow director is distinct from, and not merely a sub-set of, the office of director. O'Leary J. found support for that proposition in Part VII of the Act of 1990 in which the application of the provisions of that Part in relation to restriction and disqualification was effected by the terminology that the relevant Chapter "applies to shadow directors as it applies to directors".

165. The drafting scheme of Part V is to define the words and expressions which are given specific meanings in s. 107. The word "officer" is defined as including a director. The word "director" is defined as including a shadow director within the meaning of s. 27. The drafting technique employed in Part V, in my view, was not intended to, and does not affect the proper interpretation of s. 27. By virtue of s. 11(c) of the Act of 1937, the word "person" in s. 27 is to be construed as including a company unless the contrary intention appears. I can discern no contrary intention in Part V of the Act of 1990. Interpreting the word "person" in s. 27 as importing a company is not in any way inconsistent with s. 176 of the Act of 1963. The latter provision precludes a company from having a body corporate as a director; the former identifies the type of person who, by reference to the manner in which he acts *vis-à-vis* the company, is to be treated as a director. It follows that I consider that DCC could be a shadow director of Lotus Green.

166. It is necessary to consider next what a plaintiff has to establish to prove that a person, whether a natural person or a body corporate, is a shadow director within the meaning of s. 27.

167. The plaintiff's submission was that the court should be guided by the propositions set forth by Morritt L.J., delivering the judgment of the Court of Appeal, in *Secretary of State for Trade and Industry v. Deverell* [2000] 2 B.C.L.C. 133. The issue to which the propositions related was the correct interpretation of s. 22(5) of the Company Directors Disqualification Act, 1986, which was being considered in the context of an application by a liquidator of a company in a creditor's voluntary winding-up for the disqualification of two individuals whom it was alleged were shadow directors of the company. Section 22(5) defines "shadow director" in substantially the same terms as s. 27 of the Act of 1990. Having reviewed earlier English authorities and an Australian authority relied on by the plaintiff in this case (*Australian Securities Commission v. A.S. Nominees Ltd*. [1995] 13 A.C.L.C. 1822), and the judgment of the trial judge, Judge Cooke, Morritt L.J. set out the following propositions at para. 35:

> "(1) The definition of a shadow director is to be construed in the normal way to give effect to the parliamentary intention ascertainable from the mischief to be dealt with and the words used. In particular, the purpose of the Act is the protection of the public and as the definition is used in other legislative contexts it should not be strictly construed because it also has quasi-penal consequences in the context of the 1986 Act. …
>
> (2) The purpose of the legislation is to identify those, other than professional advisers, with real influence in the corporate affairs of the company. But it is not necessary that such influence should be exercised over the whole field of its corporate activities. …
>
> (3) Whether any particular communication from the alleged shadow director, whether by words or conduct, is to be classified as a direction or instruction must be objectively ascertained by the court in the light of all the evidence. In that

connection I do not accept that it is necessary to prove the understanding or expectation of either giver or receiver. In many, if not most, cases it will suffice to prove the communication and its consequence. Evidence of such understanding or expectation may be relevant but it cannot be conclusive. Certainly the label attached by either or both parties then or thereafter cannot be more than a factor in considering whether the communication came within the statutory description of direction or instruction.

(4) Non-professional advice may come within that statutory description. The proviso excepting advice given in a professional capacity appears to assume that advice generally is or may be included. Moreover, the concepts of 'direction' and 'instruction' do not exclude the concept of 'advice' for all three share the common feature of 'guidance'.

(5) It will, no doubt, be sufficient to show that in the face of 'directions or instructions' from the alleged shadow director the properly appointed directors or some of them cast themselves in a subservient role or surrendered to their respective discretions. But I do not consider that it is necessary to do so in all cases. Such a requirement would be to put a gloss on the statutory requirement that the board are 'accustomed to act in accordance with' such directions or instructions. It appears to me that Judge Cooke, in looking for the additional ingredient of a subservient role or the surrender of discretion by the board, imposed a qualification beyond that justified by the statutory language."

168. Before considering the defendants' submissions on whether the foregoing propositions represent Irish law and the extent to which the decision of the Court of Appeal should be considered a persuasive authority in this jurisdiction, I think it appropriate to comment on the first proposition, having regard to the function of the court in this case. In transposing the Directive into Irish law, the legislature identified the categories of persons who are subject to the insider dealing restriction whose precluded status also restricts a corporation with which they are associated partly by utilising the concept of shadow director, which has diverse application in our company law code. A finding that a person is a shadow director in a particular context may have serious consequences, for example, liability for reckless trading, restriction or disqualification under Part VII of the Act of 1990, and prohibition on loans and other financial arrangements.

169. In stating the purpose of the statutory provision which was under consideration by him, in the first proposition, Morritt L.J. stated that he agreed with a statement to a similar effect of Browne-Wilkinson V-C in *Re Lo-line Electric Motors Limited* [1988] B.C.L.C. 698, at 706. It is obvious that the passage to which he was referring was a passage in which the Vice-Chancellor, having identified the paramount purpose of disqualification as the protection of the public, not punishment, in deciding that in the particular context of the disqualification provision he was considering the word director included a *de facto* director, went on to state that he would "approach the question of construction on the normal basis". That passage was approved by the Supreme Court in a similar context, in Re *C.B. Readymix Limited; Cahill v. Grimes* (Unreported, Supreme Court, 1st March, 2002). While the Directive has similar purpose, to protect the investing public, in transposing it into Irish law, the legislature provided for both a criminal and a civil sanction for insider dealing. While I am not suggesting that the definition of "shadow director" in s. 27 of the Act of 1990 means something different when applied in Part V as opposed to Part VII of the Act of 1990, having regard to the gravity of a finding that a person is a shadow director in the context of Part V, it seems to me that the application of the definition should be approached with particular care in that context.

170. The defendants adopted the criticisms of the propositions advanced by Morritt L.J. made in Courtney on **The Law of Private Companies**, 2nd Ed., 2002. The first criticism is directed at the fifth proposition. In his commentary (at para. 8.062) Courtney states that that proposition cannot be taken as a correct interpretation of s. 27 of the Act of 1990 and continues:

"The legislation is unequivocal: the real directors must act in accordance with the 'directions or instructions' of the shadow director. The statutory words must be given their natural and unstrained meaning … . For a person to be found to be a shadow director of a company, he or she must 'direct or instruct' the real directors as to how they act i.e. how they exercise their powers as directors and to that extent the real directors must be subservient to the 'shadow' … ."

171. The second criticism is directed at the fourth proposition. Of this, Courtney states as follows at para. 8.063:

"Section 27 … plainly requires a shadow director to issue 'directions or instructions': 'advice' is not part of the primary requirement; all that s. 27 says on 'advice' is that such, given in a professional capacity, is insufficient to render its maker a shadow director. The significance of the professional advice exception can be grasped by accepting that a professional adviser does not direct or instruct a company on what it should do: he advises the company on what he perceives, in his professional judgment, to be the best course of action. The legislature clearly intended to preclude such 'advice' from being construed, as a result of judicial gymnastics of the sort seen in the judgment of Morritt L.J., a reckonable 'direction or instruction' for the purposes of … s. 27."

172. Counsel for the defendants drew attention to the following passage from the judgment of Morritt L.J. at para. 59, in which he was commenting on a finding at first instance by Cooke J. that, in the case of one of the alleged shadow directors, Hopkins, there was no evidence to suggest that "in circumstances where [Mr. Hopkins] was not giving advice that the directors did not exercise their own discretion" or that "the acceptance of advice was mechanical as opposed to considered": "… if the board were accustomed to act on the directions or instructions of Mr. Hopkins it is not necessary to demonstrate that their action was mechanical rather than considered.

"That interpretation, counsel for the defendants submitted, when coupled with the proposition that advice can constitute a direction or instruction, is a significant departure from the language of s. 27.

173. In adopting Courtney's criticisms, counsel for the defendants laid more emphasis on the criticism of the fourth proposition than on the criticism of the fifth proposition. He suggested that the divergence between Courtney's analysis of s. 27 and the fifth proposition may not be as great as might appear, in that in the fifth proposition Morritt L.J. was not diluting the mandatory effect of "direct" or "instruct". Stated in the abstract, the position of counsel for the defendants was that it would be incorrect to interpret s. 27 on the basis that "advice" comes within "directions or instructions", or that there could be a finding of shadow directorship in a situation where there is advice from a person who is alleged to be a shadow director, followed by a considered decision of the board of directors. The plaintiff's answer, in effect, was that it would be immaterial whether the board adopted a considered, rather than a mechanical, approach. All that is required under s. 27 is that the board act in accordance with the direction or instruction.

174. As Courtney points out, in a passage which immediately follows the five propositions, Morritt L.J. discouraged the use of epithets, such as describing the board as "the cat's paw, puppet or dancer to the tune of a shadow director", in place of the statutory definition, stating that doing so implies "a degree of control both of quality and extent over the corporate field in excess of what the statutory definition requires".

175. It is difficult to state in the abstract the legislative intent which underlies the rather terse definition contained in s. 27. However, in the light of the submissions in this case I make the following observations. First, it seems to me that it is implicit in s. 27 that the directions or instructions emanating from the alleged shadow director must have an imperative quality. It may be that advice, in a given factual context, will have an imperative quality. If that is the case, it would explain the apparent oddity to which counsel for the plaintiff pointed: why the legislature thought it necessary to exclude advice given in a professional capacity, if advice does not come within the expression "directions or instructions". Therefore, for a communication of any type to constitute a direction or instruction, it must have an imperative quality. Secondly, just because there is consideration by the board interposed between the direction, instruction or imperative advice does not mean that the act of the board is not to be taken into account in applying s. 27, if the board acts in accordance with the direction, instruction or imperative advice. If it were otherwise, the effect of s. 27 could be seriously diluted, particularly because of the difficulty inherent in making an objective assessment as to why the board acted in the manner it did. Thirdly, s. 27 does not require that the board should always act on the directions and instructions if a shadow directorship is to exist. That is indicated by a requirement that the board should be accustomed so to act.

176. Finally, in relation to the application of s. 27 to the facts of this case, counsel for the defendants made a number of points. First, he emphasised the distinction between a *de facto* director and a shadow director, recognising that they are not necessarily mutually exclusive and that there may be occasions when they overlap. I did not understand counsel for the plaintiff to gainsay that proposition. I have taken cognisance of the distinction. Secondly, he referred to a passage from the judgment of Morritt L.J., in which (in para. 38) he identified the standard of proof, where it is alleged that a person is a shadow director, as being the civil standard, proof on the balance of probabilities, but added that having regard to the nature of the charge, what was required was proof of the relevant facts "clearly and with conviction". Although, as I will state later, I do consider that, in the context of Part V, particular care is appropriate, this does not alter the view I express later on the appropriate standard of proof in this case. Thirdly, he submitted that the reference in s. 27 to "the directors" means the board or the majority of the directors. In my view, that submission is correct.

K. Agency/single entity

177. This issue arose from the sixth proposition set out at B above. Its significance is that, on the basis of the segregation of the beneficial ownership from the legal ownership of the DCC Group stake in Fyffes for which the defendants contend, the defendants assert that no profit accrued to DCC or S&L from the Share Sales and that the profit accrued to Lotus Green solely. The defendants admit that DCC and S&L dealt, but they contend that the dealing was lawful because it came within the exemption contained in s. 108(9). But if the s. 108(9) defence has not been established, so that DCC and S&L dealt unlawfully, if it is established that its officer, Mr. Flavin, was in possession of price-sensitive information at the dates of the Share Sales, and if the defendants are technically correct that no profit accrued to either DCC or S&L, the question which arises is whether there is any legal principle by which the plaintiff can attach, using that word in a non-technical sense, the profit which accrued to Lotus Green. The plaintiff asserted that two recognised legal principles, the doctrine of agency and the doctrine of the single entity, could be called in aid. Although the plaintiff advanced two distinct bases for treating the actions of Lotus Green and the actions of DCC, in relation to the shares of which DCC was the registered owner, and the actions of Lotus Green and the actions of S&L, in relation to the shares of which S&L was the registered owner, as one, it is convenient to consider the principles of law applicable to both bases together. For the sake of clarity and brevity, I will consider these principles by reference to the position of Lotus Green vis-à-vis DCC. Obviously, the position of Lotus Green and S&L is the same. I propose looking at the case made by the plaintiff on the pleadings first.

178. The plaintiff has pleaded that Lotus Green at all material times acted as agent of DCC and S&L and pursuant to instructions both in relation to the interest in, and control over, the shares and the disposal of the shares. Any dealing in the shares by Lotus Green was at all material times a dealing by DCC or S&L, as the case may be. That is the basis of the agency argument.

179. Additionally, the plaintiff pleaded that, having regard to the circumstances surrounding the establishment of Lotus Green, the purported transfer of the shares to Lotus Green, the manner in which Lotus Green conducted its affairs and the extent of the control of DCC over Lotus Green and the circumstances surrounding the sale of the shares, it is just and reasonable that the actions of Lotus Green in respect of the shares be treated in law as the actions of DCC or S&L, as the case may be. That is the basis of the single entity argument. The phrase "single entity" is interchangeable with phrases variously encountered in the authorities to denote the concept with which I am dealing – single economic entity, single corporate entity and such like.

180. It has been a fundamental principle of Irish company law since the decision of the House of Lords in *Salomon v. Salomon and Company Limited* [1897] A.C. 22 that a company registered under the Companies Acts is an artificial legal entity separate and distinct from the members, whether natural or corporate persons, of which it is composed. The authorities relied on by the plaintiff in support of the agency argument and the single entity argument and those cited by the defendants to controvert the propositions advanced by the plaintiff and other authorities in which it was sought to make inroads into the principle enunciated in the Salomon case, in some cases successfully and in other cases unsuccessfully, are reviewed in Keane on Company Law, 3rd Ed., in chapter 11. I propose starting the analysis of the submissions and the authorities by quoting the following summary of the law in this jurisdiction contained in para. 11.64, which I have found helpful in anchoring the multitude of concepts which are encountered in the authorities – agency, trust, lifting the veil of incorporation, piercing the corporate veil, single economic unit, single entity, commercial reality and so forth – in fundamental principle:

> "From this welter of conflicting decisions, the following principles may be extracted with some hesitation:
>
> > (1) The rule in *Salomon*'s case is still the law. The company and its shareholders are separate legal entities and the courts normally cannot infer from the degree of control exercised by the shareholder a relationship of principal and agent or beneficiary and trustee between the shareholders and the company.
> >
> > (2) The courts, however, will not permit the statutory privilege of incorporation to be used for a fraudulent, illegal or improper purpose. Where it is so misused, the court may treat the company thus incorporated as identical with its promoters.
> >
> > (3) In certain cases, where no actual misuse of the privilege of incorporation is involved, the courts may nonetheless infer the existence of an agency or a trust if to do otherwise would lead to injustice or facilitate the avoidance of tax liability.
> >
> > (4) In the case of a group of companies, the court may sometimes treat the group as one entity, particularly where to do otherwise would have unjust consequences for outsiders dealing with companies in the group.
> >
> > (5) The rule in *Salomon*'s case does not prevent the court from looking at the individual members of the company in

order to determine its *character and status* and where it legally resides."

181. Before considering the authorities and the manner in which they were relied on by the parties, I think it is useful to ask what the plaintiff is endeavouring to achieve by advancing the agency argument and the single entity argument. Counsel for the defendants suggested that it was an attempt to make the assets of one company in a group of companies available to meet the debts or liabilities of other companies in the group. That, in my view, is not a proper characterisation of the propositions advanced by the plaintiff. The plaintiff did not contend that there was a factual basis for saying that Lotus Green was in reality DCC or that Lotus Green was the alter ego of DCC, so as generally to render Lotus Green's assets liable to meet the liabilities of DCC or for all purposes. In broad terms, the plaintiff's contention was that, against the factual background which existed in relation to the companies within the DCC Group at the date of the Share Sales, Part V should be applied so as to prevent the statutory remedy available under s. 109(1) being rendered ineffective.

182. At the risk of unnecessary repetition, it is instructive re-state the key points of the defendants' defence on the dealing issue. The defendants admitted that Lotus Green dealt and that a profit accrued to Lotus Green, but denied that the dealing was unlawful. The defendants admitted that DCC and S&L dealt but contended that the dealing was not precluded by virtue of s. 108(9) and that, in any event, no profit accrued to those companies. The defendants denied that Mr. Flavin dealt and contended that, in any event, no profit accrued to Mr. Flavin.

183. The plaintiff directed the agency argument and the single entity argument towards the defendants' contention, which counsel for the plaintiff described as being both highly technical and fortuitous, that DCC and S&L did not make a profit, a state of affairs which, in the context of these proceedings, counsel for the plaintiff described as "pure happenstance". The essence of the agency argument and the single entity argument, as I understand the plaintiff's submissions, is that, because of the factual circumstances which prevailed, the act of Lotus Green in selling the shares and thereby making a profit was the act of DCC or, alternatively, should be treated as such. Further, the profit generated was DCC's or should be treated as such. If DCC was precluded from dealing, for example, by virtue of s. 108(6), Lotus Green was similarly restricted. Therefore, Lotus Green is liable to account for the profit under s. 109. Justice and equity require that the provisions of Part V be applied in this manner.

184. In support of the agency argument, the plaintiff relied on the decision of the English High Court in *Smith, Stone and Knight Limited v. Birmingham Corporation* [1939] 4 All E.R. 116, which it was contended has been adopted in, and is still part of the law, of this jurisdiction. The issue in that case was whether a holding company, which was the owner of property which was compulsorily acquired, was entitled to compensation for disturbance in relation to the business carried on in the property by a subsidiary. Atkinson J. held that the subsidiary was carrying on business as agent of the holding company, not on its own behalf, and that, accordingly, the holding company was entitled to compensation for disturbance. He identified six points which were deemed relevant for the determination of the issue as to who was really carrying on the business in earlier authorities. As is pointed out in Keane op. cit. (para. 11-38), if an agency were to be inferred in every case where those points or criteria were met, a significant number of subsidiaries would have to be treated as agents of their holding companies.

185. The plaintiff also relied on the decision of the Court of Appeal in Northern Ireland in *Munton Brothers Limited v. Secretary of State* [1983] N.I. 369, in which the *Smith, Stone and Knight Limited* case was followed. That case concerned a claim for compensation under the Criminal Injuries Acts (North Ireland) 1956-1970 by a parent company and two subsidiaries arising out of the destruction of the factories occupied by the subsidiaries by terrorist explosions. The issue for the Court of Appeal was whether compensation was payable for consequential loss suffered by the parent company as a result of compensateable damage caused to the property of its wholly-owned subsidiaries. Having reviewed a number of authorities, including the judgment of Atkinson J. in the *Smith, Stone and Knight Limited* case and a judgment of Lord Denning M.R. in D.H.N. *Food Distributors Limited v. Tower Hamlets London Borough Council* [1976] 1 W.L.R. 852, which was also followed, Lord Lowry L.C.J., stated as follows (at p. 376):

> "So, in the present case, one can – and, in my opinion, should – say that the subsidiaries were acting as the alter ego, or alternatively as the agents (it scarcely matters which), of [the parent company]: then the original corporate entity emphasised by *Salomon* yields to the group entity. Derogatory words like 'façade' have been used to describe this result, but this can be misleading because, as we have seen, the 'realities' doctrine has been applied in favour of an enterprise as well as against it."

186. Lord Lowry quoted two passages from a Canadian judgment, *Nedco Limited v. Clark* (1973) 43 D.L.R. (3d) 714. The second passage, at p. 721, on which counsel for the plaintiff laid particular emphasis, was as follows:

> "After reviewing the foregoing, and many other cases, the only conclusion I can reach is this: while the principle laid down in *Salomon v. A. Salomon & Co. Ltd*., *supra*, is and continues to be a fundamental feature of Canadian law, there are instances in which the court can and should lift the corporate veil, but whether it does so depends upon the facts in each particular case. Moreover, the fact that the court does lift the corporate veil for a specific purpose in no way destroys the recognition of the corporation as an independent and autonomous entity for all other purposes."

187. It is generally accepted that the advent of the single corporate entity principle in this jurisdiction was in the decision of this court (Costello J.) in *Power Supermarkets Limited v. Crumlin Investments Limited* (Unreported, High Court, 22nd June, 1981). The issue in that case was whether the first defendant could avoid being liable to the plaintiff on foot of a covenant in a lease of a unit in the shopping centre to the plaintiff, which restricted the use of the remainder of the shopping centre in a particular manner, by conveying the freehold in another part of the shopping centre to another company, Dunnes Stores (Crumlin) Limited, which, like the first defendant, was controlled by the Dunne family and which had commenced trading in that part in a manner restricted by the covenant. Costello J. referred to the *Smith, Stone and Knight Limited* case and also to the *DHN Limited* case. He went on to say at p. 8:

> "It seems to me to be well established from these as well as from other authorities … that a court may, if the justice of the case so requires, treat two or more related companies as a single entity so that the business notionally carried on by one will be regarded as the business of the group, or another member of the group, if this conforms to the economic and commercial realities of the situation. It would, in my view, be very hard to find a clearer case than the present one for the application of this principle. I appreciate that Crumlin Investments is a property-owning not a trading company but it is clear that the creation of the new company and the conveyance to it of the freehold interest in a unit in the shopping centre were means of carrying out the commercial plans of the Dunne family in the centre. The enterprise had a twofold aspect (a) the creation of a new retail outlet for the Dunnes Stores Group in the shopping centre and (b) the enhancement of the rents in the centre as a whole which the creation of such an outlet would hopefully produce. To treat the two companies as a single economic entity seems to me to accord fully with the realities of the situation. Not to do so would involve considerable injustice to the plaintiffs as their rights under the covenant might be defeated by the

mere technical device of the creation of a company with a £2 issued capital which had no real independent life of its own. If it is established that the covenant is breached there should in my opinion be an injunction against both defendants."

188. It is pointed out in Keane *op. cit*. at para. 11.53 that the general proposition set out at the beginning of that passage was subsequently approved of by the Supreme Court *in Re Bray Travel Limited and Bray Travel (Holdings) Limited* (Unreported, Supreme Court, 13th July, 1981) and may be treated as representing the law in Ireland. However, it is recorded there that the decision of the Supreme Court was on an interlocutory application in which no written judgments were delivered and it is suggested that may be of somewhat doubtful value as an authority. The commentary in para. 11.53 suggests that the general proposition may state the law too widely; that the "justice of the case" is a somewhat elusive concept and it is extremely difficult to predict with anything approaching certainty how it might or should be applied in specific cases.

189. Despite the foregoing comments, and developments in the United Kingdom to which I will refer later, there has been a general acceptance of the principle established in the *Power Supermarkets Limited* case in this jurisdiction. The plaintiff referred to the decision of this court (Murphy J.) in *Lac Minerals Limited v. Chevron Mineral* [1995] 1 I.L.R.M. 161 and, in particular, to the following statement of the principle by Murphy J. at p. 187:

> "However, the fact that the corporate veil may be lifted in the sense that the acts of one corporate body may be treated as those of another is now well established within this jurisdiction. It is clear from the decisions in *Power Supermarkets Limited v. Crumlin Investments Limited* … and the decision *in the State (Thomas McInerney & Co. Ltd.) v. Dublin County Council* [1985] 1 I.L.R.M. 513. In the latter case Carroll J. laid down the following principle at p. 518: '
>
>> In my opinion the corporate veil is not a device to be raised and lowered at the option of the parent company or group. The arm which lifts the corporate veil must always be that of justice. If justice requires, as it did in the DHN case, the courts will not be slow to treat a group of subsidiary companies and their parent company as one.'
>
> In addition to the broad requirement of justice, it is clear that in both of the cited cases the allegation was that the affairs of associated companies were being carried on in such a manner that the decisions of one body corporate were dominated by the other so that there was no reality in the distinction between them. These two ingredients are required, first, the factual identification of the acts of one body corporate with those of another and secondly, the requirement that justice would be served only if the court ignores the distinction between the separate corporate entities."

190. In my view, there is little practical guidance to be obtained from the application of the principle in that case. The proceedings had been preceded by an arbitration, as a result of which, by implication, all of the parties had accepted the identification of the affairs of two corporate parties. Murphy J., in effect, held that the parties could not resile from that position in the proceedings; none of them was entitled to rely upon the objective legal reality of the distinctive corporate personality of each of the companies.

191. The Supreme Court considered the judgment of Costello J. in the *Power Supermarkets Limited* case *in Allied Irish Coal Supplies Limited v. Powell Duffryn International Fuels Limited* [1998] 2 I.R. 519. In that case, the plaintiff had invoked the single corporate entity principle in support of an application to join the parent company as a co-defendant in an action against a wholly-owned subsidiary, the objective of which was to have recourse to the assets of the parent, if successful. In the Supreme Court, Murphy J., on the facts, distinguished the relationship between the defendant and the parent company from the relationship between Crumlin Investments Ltd. and Dunnes Stores (Crumlin) Ltd. in the *Power Supermarkets Limited case*. He went on to say at p. 536:

> "However, apart from the distinctions which may be drawn between this and other cases, the crucial feature of *Power Supermarkets Limited v. Crumlin Investments Limited* is that Costello J. did not purport to question the authority *of Salomon v. Salomon and Company* [1897] A.C. 22. Indeed no reference was made to that case in the course of his judgment nor, as far as I am aware, the argument on which it was based. Again it is clear from the judgment in *Rex Pet Foods Limited v. Lamb Brothers* (Ireland) Limited (Unreported, High Court, Costello J. 5th December, 1985) that Costello J. had not intended in *Power Supermarkets Limited v. Crumlin Investments Limited* to lay down any revolutionary principle of law."

192. The thrust of the defendants' response to the agency argument and the single entity argument put forward by the plaintiff was that the value of the decisions in the *Smith, Stone and Knight Limited* case and the *Power Supermarkets Limited* case as authorities requires to be reassessed in the light of the decision of the Court of Appeal in *Adams v. Cape Industries Plc*. [1990] Ch. 433. In that case, three main submissions, which in the judgment of Slade L. J., speaking for the court, were dubbed "the single economic unit" argument, "the corporate veil" argument and "the agency argument", were advanced in support of a proposition that Cape Industries Plc., an English company, was present in the United States of America when default judgments were obtained against it in a court in that jurisdiction in actions for damages for personal injuries alleged to have been suffered as a result of exposure to asbestos dust. The proceedings in England were to enforce the default judgments.

193. In his judgement Slade L.J. reviewed three of the decisions which Costello J. identified in the *Power Supermarkets Limited* case as authorities for the principle which he stated: *Harold Holdsworth & Co. (Wakefield) Ltd. v. Caddys* [1955] 1 W.L.R. 352; *Scottish Co-operative Wholesale Society Limited v. Meyer* [1959] A.C. 324; and the *DHN Limited* case. In the context of the "single economic unit" argument he stated as follows at p. 536:

> "It is not surprising that in many cases such as *Holdsworth* …, *Scottish Co-operative* …, …, the wording of a particular statute or contract has been held to justify the treatment of parent and subsidiary as one unit, at least for some purposes. The relevant parts of the judgments in the DHN case … must, we think, likewise be regarded as decisions on the relevant statutory provisions for compensation, even though these parts were somewhat broadly expressed, and the correctness of the decision was doubted by the House of Lords in *Woolfson v. Strathclyde Regional Council* 1978 S.L.T. 159 …"

194. Having stated that counsel for the plaintiff had described the theme of all of the cases he referred to as being that, where legal technicalities would produce injustice in cases involving members of a group of companies, such technicalities should not be allowed to prevail, Slade L.J. stated that the court did not think that the cases relied on went nearly so far as that. He continued:

> "As [counsel for the defendants] submitted, save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v. A. Salomon and Company Limited* … merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities."

195. Later, at p. 539, in dealing with the "corporate veil" argument, Slade L.J. recognised the "cases where statute or contract permits a broad interpretation to be given to references to members of a group of companies". He went on to deal with an argument advanced on behalf of the plaintiff that the court will lift the corporate veil where a defendant by the device of a corporate structure attempts to evade such rights of relief as third parties may in the future require, stating at p. 544:

> "… we do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law. [Counsel for the plaintiff] urged on us that the purpose of the operation was in substance that Cape would have the practical benefit of the group's asbestos trade in the United States of America without the risks of tortious liability. This may be so. However, in our judgment, Cape was in law entitled to organise the group's affairs in that manner and … to expect that the court would apply the principle of *Salomon v. A. Salomon and Company Limited* … in the ordinary way."

196. As was pointed out by counsel for the defendants, there are echoes of the remarks of Slade L.J. about the effect of the Salomon case in the short judgment of Barron J. in the *Allied Irish Coal Supplies Limited* case in the following passage at p. 538:

> "Of course a subsidiary company may be dependent upon its parent company as regards control, finance and operations. But none of that prevents it from being a separate legal entity. The whole concept of limited liability is to enable some part of a person's affairs to be placed in a separate compartment. What is important is that having decided to carry out a business transaction by way of a particular legal entity, such transaction remains solely the legal and financial concern of that entity. There must, for example, be no suggestion that the benefit of a transaction will be taken by one company and the liabilities under the same transaction borne by another. It is legitimate for individual transactions to be carried out through the medium of a limited liability company. What is not legitimate is for the person in charge to pick and choose which companies shall obtain the benefit of a transaction, only when that transaction has been completed or is under way."

197. The defendants submitted that in the *Adams* case, the Court of Appeal carefully confined the possibility that a subsidiary might be the agent of its principal to cases where such an inference was factually justified. That seems to me to be correct. However, I do not think that the further submission made by the defendants that, in the light of the judgment of Slade L.J. in the Adams case, only evidence of an express agency agreement between the parties will suffice, is correct. In dealing with the single economic unit argument, Slade L.J. considered the significance of the relationship between the parent and the subsidiary in the following passage at p. 536:

> "In deciding whether a company is present in a foreign country by a subsidiary, which is itself present in that country, the court is entitled, indeed bound, to investigate the relationship between the parent and the subsidiary. In particular, that relationship may be relevant in determining whether the subsidiary was acting as the parent's agent and, if so, on what terms."

198. Later, in considering the agency argument, having identified the crucial question as being whether it could be fairly said that Cape's business had been transacted by the subsidiary at or from an address in the state of Illinois, he stated that the question necessitated an investigation of the functions which the subsidiary performed and all aspects of the relationship between it and Cape (p. 545).

199. On the basis of the foregoing analysis of the pleadings, the submissions made by the parties, the authorities and commentary on the authorities, I have come to the following conclusions:

> (1) As a matter of law, Lotus Green may be regarded as having acted as the agent of DCC in relation to the holding and disposal of the shares in Fyffes, if to do otherwise would lead to an injustice. Whether it should be, depends on whether the inference is factually justified. This is to be determined having regard to all of the facts, including the nature of its interest in the shares, and the relationship between Lotus Green and DCC. The views of the human agents of the companies are not in any way determinative of the question.
>
> (2) As a matter of law, Lotus Green and DCC may be treated as a single entity as regards the sale of the shares in Fyffes and the generation of the profit therefrom for the purpose of preventing the avoidance of the availability of an effective remedy under s. 109 and thus preventing an injustice to parties with a remedy under s. 109, if DCC is liable to account. It should be so treated if the plaintiff has established that:
>
> > (a) an evidential basis exists for finding that, as regards the holding and disposal of the shares, to borrow the terminology used by Murphy J. in the *Lac Minerals Limited* case, there was a factual identification of the acts of Lotus Green and DCC; and
> >
> > (b) not to so treat the companies would allow the DCC Group to evade its obligations under Part V.

200. In relation to the point at (a), the plaintiff argued that the companies in the DCC Group could have, but did not in fact, arrange their affairs so as to ensure that factual identification did not take place. In relation to the point at (b), the plaintiff did not and, on the evidence could not, assert that the purpose of the incorporation of Lotus Green and the hiving off of the shares to it was to avoid liability under Part V. The sole objective was to mitigate the tax liability of the DCC Group. However, the reality of the situation is that by defending the plaintiff's statutory claim on the basis that DCC made no profit fromthe sale of the shares, if DCC was precluded from dealing by virtueof s. 108(6) and Lotus Green was not, the DCC Group would effectively evade liability under s. 109, if the profit generated by Lotus Green on the Share Saleswere not treated as the profit of DCC. To recognise this reality is to give apurposive meaning to Part V in the light of the Directive.

L.Construction issues in relation to section 109

The issues generally

201. The statutory remedy which the plaintiff claims is that provided for in s. 109(1)(b). In fact two remedies are provided for in s. 109. The first is an entitlement to compensation for a specific type of loss at the suit of a counterparty to a transaction which has been carried out in an unlawful manner (sub-s. (1)(a)). The second is an entitlement to an account at the suit of the issuer company

of the securities dealt, in this case the plaintiff, for "any profit … accruing from dealing …" (sub-s. (1)(b)). Sub-section (2) of s. 109 recognises that a person rendered liable by s. 109 may face claims under paras. (a) and (b) and that sub-section contains provisions to deal with such eventuality. As has been stated, there are claims pending in this court by four counterparties, which claims await the outcome of these proceedings.

202 The issues which I am addressing here are issues which concern the construction of s. 109(1) and its application generally and, in particular, issues which arose from the stance adopted by the defendants in relation to the ninth and tenth propositions set out at B above.

Equitable principles govern order under s. 109(1)(b) ?
203. The first issue is whether the proposition advanced by the defendants, that equitable principles govern the taking of an account under sub-s. (1)(b), is correct. On the basis of the defendants' contention, if, on the proper construction of s. 109(1), the court determined that any defendant was liable to account, the court, applying equitable principles, would have a discretion whether or not to grant the remedy. As I understand the defendants' submission, the principles which would come into play in the exercise of that discretion are the usual equitable maxims under which a court may have regard to the conduct of a party pursuing equitable relief. So, the submission goes, in this case the court could have regard to the conduct of the plaintiff in relation to the pursuit of the statutory claim.

204. I have no doubt that the proposition advanced by the defendants is not correct. In s. 109 the legislature has mandated a person who is liable in accordance with its terms to account in the manner stipulated in para. (b). Once liability is established, if there is "any profit …" within the meaning of para. (b), the person liable must account. The court has no discretion. The parameters of the account are determined by the provisions of the Act on their proper construction. Equitable principles do not come into play.

The meaning of "any profit accruing"
205. Two issues arose on the construction of the expression "any profit accruing" in para. (b).

206. First, the plaintiff submitted that there is no requirement in s. 109 that the profit in question should accrue from use of price-sensitive information or, indeed from any illegality. That submission was controverted by the defendants, who argued that the expression "any profit accruing", as a matter of construction, is linked to the unlawful nature of the dealing. The object of declaring the dealing activity to be unlawful and the object of mandating an account of profit is to strip from the insider the advantage he may have from possessing price-sensitive information. The defendants also argued that this construction is consistent with para. (a) of sub-s. (1), which measures the counterparty's loss by reference to the difference between the price at which the securities were dealt in in the relevant transaction and the price at which they would have been likely to have been dealt in if the price-sensitive information was in the public domain at the time of that transaction.

207. However, the defendants sought to narrow the concept of "profit accruing" further and this gives rise to the second issue. They submitted that the concept of profit in sub-s. (1)(b) does not cover what they termed "negative profit", in other words, the avoidance of a loss. The defendants primarily drew on their contention that equitable principles govern the taking of an account under sub-s. (1)(b), a contention which I have already rejected, in support of their argument. However, they did also point out that in other jurisdictions, for example, New Zealand and Hong Kong, the legislature, in enacting similar legislation, has expressly provided for an account of negative profit. In answering that submission, the plaintiff referred to the ordinary meaning of the word "profit", quoting a definition from the Oxford English Dictionary – "an advantage or benefit … financial gain; excess of returns over outlay" and argued for a literal interpretation of the concept of profit in sub-s. (1)(b). It suggested that such approach is supported when one has regard to the Directive and, in particular, the references therein to "taking advantage" of information (article 2.1) and insider dealing "benefiting certain investors as compared with others" (the fifth recital). It also pointed to authorities in other jurisdictions in which, in circumstances analogous to the circumstances covered by sub-s. (1)(b), an account of a negative profit was allowed on foot of a non-statutory claim for an account. In this context the plaintiff cited the decision of the New York Court of Appeal in *Diamond v. Oreamuno* (1969) 248 N.E. 2d 910, an authority to which I will refer later in the context of the non-statutory claim.

208. I have encountered some difficulty in deciding how to address these issues without trespassing into territory which the parties have agreed *inter se*, and with the plaintiffs in the counterparty actions to which I have already referred, and with the Attorney General as regards the defendants' challenge to the validity of s. 109(1)(b) having regard to the provisions of the Constitution, if a particular construction of that provision advanced by the plaintiff is accepted, is for another day. In the course of the plaintiff's final legal submissions it was made clear that the court is not concerned to determine the legal theory according to which the profit is calculated. The defendants did not demur from that position. However, having regard to the arguments advanced by the parties on the two issues which I am now considering, and the evidence adduced and the arguments advanced on the price-sensitivity issue with which I will be dealing later, I have found it impossible to draw a line which avoids expressing a view on what I believe to be the proper theoretical basis of an account of profit in s. 109(1)(b).

209. I think it is not unfair to say that in delimiting the parameters of the account to which an issuer company is entitled under para. (b) of sub-s. (1), the legislature has been somewhat economical and spare, particularly, by comparison to the manner in which a counterparty's entitlement to compensation is delimited in para. (a) of the same sub-section. However, para. (b) cannot be construed in isolation; it must be construed in the context of Part V as a whole and, in particular, it must be read in conjunction with the rest of s. 109 and, more importantly, s. 108. In setting out the reasoning behind my conclusions on these issues, I propose to do so by reference to sub-s. (1) of s. 108, which is the fulcrum of the legislature's outlawing of insider trading. That sub-section renders unlawful dealing by a connected person who is in possession of price-sensitive information by reason of that connection. The price-sensitivity of the information is posited on two factors, one real, that the information is not generally available, and the other hypothetical, that if it were, it would be likely to materially affect the share price. The hypothesis is not premised on the information being good news, as opposed to bad news, from the company's perspective nor is it premised on the hypothetical share price effect being a variation upwards rather than downwards.

210. Following on from that, if the connected person deals in contravention of s. 108(1), by virtue of s. 109(1), he is liable to account for any profit accruing from dealing. As the unlawfulness of dealing on his part is founded on his possession of price-sensitive information by reason of his connection to the issuer company at the time of dealing, his liability to account must be related to the price-sensitivity of that information which, for the purposes of establishing his liability, is identified by reference to the statutory hypothesis. The profit for which he is liable to account is so much of the advantage or benefit gained from dealing as flows from his possession of price-sensitive information by reason of his connection with the issuer company, measured by reference to the statutory hypothesis. That conclusion is the only conclusion which is open on an interpretation of the relevant provisions of Part V when read as a whole, including para. (a) of s. 109(1). It produces a result which is commensurate with the mischief which the Directive, which the Act implements, was designed to prevent.

211. In relation to the second issue, as I understand the distinction drawn by the defendants, it is between two possible outcomes of dealing, which reflect the availability of price-sensitive information, to the dealer: one being an increase in the value of the shares; and the other being the avoidance of a decrease in the value of the shares. The formula which the legislature has deployed in Part V by which price-sensitivity is established, the statutory hypothesis, does not presage an intention that any such distinction should determine the imposition of civil liability or the entitlement to the remedy of an account under s. 109. In my view, the expression "profit accruing" in sub-s. (1)(b) means any advantage or benefit gained which is measurable by reference to that formula, including what has been termed a negative profit by the defendants. To construe the expression as advocated by the defendants is not open on a proper construction of all of the relevant provisions of Part V. To do so would involve an inconsistency of approach in relation to measuring profit under para. (b) and compensation for loss under para. (a) Further, in my view, it would defeat to a considerable degree the purpose of the Directive.

Meaning of "any profit accruing" in the context of causing/procuring

212. The final issue of construction to which s. 109(1) gave rise, and the issue I have found most difficult to resolve, concerns the meaning of the expression "any profit accruing to the first-mentioned person from dealing", where the person liable is a person who causes or procures another person to deal in a manner declared unlawful by s. 108, that is to say, who acts in contravention of sub-s. (4) of s. 108. The plaintiff contended that the reference to "the first-mentioned person" in para. (b) of s. 109(1) is a reference to the first person mentioned in that sub-section, the person who deals, so that the person who causes or procures is liable for profit accruing to the dealer from dealing.

213. In s. 109(1) the legislature imposed two forms of civil liability, an obligation to compensate (para. (a)) and an obligation to account (para. (b)) for three distinct unlawful activities – dealing, causing or procuring and communicating. In para. (b) the draftsman has telescoped the nature of the obligation to account as it applies to the three activities in a manner which undoubtedly raises questions of interpretation. Insofar as it applies to dealing, the reference to "first-mentioned person" in para. (b) is surplusage, if the plaintiff's submission is correct: "to him" could be substituted for "to the first-mentioned person". The plaintiff's argument was that the function of the reference to the first-mentioned person comes into play when the unlawful activity involves more than one person, as in the case of causing or procuring another person to deal. In that situation, its function is to identify which of those persons' profit is to be the subject of the account. In my view, on a literal construction of s. 109(1) the plaintiff's submission is problematic. The problem is that the draftsman, in endeavouring to make that distinction, has conflated two distinct unlawful activities – dealing and causing or procuring another to deal. On a plain reading of the provision, in relation to the second activity when considered separately, the person who deals is the second-mentioned person.

214. However, the plaintiff advanced a further ground to support its interpretation. Given that s. 109(1)(a) imposes liability on the person who causes or procures for loss incurred by a counterparty, why should he not be liable to account for profit accruing from dealing to the dealer under s. 109(1)(b), the plaintiff asked rhetorically. He should, it was argued, because civil liability is the only sanction which the legislature has imposed on the person who causes or procures, there being no provision in Part V that causing or procuring is a criminal offence. Therefore, the plaintiff submitted, its interpretation is the only permissible interpretation, being the only interpretation consistent with the provision of an effective sanction for the unlawful activity of causing or procuring. The plaintiff rejected the defendants' suggestion that, in making the person who causes or procures liable to account, the legislature intended to attach any "kick back" which he obtained. Any such benefit which the person who causes or procures obtained would not accrue "from dealing"; it would accrue from a separate arrangement between the parties, the plaintiff submitted.

215. To resolve the undoubted difficulty of construction presented by para. (b) it is necessary to consider the relevant provisions of Part V as a whole. The civil liability imposed in s. 109 is cumulative. The person who causes or procures is liable both for compensation and to account. The adjustment or set-off mechanism provided for in sub-s. (2) regulates the interface between the two forms of liability where they arise by reason of the same act or transaction. A purposive interpretation of s. 109 is suggestive of an intention on the part of the legislature to capture the profit accruing to the dealer when imposing liability to account on the person who causes or procures, because it is to the dealer that profit from dealing accrues. Such an interpretation is more consistent with the fulfilment of the objective of the Directive than an interpretation which renders the person who causes or procures liable to account only for profit accruing to himself, because the latter, unlike the former interpretation, may not provide any effective sanction or deterrent against unlawful causing or procuring of insider dealing. Therefore, while I consider that the presence of the words "to the first-mentioned person" in para. (b) creates a difficulty, I have come to the conclusion, albeit with some degree of diffidence, that the interpretation contended for by the plaintiff is the correct interpretation.

216. Insofar as s. 109(1)(b) is still of relevance, notwithstanding the enactment of the Act of 2005, in my view, it would be prudent if it were reviewed by the legislature with a view to eliminating the uncertainty it creates.

M. Summary of issues in relation to proscribed activities on which the statutory claim is based.

217. As a result of the conclusions I have reached in relation to the proper construction of the provisions of Part V and the applicability of certain legal principles in the context of the statutory claim advanced by the plaintiff, certain aspects of the claim have been eliminated. The entire claim is premised on Mr. Flavin having been in possession of price-sensitive information by reason of his connection with Fyffes on the date of the Share Sales. Apart from that overriding issue, the issues which remain on the statutory claim involve the application of the legal principles to the facts and are as follows:

(1) Did Mr. Flavin –

(a) deal, so that a contravention of s. 108(1) occurred, if the plaintiff has established the overriding issue, or

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

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

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

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

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

(b) should Lotus Green with DCC, and Lotus Green with S&L, each be treated as a single entity in relation to the holding of the shares, the sales thereof, and the profits generated by the sales for the purpose of meeting the liability of DCC and S&L to account under s. 109.Before identifying the facts relevant to those issues, applying the law to the facts and determining those issues, it is necessary to determine some evidential issues raised in the proceedings.

N. Evidential matters

Standard of Proof
218. It was not in dispute that the appropriate standard of proof in this case is the civil standard – proof in the balance of probabilities. There was, however, some divergence between the parties as to how the civil standard should be applied in this case.

219. The plaintiff submitted that the decision of the Supreme Court in *Banco Ambrosiano v. Ansbacher & Company* [1987] I.L.R.M. 669 is the *fons et origo* of the jurisprudence in this jurisdiction on the application of the civil standard. The court was referred to the oft cited passage from the judgment of Henchy J. at pp. 701 and 702, rejecting a submission that the degree of proof of fraud in civil cases is higher than the balance of probabilities but lower than the standard required in criminal cases, proof beyond reasonable doubt, of which the following is a somewhat truncated version:

> "… To require some intermediately high degree of probability would, in my opinion, introduce a vague and uncertain element, just as if, for example, negligence were required to be proved in certain cases to the level of gross negligence. …
>
> In any event, it is difficult to put forward a rational and cogent reason for singling out civil cases of fraud for this higher degree of proof. It is of course to be said that a finding of fraud usually carries with it a high degree of moral condemnation which may have serious consequences for the person so condemned. But similar consequences may follow from a finding against a defendant in other types of civil proceedings. …
>
> I am unable therefore to discern, in principle or in practice, any rational or cogent reason why fraud in civil cases would require a higher degree of proof than is required for the proof of other issues in civil claims. …
>
> Proof of fraud is frequently not so much a matter of establishing primary facts as of raising an inference from the facts admitted or proved. The required inference must, of course, not be drawn lightly or without due regard to all the relevant circumstances, including the consequences of a finding of fraud. But that finding should not be shirked because it is not a conclusion of absolute certainty. If the court is satisfied, on balancing the possible inferences open on the facts, that fraud is the rational and cogent conclusion to be drawn, it should so find."

220. It is implicit in the reference to "all the relevant circumstances", when read in conjunction with the reference to "consequences of a finding …" in the last paragraph of that quotation, that the gravity of an allegation is a matter which the court should have regard to in applying the civil standard.

221. The defendants referred to a number of later authorities in which the application of the civil standard was considered. The most recent decision of the Supreme Court cited, in which the standard of proof was actually in issue, was *Georgopoulus v. Beaumont Hospital Board* [1998] 3 I.R. 132. In his judgment in that case, Hamilton C.J., with whom the other two judges of the Supreme Court agreed, at p. 141, approved the following statement in the 6th Edition of **Wade's Administrative Law** at p. 341:

> "But the civil standard is flexible, so that the degree of probability required is proportionate to the nature and gravity of the issue. Where personal liberty is at stake, for example, the court will require a high degree of probability before it will be satisfied as to the facts justifying detention; and the requirement will not be much lower in matters affecting livelihood and professional reputation, or where there is a charge of fraud or moral turpitude. Lord Scarman has indeed said that the choice between the two standards is largely a matter of words …"

222. The latest edition of Wade, the 9th edition, contains a statement in precisely the same terms at p. 291.

223. It may be that the judgment of Hamilton C.J. envisages a greater degree of flexibility in the application of the civil standard of proof than the judgment of Henchy J., but I do not think that is necessarily so. However, both judgments recognise that the gravity of an allegation and of the consequences of finding that it has been established are matters which the court must have regard to in applying the civil standard. There is no doubt that the allegations made against the defendants in this case are serious and that the likelihood is that the adverse consequences of a finding of unlawful dealing would not be confined to the financial sphere. These are matters to which I must have due regard.

Burden of proof
224. It is not in dispute that the burden of proof in this case rests with the plaintiff. However, there are two matters in relation to the discharge of that burden which were the subject of debate at the hearing: the assessment of expert testimony; and the significance or otherwise of failure to call certain witnesses.

Expert witnesses
225. In the context of a submission that the evidence adduced by the defendants on the issue of price-sensitivity is to be preferred to that adduced by the plaintiff, which is an assertion which I will consider later, the defendants submitted that if, on the court's assessment of the expert evidence, it found it difficult to choose between them, the court would have to conclude that the plaintiff had not discharged the onus of proof. As authority for this proposition the defendants cited the recent decision of the Supreme Court in a medical negligence case, *Quinn v. Mid-Western Health Board* [2005] 2 I.L.R.M. 180. That proposition is only correct insofar as there is no evidence on which a particular issue can be decided other than two conflicting bodies of expert evidence, as happened in the Quinn case where, on the difficult issue of causation and the timing of the infant plaintiff's injury, the obstetric evidence adduced on behalf of the plaintiff provided one credible explanation of events, while the radiological evidence adduced on behalf of the defendants provided another.

Absent witnesses
226. The other issue which it is convenient to consider in the context of the burden of proof is much more difficult. It was the

plaintiff's contention that the court should draw certain inferences from the failure of the defendants to call certain witnesses. The plaintiff made this argument in relation to the defendants' failure to call –

> (a) Kyran McLaughlin, a senior executive in Davy, whom it was contended was a critical witness in relation to the dealing issue and whose involvement will be outlined later, and
>
> (b) two of the non-executive directors of DCC, the chairman, Mr. Spain, and Mr. Gallagher, and two of the Dutch directors of Lotus Green, Gerard Jansen Venneboer and Henri Roskam, in relation what was characterised as Mr. Flavin's direct and controlling involvement in the share deals.

227. While the plaintiff did not cite any authority of a court of this jurisdiction in support of its argument, it did rely on a number of English authorities, which it is necessary to consider in some depth in order to ascertain whether they support the proposition advanced by the plaintiff.

228. The earliest authority cited by the plaintiff was *M'Queen v. Great Western Railway Company* [1875] L.R. 10 Q.B. 569. The plaintiff in that case sued for the value of a parcel of drawings which he had entrusted to the defendant railway company for delivery. The goods never reached their destination, having been stolen while in the custody of the defendant. The defendant pleaded a defence under the Carriers Act. The plaintiff responded that the defence was not available because the goods were lost by reason of having been taken feloniously by the servants of the carrier. The trial Judge directed the jury that, if the facts, in their opinion, were more consistent with the guilt of the defendant's servants than with that of any other person not in their employ, that was sufficient to call upon the defendants for an answer, which not having been given, the inference might well be that a felony had been committed by some of the defendant's servants. It was held that the direction was wrong and that the jury's verdict in favour of the plaintiff was wrong. The principle relied on by the plaintiff is contained in the following passage of the judgment of Cockburn C.J., who, coincidentally, had been the trial judge, at p. 574:

> "If a *prima facie* case is made out, capable of being displaced, and if the party against whom it is established might by calling particular witnesses and producing particular evidence displace that prima facie case, and he omits to adduce that evidence, then the inference fairly arises, as a matter of inference for the jury and not as a matter of legal presumption, that the absence of that evidence is to be accounted for by the fact that even if it were adduced it would not disprove the prima facie case. But that always presupposes that a prima facie case has been established; and unless we can see our way clearly to the conclusion that a prima facie case has been established, the omission to call witnesses who might have been called on the part of the defendant amounts to nothing."

229. It was held that a *prima facie* case had not been made out that the defendant's servants, rather than somebody else, had stolen the goods. All that had been established was that the defendant's servants had a greater opportunity of committing the theft.

230. In *Reg. v. IRC, ex p. Coombs & Co*. [1991] 2 A.C. 283, the issue was whether a notice under the taxation code issued by the Inland Revenue to a firm of stockbrokers to deliver or make available for inspection documents in their possession relevant to the tax liability of a taxpayer, a former employee, in connection with various named companies should be quashed. Against the background of a presumption of validity and having noted the sparseness of the evidence adduced by the IRC, Lord Lowry, with whom the other Law Lords agreed, stated as follows at p. 300:

> In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a *prima facie* case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified."

231. The IRC had relied on their general duty of confidentiality as a justification for their reticence. Lord Lowry accepted that, by reason of the principle of confidentiality, the general rule for taking account of a party's silence did not fully apply.

232. The earlier authorities were reviewed by the Court of Appeal in *Wisniewski v. Central Manchester Health Authority* [1998] Lloyd's Reports Med. 223. Brooks L.J. summarised their effect in the following passage from his judgment:

> "From this line of authority I derive the following principles in the context of the present case:
>
>> (1) In certain circumstances the court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>>
>> (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call witnesses.
>>
>> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>>
>> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

233. That case which concerned a claim on behalf of an infant who suffered irreversible brain damage before birth in the defendants' hospital, which it was alleged was caused by negligence of the defendants, illustrates the application of the foregoing principles. The trial judge had held that the defendants were negligent, in that the senior house officer should have attended and examined the plaintiff's mother about two hours before the birth. That led to an issue on causation, which turned on what the senior house officer would probably have done if he had attended the mother, read her notes and seen the cardiotachograph trace and, in particular, whether a Caesarean section would have been performed at that stage, which would have prevented the injury which was caused because, as the baby moved down the birth canal, the umbilical cord was wrapped around his neck and had a knot in it and he was effectively being strangled. The senior house officer, who was living in Australia, was not called, nor was the registrar who had been on call that night, nor the consultant with overall responsibility for the obstetrics unit. On an analysis of the evidence, Brookes L.J.

identified the evidence on the issue as to what the senior house officer would have done which was adduced by the plaintiff as the evidence of two expert witnesses (whose evidence conflicted with the evidence of two expert witnesses called on behalf of the defendants) and certain text book references. The Court of Appeal held that the trial judge was entitled to adopt the course he chose to adopt, which was to infer from the failure of the senior house officer to attend the trial that he had no answer to the criticism made and to find that he would have done what the plaintiff's expert witnesses testified should have been done and that he would have proceeded to a Caesarean section. The Court of Appeal found that the plaintiff had established a *prima facie*, if weak, case as to what a doctor would have done in the hypothetical situation the court was required to envisage. The trial judge was entitled to treat the absence of the senior house officer, in the face of a charge that his negligence had been causative of the catastrophe which had befallen the plaintiff, as strengthening the case against him on that issue.

234. The court was referred to three recent decisions of the English High Court in which the application of the principles set out by Brooks L.J. in the *Wisniewski* case was considered: *Pedley v. Avon Insurance* [2003] E.W.H.C. 2007; Rock Nominees v. RCO Holdings [2003] 2 B.C.L.C. 493; and *Lewis v. Eliades* (No. 4) [2005] E.W.H.C. 488. Having considered the judgments in those cases, I am of the view that decisions made in the last two cases to draw adverse inferences because of the failure to call witnesses turned very much on the facts of those cases.

235. While, as I have already stated, the plaintiff did not point to any Irish authority in which the basis on which adverse inferences may be drawn from the absence or silence of a witness whose evidence might be expected to be critical to an issue arose, I have no doubt that in practice, in the course of fact finding, judges do draw adverse inferences in such circumstances. The type of situation I have in mind arose in one of the earlier authorities considered in the *Wisniewski case*: *Herrington v. British Railways Board* [1972] A.C. 877. Where an issue arises as to whether an adverse inference should be drawn, I consider that the principles outlined in the Wisniewski case are helpful guidelines for the court.

236. In this case, however, I do not consider it appropriate to draw the inference which the court was invited to draw from the failure of the defendants to call Mr. McLaughlin. In arriving at this conclusion I have had regard to the following factors:

(1) On the dealing issue, the onus of proof was on the plaintiff.

(2) As a result of the pre-trial procedures, the plaintiff was aware that Mr. McLaughlin was in a position to give material evidence on that issue. It is quite clear that Mr. McLaughlin was a witness whose attendance could have been procured, if necessary, by service of a subpoena.

(3) The plaintiff decided not to call Mr. McLaughlin as a witness. I must assume that that decision was made on the basis that the plaintiff could establish a prima facie case on the dealing issue without Mr. McLaughlin's evidence. That was a legitimate tactical decision for the plaintiff to make in the adversarial process which applies in the Irish legal system.

(4) It is reasonable to assume that the defendants anticipated that they might have a case to answer on the dealing issue. Mr. McLaughlin was listed as one of the witnesses they would be calling. In relation to the dealing issue, the defendants adduced evidence from a number of witnesses, primarily from Mr. Flavin and Roy Barrett, whose evidence will be referred to later. In the course of the hearing it was indicated on behalf of the defendants that Mr. McLaughlin would be called. In the event, the defendants did not call him. That was also a legitimate tactical decision for the defendants to make within the adversarial process.

(5) The plaintiff invited the court to draw two inferences from the failure of the defendants to call Mr. McLaughlin. The first was that Mr. McLaughlin's evidence would not have supported the case advanced by the defendants as far as the actions of Mr. Flavin relevant to the dealing issue up to and including 3rd February were concerned. The second was that it would have confirmed the version of Mr. Flavin's involvement in the first of the Share Sales, which Mr. Carl McCann contended was given by Mr. McLaughlin to him on two occasions on and after 3rd February, 2000. The second inference raises a fundamental evidential difficulty, which I will deal with later.

(6) In relation to the first inference, I do not think it would be appropriate to draw such an inference as was suggested by the plaintiff. The defendants argued that, insofar as any inference should be drawn in relation to the absence of Mr. McLaughlin, it should be drawn adverse to the plaintiff because the plaintiff was the party who carried the burden of proving the issue to which Mr. McLaughlin's evidence would have been relevant. The plaintiff's response to that argument was that there was documentary evidence before the court to show the extent to which Mr. McLaughlin was assisting the defendants in the pre-trial phase. In my view, that response reveals a blatant inconsistency in the plaintiff's approach and exposes the risk the court would be assuming when drawing an inference either way as to what Mr. McLaughlin's evidence would have been. Aside from that, the probative value of such an inference in the circumstances of this case is questionable. Mr. Flavin and Mr. Barrett have given evidence on the factual matters in relation to which Mr. McLaughlin might be expected to give evidence. If it was proper to infer that his evidence would not have supported the defendants' case, the following question would have to be addressed: in evaluating the totality of the evidence on the dealing issue and, in particular, the evidence of Mr. Flavin and Mr. Barrett, what weight should the court give to the inference in circumstances where it has not had the opportunity to assess Mr. McLaughlin's credibility? Very little, if any, I think is the answer.

237. In relation to the plaintiff's submission that the court should draw inferences adverse to the defendants because of their failure to call Mr. Spain and Mr. Gallagher and Mr. Roskam and Mr. Venneboer, somewhat different considerations apply. I should record that I am satisfied that a reasonable explanation was advanced for not calling Mr. Roskam. In relation to the other potential witnesses, it seems to me that the plaintiff has sought to stretch the *Wisniewski* principles way beyond the limit of reasonable application. Two non-executive directors of DCC, Mr. Barry and Mr. Crowe, gave evidence and as did one Dutch director of Lotus Green, Tom Diepenhorst. As a general proposition, the fact that every witness who may have material evidence on a particular issue is not called, cannot, in my view, give rise to an adverse inference against the party who might have been expected to call all of the witnesses.

238. I return now to the evidential problem which arises out of the second inference which the plaintiff contended should be drawn from the failure of the defendants to call Mr. McLaughlin as a witness. In the course of the evidence of Mr. Carl McCann two documents were put in evidence, which contained Mr. McCann's record of discussions he had with Mr. McLaughlin in relation to what transpired before and on 3rd February, 2000 in relation to the sale of the DCC Group holding in Fyffes. The earliest was Mr. McCann's record of a telephone conversation between him and Mr. McLaughlin at lunch time on Thursday, 3rd February, 2000. The second was Mr. McCann's record of a meeting with Mr. McLaughlin, which he attended with Mr. Neil McCann on 10th July, 2000. The discovery process in this case produced voluminous documents. The parties adopted a sensible and pragmatic approach in relation to the admission of documents in evidence. For instance, it was agreed that the documents emanating from the plaintiff or the defendants

or their respective servants or agents could be admitted in evidence as *prima facie* evidence of the truth of the contents, subject to rebuttal. Before the two documents with which I am now concerned with were handed in, counsel for the plaintiff referred to that agreement. He acknowledged that the documents were not such as would normally be admitted on the basis of the agreement. They were being submitted at that stage on the basis of original evidence as opposed to hearsay evidence, to record what Mr. McLaughlin said on the relevant dates, Mr. McLaughlin being a witness who was to be called by the defence. Counsel for the defendants indicated that there was not an objection to tendering the documents on that basis. Mr. McCann then proceeded to testify by reference to the documents as to what he was told by Mr. McLaughlin of his dealings with Mr. Flavin.

239. At the core of the plaintiff's submission that the court should infer from the defendants' failure to call Mr. McLaughlin that, if he had been called, he would have confirmed that the substance of Mr. Flavin's involvement in the first of the Share Sales accorded with Mr. McCann's evidence is the proposition that Mr. McCann's evidence was admissible as evidence of Mr. Flavin's involvement. But what is the status of Mr. McCann's evidence, Mr. McLaughlin not having been called by the defendants? The plaintiff acknowledged, properly in my view, that Mr. McCann's evidence was hearsay. However, the plaintiff contended that it was admissible under an exception to the hearsay rule, on the basis that Davy was the agent of the DCC Group in relation to the shares. The defendants argued that it was not admissible under an exception to the hearsay rule and referred to the following passage from McGrath on Evidence (Thomson Round Hall, 2005) at para. 5-94 as a correct statement of the law on the circumstances in which an admission by an agent is admissible as an exception to the hearsay rule:

> "An admission by an agent is admissible against his or her principal if it was made:
>
> > (1) at a time when the agency existed;
> >
> > (2) in the course of a communication which the agent was expressly or impliedly authorised by the principal to make; and
> >
> > (3) the communication was with a third party and not with the principal himself or herself."

240. I have considered the authorities cited by the defendants in support of the foregoing statement and I consider it to be a correct statement of the law. I have absolutely no doubt that any statement made by Mr. McLaughlin to Mr. McCann on 3rd February, 2000 or on 10th July, 2000, as to Mr. Flavin's involvement up to and including 3rd February, 2000, is not admissible as against the defendants under that exception to the hearsay rule. Irrespective of the basis on which Davy was paid commission by the DCC Group on the first of the Share Sales, I have absolutely no doubt that Mr. McLaughlin was neither expressly nor impliedly authorised to discuss the sale of the DCC Group holding in Fyffes by the DCC Group or any company in the DCC Group with Mr. McCann or any person connected with the plaintiff. The evidence from the Davy dealing room recordings on 3rd February, 2000, which is outlined later, establishes unequivocally that Davy personnel had no authority to discuss the sale of the DCC Group stake with Fyffes' personnel. Therefore, I consider that I cannot have any regard to Mr. McCann's evidence as to what he was told by Mr. McLaughlin in fact finding in relation to the dealing issue.

O. The facts relevant to whether Mr. Flavin dealt

General approach to recording facts

241. There is a very considerable body of evidence as to the manner in which the Share Sales came about from the witnesses who testified and from the documents put in evidence, both contemporaneous documents and documents generated *ex post facto*, for example, in connection with the investigation carried out by the Irish Stock Exchange under Part V. The significant facts, however, on the issue as to who dealt within the meaning of Part V relate to, first, what transpired between the officers and executives of the DCC Group, on the one hand, and the executives of Davy and Goodbody, on the other hand, in the week leading up to 3rd February, 2000, on that day, and in the succeeding period up to 14th February, 2000, and, secondly, what happened within the DCC Group in the same period, in particular, the degree to which Lotus Green was involved in the transactions. Therefore, in selecting the facts to record in this judgment, I have concentrated on those aspects of the evidence.

The details of the Share Sales

242. At the beginning of February, 2000 Lotus Green was considered by all the defendants to be the beneficial owner of 31,169,493 ordinary shares and 4,621,901 8.25% convertible cumulative preference shares in Fyffes. All of the preference shares were registered in the name of DCC. As regards the ordinary shares, which comprised shares allotted on foot of an election made in 1998 under Fyffes Scrip Dividend Plan in addition to the shares agreed to be transferred by DCC and S & L to Lotus Green in 1995, S & L was the registered owner of 7,765,280 shares and DCC was the registered owner of the balance.

243. According to the contract note, which was to the account of Lotus Green, the first sale was executed at 16.43 on 3rd February, 2000 when 17,895,697 shares were sold at a price of €3.20, the total consideration being €57,266,230.40. This sale was satisfied by the transfer of all of the shares registered in the name of S & L and 10,130,417 registered in the name of DCC. According to the contract note, this sale was executed by Davy dealing as agent. Commission at the rate of 0.25% was charged on the transaction.

244. Although this transaction was recorded by Davy on the Stock Exchange, there had been a prior agreement between Davy and Goodbody, the circumstances of which are outlined later, that the shares acquired would be split equally between them on a broker deal.

245. The second and third sales were with Goodbody. The second was effected on 8th February, 2000, when 8,000,000 ordinary shares registered in the name of DCC were sold at a price of €3.60 per share, the total consideration being €28,800,000. The third sale related to the balance of the ordinary shares registered in the name of DCC, 5,273,796 shares. This sale was effected on 14th February, 2000 at a price of €3.90 per share, the total consideration being €20,567,804.40. Commission was charged on these transactions at the rate of 0.25%. The evidence of Michael Dillon, a retired stock broker, was that, in relation to the second and third sales, the contract note indicated that Goodbody dealt as principal, that is to say, that Goodbody took the shares on its own book.

246. Following the three sales, DCC remained the registered owner of the preference shares, which represented 1.3% of the share capital of Fyffes. The defendants considered that Lotus Green was the beneficial owner of this holding.

How the first share sale came about as between the seller and the buyer

247. The first sale took place against the background of a spectacular rise in Fyffes' share price in the previous two months. For instance, as appears from the table of closing prices set out later, on 3rd December, 1999 Fyffes' share price closed at €1.62. Following the Preliminary Announcement it rose to €2 on 16th December, 1999. A month later, on 17th January, 2000, it closed at €2.63. On Thursday, 27th January, a week before the first sale, the closing price was €2.95. On the following Monday, 31st January,

the closing price had risen to €3.30. It was €3.26 on Tuesday, 1st February and €3.32 on Wednesday, 2nd February.

248. The buyer on the first sale on February 3rd was Davy which contracted for Davy and Goodbody jointly. Recordings made from the Davy dealing room tapes of what transpired on the afternoon of 3rd February, 2000 between –

(i) the Davy dealing room and the Goodbody dealing room,

(ii) the Davy dealing room and Mr. Flavin, who was in DCC House in Dublin, and

(iii) Mr. Diepenhorst, who was in Amsterdam, and the Davy dealing room, during the course of thirteen telephone calls were put in evidence. Ronan Godfrey, head of the equity desk at Davy, who was assigned to the task by Mr. McLaughlin, acted on behalf of Davy, and Bruce Ashmore, an equity dealer at Goodbody, who was assigned to the task by Roy Barrett, the managing director of Goodbody, acted on behalf of Goodbody. Both Mr. Ashmore, who was called by the plaintiff, and Mr. Barrett, who was called by the defendant, gave evidence. Mr. Godfrey was not called, nor was Mr. McLaughlin, whose absence gave rise to the evidential controversy which I have considered earlier.

249. It is common case that the recordings are an accurate representation of the exchanges which took place between the parties involved in the exchanges. I am of the view that, as a contemporaneous record, the tapes give a particularly reliable insight into the manner in which the first sale came about.

250. Until the eleventh call recorded, a call from Mr. Diepenhorst to Mr. Godfrey, all communications from Davy and Goodbody to the DCC Group were to Mr. Flavin. Apart from Mr. Diepenhorst in the course of the eleventh call, nobody other than Mr. Flavin communicated on behalf of the DCC Group with either stockbroking firm at any time in connection with the first sale. In the days preceding and on the day of the first sale Mr. Flavin had numerous telephone contacts with Mr. McLaughlin and Mr. Barrett. In outline, the defendants' evidence as to the important milestones in the sequence of events involving Mr. Flavin and the stockbroking firms, which led to the exchanges recorded on the tapes, was as follows:

· Mr. Flavin testified that at the end of January, probably on 27th January, he received the first of a number of unsolicited calls from Mr. McLaughlin. Mr. McLaughlin informed him that there was a substantial demand for shares in Fyffes because of the wof.com venture and the significant share price rise. Mr. McLaughlin inquired whether the DCC Group holding in Fyffes was for sale. Mr. Flavin did not indicate whether the shares were for sale or not. However, he surmised that Mr. McLaughlin, on the basis of his knowledge that the holding in Fyffes was not a strategic core asset of the DCC Group, would have assumed that it would have been for sale at the right price. As I understand Mr. Flavin's evidence, his interpretation of the unsolicited approaches made by Mr. McLaughlin to him prior to 3rd February was that Mr. McLaughlin was seeking to have the DCC Group shares placed with Davy for sale. This did not happen, to the displeasure of Mr. McLaughlin, as Mr. Flavin perceived it.

· Mr. Barrett telephoned Mr. Flavin on 1st February, 2000, and this call was also characterised as unsolicited by Mr. Flavin. He informed Mr. Flavin that he had substantial institutional demand for shares in Fyffes at market price, which on the day was approximately €3.30. Mr. Barrett corroborated this evidence. His evidence was that he told Mr. Flavin that the extent of the demand was such that, in the event that a transaction was to happen in relation to the DCC Group holding, he believed there would not be a requirement for a significant discount, and that the demand was there at market price. Mr. Flavin's evidence was that his reaction to Mr. Barrett's expression of interest in acquiring the shares was not to indicate that they were for sale or to seek any offer for them. Mr. Barrett's evidence was that, while Mr. Flavin's initial response was that the shares were not for sale, the impression he was left with was that a bid from Goodbody might be entertained.

· Mr. Flavin received a further unsolicited telephone call from Mr. McLaughlin on 2nd February. Mr. McLaughlin indicated that he believed that Davy could put together a bid for all the shares at €3 per share. Mr. Flavin was adamant that this was not a bid in the sense of an offer to purchase the entire holding at €3 per share; rather it was an expression of confidence on Mr. McLaughlin's part of being able to complete such a transaction. In response, Mr. Flavin did not indicate whether or not the shares were for sale but he did advise Mr. McLaughlin that approaches had been made by another broker at market price and that an offer at a significant discount to market price could not be accepted.

· In the early afternoon of 3rd February Mr. Flavin received a further unsolicited telephone call from Mr. Barrett, who asked him to convey to Mr. McLaughlin that Goodbody would like to make a joint bid with Davy for the Fyffes shares. Mr. Barrett's evidence was that it had become clear from feedback from institutional investors with which Goodbody was in contact with a view to putting a bid together, that Davy was also trying to put a bid together. When asked by Mr. Barrett whether it was so, Mr. Flavin had confirmed that he had been approached by Davy in relation to the Fyffes shares. Mr. Flavin agreed to convey Mr. Barrett's suggestion to Mr. McLaughlin.

· Mr. Flavin telephoned Mr. McLaughlin and passed the information on to him. Subsequently, he telephoned Mr. Barrett to inform him that Mr. McLaughlin would be in contact with him.

· Mr. McLaughlin did contact Mr. Barrett by telephone. Mr. Barrett's evidence as to what transpired during this call, which he described as a "very unique event" and which, as he recollected, was fairly short, was that it was agreed that Davy and Goodbody would work together to make a joint bid for the shares. They would have "joint economics", meaning that the commission would be split equally between them. Mr. Barrett had no recollection of any discussion in relation to the rate of commission. However, 0.25% was the standard commission rate payable by institutions on their normal day to day dealings and he considered that to be the standard rate applicable to the transaction. Mr. Barrett had no recollection of how the bid price of €3.20 was arrived at. His evidence was that he believed that it came from a conversation he had with Mr. McLaughlin. At the time the shares were trading at €3.30, and €3.20 to €3.30 was the indicative range. It was agreed between Mr. Barrett and Mr. McLaughlin that Mr. Ashmore of Goodbody and Mr. Godfrey of Davy would make contact to sort out the logistics of making the bid.

251. Although I infer that, as a matter of probability, there was considerably more interaction in relation to the Fyffes' shares between Mr. Flavin and Mr. McLaughlin than the foregoing resumé suggests before the first call on the Davy dealing room recordings, I think it probable that the state of play between the main players, Mr. Flavin, Mr. McLaughlin and Mr. Barrett at that point was as Mr. Barrett testified.

252. The following summaries of the contents of the Davy dealing room recordings are intended to convey the substance of the calls, by reference, where appropriate, to other evidence of the surrounding circumstances:

(1) The first call between Mr. Ashmore and Mr. Godfrey was initiated by Mr. Ashmore following on instructions from Mr. Barrett to make contact with Mr. Godfrey in relation to forming a joint bid for the shares. Mr. Ashmore's evidence was that this call took place in the early afternoon of 3rd February, some time between mid-day and 2 p.m. However, the probability is that it took place around 15.00.

The whole tenor of the conversation between the brokers is consistent with the proposition that what they were about at that juncture was endeavouring to put together a bid for the entire shareholding of the DCC Group in Fyffes. They discussed the size of the bid and its timing. A figure of 34 million shares was mentioned, but no distinction was made at that juncture between ordinary shares and preference shares. The figure was mentioned in the context of the brokers trying to reach a consensus as to what they would tell their institutional clients. Mr. Ashmore suggested that they should be told that the bid would not "leave an overhang", but Mr. Godfrey seems to have been somewhat diffident about achieving a bid for more than 20 million shares. It is clear that they envisaged that it would take time to put the bid together. One does not get any sense that they were optimistic that that they would be able to put a bid together that afternoon. In fact Mr. Ashmore seemed to derive some comfort from the fact that the wof.com road show would be in London on the following day and in the United States during the following week. Mr. Godfrey appears to have been more concerned about timing, in the sense of making some bid in the short term, by the next day at the latest. Mr. Ashmore disclosed that Goodbody had orders or commitments for about 10 million shares and Mr. Godfrey indicated that Davy had commitments for "about the same".

On the question of price, when, early on in the conversation, Mr. Godfrey asked what figure Goodbody was at, Mr. Ashmore responded that they were talking about a price of €3.20. Later in the conversation, when trying to reach consensus as to what they would tell their institutional clients, it was agreed that they would say that they would present a bid "to DCC", which might or might not be accepted, at circa €3.20 "as an indication".

At the outset, Mr. Ashmore told Mr. Godfrey that he had been told by Mr. Barrett that "the economics is being split … on the buy and sell side". Later, Mr. Ashmore made it clear that he was operating on the assumption that the rate of commission was 0.25%. Mr. Godfrey did not demur.

The matter was left on the basis that each would make a list of their institutional client buyers. It is not clear to me that they had reached any consensus about putting forward a bid at that stage. However, I infer from the evidence that there was considerable interaction between Mr. Flavin and Mr. McLaughlin and Mr. Barrett in the period of about three quarters of an hour which intervened between the end of that call and the commencement of the second call. The telephone records suggest that Mr. Flavin spoke to Mr. Barrett for about ten minutes in a call which commenced at 15.14. This was followed immediately by a call from Mr. Flavin to Mr. McLaughlin. At 15.37 Mr. Barrett called Mr. Flavin. The progress which had been made is discernible in the second call.

(2) The second call was between Mr. Godfrey and Mr. Flavin. The telephone records suggest that it commenced at 15.44 and lasted almost six minutes. It was initiated by Mr. Godfrey. Mr. Flavin's evidence was that he was slightly surprised to hear from Mr. Godfrey; he had been expecting a call from Mr. McLaughlin, because he had been speaking to Mr. McLaughlin on the telephone shortly before. After the usual pleasantries, Mr. Godfrey told Mr. Flavin that he had been asked by Mr. McLaughlin to contact Mr. Flavin to "reconfirm really we're firm" for ten million ordinary shares at €3.20, but could not give certainty beyond that. Mr. Flavin's evidence was that Mr. McLaughlin had already indicated to him that he was likely to be in a position to make such an offer. Mr. Flavin's response to Mr. Godfrey, in effect, was a query as to what the position would be if "we", obviously meaning the DCC Group, wanted "to do the lot", but he was not saying that they did want to or would. However, he did add that he had just been on the telephone to Mr. Barrett who sounded more optimistic about being able to. Mr. Flavin's evidence was that, in referring to Mr. Barrett, he had effectively become a conduit; he was not trying to engender competition. After observing that optimism was one thing but deliverability was another, Mr. Godfrey posed the question: what are you going out and selling? Mr. Flavin's response was that, as he had already explained to Mr. McLaughlin, it was either the entire holding or exactly half the holding and, if half, the preference shares had to be included. Mr. Flavin's evidence was that around lunchtime that day, or immediately after lunch, he learned from Mr. O'Dwyer that that had to be the approach for tax reasons. From the evidence of the contacts between DCC and PwC that afternoon, I infer that the tax advice was received from PwC at around 15.00 and it was probably passed on by Mr. O'Dwyer to Mr. Flavin shortly thereafter.

There followed exchanges between Mr. Godfrey and Mr. Flavin in relation to the inclusion of the preference shares. From Mr. Godfrey's perspective their inclusion was a problem – nobody wanted them. Mr. Flavin countered that they were ordinary shares except that there was an 11% premium. Mr. Flavin's evidence was that he had been furnished with a document, which the evidence indicates was prepared by Mr. Scholefield and which I infer was also considered by Mr. O'Dwyer, which showed that the preference shares had a yield pick-up or enhanced dividend of the order of 11 cents per share. Mr. Flavin admitted, while testifying, that he was trying to get a higher price than €3.20 per share for the preference shares during the course of this call. Mr. Godfrey proposed a solution: that the preference shares would be converted into ordinary shares at the end of the month and Davy could take late delivery of them.

Exchanges in the course of this call gave rise to considerable controversy as to whether Mr. Flavin had received a bid from Davy on the previous day and whether Mr. Godfrey made a bid at the beginning of the call. Mr. Godfrey asserted that Mr. Flavin had received a bid from Davy for the entire block of stock the previous day. Mr. Flavin interjected to the effect that it was "at a crazy price". Mr. Godfrey reiterated his assertion. As I have already recounted, Mr. Flavin's evidence was that what had occurred on the previous day was not that Mr. McLaughlin had made a bid but that he was expressing confidence that he could put together an offer for the entire holding at €3 per share. Mr. Godfrey further stated that he had just given Mr. Flavin a further bid, a firm bid, referring to the bid for 10 million shares at €3.20 per share.

Mr. Flavin then said that they would consider a bid for the entire holding at €3.20 or a bid for exactly half the holding. He informed Mr. Godfrey that Mr. Barrett had been on the telephone during the course of the call. He was aware that Goodbody personnel were going to call Mr. Godfrey. He invited Mr. Godfrey to come back to him with "a joint decision". When Mr. Godfrey expressed a concern that the matter might "go totally out of control", Mr. Flavin assured Mr. Godfrey that Mr. Barrett was absolutely firm and that there was no difficulty buying that afternoon at the level of 17 million shares and "splitting it down the middle", which Mr. Flavin testified meant splitting the shares between Davy and Goodbody. Mr.

Flavin stated that "because of the logistics" and "things" he had to do, he would appreciate hearing from Davy and Goodbody. The matter was left on the basis that Mr. Godfrey would telephone Goodbody.

(3) In fact, the third call was a call initiated by Mr. Ashmore to Mr. Godfrey. The upshot of that conversation was that it was agreed that there would be a joint bid for half the holding, including the preference shares, but on the basis that the preference shares would be converted into ordinary shares and there would be late delivery of them. It was implicit that the offer price was to be €3.20. The offer was going to be "on a half and half basis". It was agreed that Mr. Godfrey would make the offer to Mr. Flavin.

(4) That agreement led to the fourth call from Mr. Godfrey to Mr. Flavin. The telephone records indicate that that call commenced at 15.55 and lasted about three minutes. The message immediately conveyed to Mr. Flavin by Mr. Godfrey was that Goodbody was prepared to bid for half of half of the holding. Mr. Flavin queried whether there was to be a mix of ordinary and preference shares. From the exchanges that followed I infer that Mr. Flavin only abandoned his attempt to get a premium for the preference shares during this call. Once again, Mr. Godfrey suggested that the preference shares be converted and that the buyers, Davy and Goodbody, would take delivery of ordinary stock. Mr. Flavin then raised the question whether Goodbody understood that there would be late delivery, which, in their case, would amount to late delivery of in excess of 2.3 million shares. He pointed out to Mr. Godfrey that he was "acting for both firms". Mr. Godfrey's response was that he would make one call, to which Mr. Flavin's riposte was that he thought that there was a firm bid for half the holding. The matter was left on the basis that Mr. Godfrey would ring Goodbody and would revert to Mr. Flavin "in two seconds".

(5) The fifth call was a short call from Mr. Godfrey to Mr. Ashmore, in which Mr. Ashmore confirmed that he was standing over his order for 8.9 million shares approximately at €3.20, adding that, if Mr. Godfrey wanted to "do some more", there would be no problem.

(6) As promised, Mr. Godfrey reverted to Mr. Flavin. The sixth call was made at 16.00, the telephone records suggest, and lasted for two minutes. At that stage of the process there was no need for pleasantries or introductory remarks. Mr. Godfrey immediately stated:

> "I will bid you for 17,895,697 ordinary shares at three twenty"

Mr. Flavin's response was that he would come back to Mr. Godfrey as soon as he could. He then elaborated as follows:

> "It may, Ronan it may be that you get a call not from me but from a guy from ING Bank in Holland, Tom Diepenhorst, and if it's not him you can take it that they have authority to give an instruction."

Mr. Godfrey indicated that that was not a problem. Mr. Flavin then said:

> "I have no authority on the matter".

What appears to have been a laugh on Mr. Flavin's part is then audible on the tape. Mr. Flavin explained this on the basis that it was a mannerism of his when he was nervous and that he felt discomfiture about only telling Mr. Godfrey that he had no authority at that stage. Mr. Godfrey then queried whether it was the case that Mr. Flavin would have to come back and say he was happy to deal. Mr. Flavin's response was as follows:

> "… if you get a call from ING Bank, they'll know all about it, you can take instruction from them instead of me."

He added that the shares were in Holland. Mr. Flavin made three further references to the shares being in Holland:

> (a) When Mr. Godfrey referred to delayed delivery, he interjected to say:
>
> > "In fact you know doing it won't be with us at all. It will be entirely between here and Holland. I wouldn't want any trail of any paper between here and …"
>
> (b) When Mr. Godfrey interjected to say that he would get the settlement details off them, clearly meaning ING Bank, Mr. Flavin responded:
>
> > "Exactly, exactly and we'd want everything sent to them, nothing to DCC."

Mr. Flavin elaborated that Mr. Diepenhorst would fill him in, that "he's a director of the subsidiary there of ING Bank".

> (c) Mr. Godfrey again mentioned delayed delivery on approximately 4.6 million shares. Mr. Flavin indicated that he knew and understood the position and he added:
>
> > "No, he'll stand over that but just we really want the trail of instruction entirely from Holland to you in correspondence to you there and back."

In relation to the reference to any "trail of paper", Mr. Flavin's evidence was that his concern was to ensure that all of the paperwork should reflect the factual situation which he had just given to Mr. Godfrey, that he had no authority in the matter. His concern was driven by tax considerations.

The call ended by Mr. Flavin saying that he would revert to Mr. Godfrey. Mr. Flavin's evidence was that it had always been his intention that, if a formal bid was made, he would pass it on to Lotus Green. He passed the bid he had just received from Mr. Godfrey on to Mr. O'Dwyer. The evidence is that there was no discussion between Mr. Flavin and Mr. O'Dwyer as to whether the bid was the best which was achievable.

(7) The seventh call was a call from Mr. Godfrey to Fyffes seeking to speak to Mr. Carl McCann, who was unavailable.

(8) The eighth call was initiated by Mr. Flavin and it is of significance that it occurred before Mr. Godfrey received a call from Mr. Diepenhorst. The telephone records suggest that it commenced about 16.11 and lasted for about three minutes. Mr. Flavin told Mr. Godfrey that he was about to put a call through to Mr. Neil McCann, adding that he, Mr. McCann, was entitled to have a view as to "who … is coming in …". Mr. Godfrey's response was that they were "mostly institutional". After further questions, the only further information which Mr. Flavin elicited was that the in-comers were mainly institutional, mainly new and mainly international. Mr. Godfrey then mentioned that he was going to ring Mr. Carl McCann.

Mr. Flavin objected strenuously to this course, pointing out that it was a "private transaction between Davys and DCC". When Mr. Godfrey queried whether Mr. Flavin was suggesting that he should not talk to Fyffes, who were also clients of Davy, Mr. Flavin responded: "

> Absolutely, absolutely, I mean you have no authority to talk to them in relation to any transaction that DCC is contemplating, none whatsoever … ."

The matter was left on the basis that Mr. Flavin would ring Mr. Neil McCann and then call Mr. Godfrey back.

The telephone records indicate that Mr. Flavin telephone Mr. Neil McCann at 16.17 and the call lasted about ten minutes. I will return to this call later in my analysis of the evidence.

(9) The ninth call was a call to Mr. Godfrey from Mr. Ashmore who was enquiring about the up to date position. The content of the call suggests that it was made around 16.30. Mr. Godfrey informed Mr. Ashmore that he, an obvious reference to Mr. Flavin, had "technically still not dealt". However, he assured Mr. Ashmore that it was "effectively 99 point 999 but effectively he has not said dealt". Mr. Ashmore explored whether Mr. Flavin would "do any more", but Mr. Godfrey disabused him of the notion that he would, stating – "… as far as he's concerned the half is dealt now or is about to deal."

(10) The tenth call was a further call from Mr. Ashmore to Mr. Godfrey. What seems to have provoked this call was that a Goodbody client, who, according to Mr. Ashmore, had already got a bid in with Goodbody, had been offered Fyffes stock at €3.20 by a member of the Davy dealing team. Mr. Godfrey said to Mr. Ashmore:

> "The story is until such time as I get a call from your man, nobody has dealt."In the overall context of the evidence, the ninth and tenth calls would appear to have taken place between 16.15 and 16.40.

(11) The eleventh call was a call from Mr. Diepenhorst to Mr. Godfrey. This call commenced at 16.40, Mr. O'Dwyer having already telephoned Mr. Diepenhorst at about 16.30. Mr. Diepenhorst introduced himself as follows:

> "This is Tom Diepenhorst … from Lotus Green in Amsterdam …"

This was the first mention of Lotus Green. Mr. Diepenhorst did not give any further elaboration or explain his role in any way. Mr. Godfrey indicated that he was expecting the call. Mr. Diepenhorst's evidence was that he was expecting Mr. Godfrey to make an offer but his recollection is that there was silence at Mr. Godfrey's end. While there was no obvious silence on the tape, I accept Mr. Diepenhorst's evidence that, in his perception, there was a small pause. His evidence was that he had never dealt with a broker in such a large deal before and he was unsure whether Mr. Godfrey would make the offer to him or he should mention what he had been informed was the offer. Accordingly, Mr. Diepenhorst said that he confirmed the transaction. Mr. Diepenhorst continued:

> "We sell to you, we being Lotus Green in Amsterdam … we confirm the data … that is 17,895,697 ordinary shares in Fyffes at a price of 3 point 20 cents."

Mr. Godfrey confirmed that that was correct. Mr. Diepenhorst queried whether he was aware there would be late delivery. Mr. Godfrey confirmed that he was and Mr. Diepenhorst indicated that it related to a block of 4,621,901 ordinary shares. Mr. Godfrey confirmed that there would be late delivery by about a month but indicated that he did not require that noted in the written confirmation, which he sought either by email or fax. Mr. Godfrey then gave Mr. Diepenhorst his fax number. That effectively was the end of the call.

(12) The twelfth call was a call initiated by Mr. Godfrey and was to Mr. Flavin. Mr. Godfrey confirmed that Mr. Diepenhorst had been in touch with him and that Davy was putting the transaction through. As has been mentioned earlier, the contract note recorded that the first sale was executed at 16.43. Mr. Flavin queried whether Mr. Godfrey had talked to Goodbody. Mr. Flavin stated that he had just been talking to Mr. Barrett and that he had checked with him that Mr. Diepenhorst's call to Davy would be sufficient. There followed some exchanges as to how the transaction would be split between Davy and Goodbody administratively, and it is manifest from the tape that Mr. Flavin had some concern about the arrangements. When Mr. Godfrey tried to assure him that there was not an issue, Mr. Flavin interjected and stated:

> "… in fairness we, we have appointed you jointly now, so long as it is a joint, a joint placing."

Mr. Flavin testified that in that remark he had used extremely clumsy language. He did not intend his observations to convey that the DCC Group requested Davy and Goodbody to place the shares. All he was doing was checking that Mr. Godfrey was representing both Goodbody and Davy. Mr. Flavin indicated to Mr. Godfrey that there would be a stock exchange announcement when he had got confirmation that the transaction was done. Mr. Godfrey confirmed it was done and that that was the reason he was calling Mr. Flavin.

(13) The final call was from Mr. Godfrey to Mr. Ashmore advising that the transaction had been dealt and that Davy would deliver 8,947,848 shares to Goodbody, settlement to be in five days time with delayed delivery as agreed. Mr. Godfrey stated that Davy would remit half the commission to Goodbody when they got paid. There followed exchanges about the rate of commission, which I am satisfied were just banter.

The involvement of the Board of Lotus Green in the first Share Sale

253. The following outline of the involvement of the board of Lotus Green in the first of the Share Sales is based primarily on the evidence of Mr. O'Dwyer and Mr. Diepenhorst and the contemporaneous documentation put in evidence.

254. Mr. O'Dwyer was the first director of Lotus Green to learn that stockbrokers were interested in acquiring the DCC Group holding in Fyffes. Towards the end of January, 2000, probably on the 28th, which was a Friday, Mr. Flavin informed him that he had received telephone calls from Davy expressing an interest in the holding. On the following Monday morning, 31st January, Mr. Flavin informed Mr. O'Dwyer of an increasing level of interest in the holding and the possibility that an offer might be made. Mr. O'Dwyer's evidence

was that information was conveyed to him in his capacity as a director of Lotus Green. At the time, he was the only "A" director of Lotus Green. As I have indicated in the introduction, he was also the chief financial officer of DCC. There were three "B" Dutch directors of Lotus Green at the time, Mr. Roskam, who usually chaired meetings of the board, Mr. Venneboer and Mr. Diepenhorst. The significance of the distinction between "A" and "B" directors is explained later.

255. Mr. O'Dwyer telephoned Mr. Roskam after his conversation with Mr. Flavin at about 11 a.m. on the morning of 31st January. The outcome of that telephone call was that it was agreed between Mr. O'Dwyer and Mr. Roskam that a board meeting of Lotus Green would be held as quickly as possible. Mr. O'Dwyer's evidence was that he suggested to Mr. Roskam that, for tax reasons, he might write a note to that effect. Mr. Roskam sent a letter by fax to Mr. O'Dwyer in the early afternoon referring to the fact that the Fyffes' share price had moved ahead strongly and suggesting a board meeting. Although that letter gives a contrary impression, in my view, it is clear on the evidence that the initiative in relation to holding an early board meeting came from Mr. O'Dwyer and that what provoked it was Mr. Flavin's contacts with Mr. McLaughlin and Davy's interest in the DCC Group holding in Fyffes.

256. On the following day, 1st February, Mr. O'Dwyer contacted Mr. Venneboer with a view to setting up a board meeting as soon as possible. He was unable to contact Mr. Diepenhorst. However, it was agreed between Mr. O'Dwyer, Mr. Roskam and Mr. Venneboer that a meeting of the board of Lotus Green would be held in Amsterdam on 3rd February. Mr. Diepenhorst's office was informed of the arrangement. On the same day, 1st February, Mr. Flavin informed Mr. O'Dwyer of the telephone call he had received from Mr. Barrett. Mr. O'Dwyer's evidence was that Mr. Flavin simply told him that Mr. Barrett had called indicating that there was institutional interest in a substantial amount of Fyffes' stock at market price. On the morning of 2nd February, 2000, Mr. O'Dwyer travelled to Holland. He brought with him the first draft of a memorandum he was preparing for the board meeting on the following day. He arranged to have a copy of the draft sent to PwC with a view to it being assessed from a tax perspective. The meeting of the board was to take place at the business address of Lotus Green in Amsterdam, which was also the business offices of Mr. Roskam and Mr. Venneboer. Mr. O'Dwyer discussed a second draft of the memorandum with the tax advisor in PwC in Dublin on the telephone. He furnished that draft to Mr. Roskam and Mr. Venneboer. Later in the afternoon he had a meeting with them to finalise the memorandum. Because of other commitments, Mr. Diepenhorst was not available on that day.

257. The memorandum in its final form was addressed to the board of Lotus Green and was represented as emanating from Mr. Roskam and Mr. Venneboer. Mr. O'Dwyer explained that this approach was adopted for tax considerations and reflected his obsessiveness with demonstrating Dutch involvement in the decision-making process and in events leading to a decision. The memorandum summarised three strategic options available to Lotus Green. The first was to increase its shareholding in Fyffes. The commentary on this option alluded to a risk that the EU banana regime would not be sorted out in Fyffes' favour and a further risk that the wof.com venture would be loss-making. On the evidence, it is clear that, given that the strategy of DCC was to exit from Fyffes when the opportunity arose, this option had no basis in reality. The second option was to leave its existing interest in Fyffes unchanged. The third was to dispose of some or all of its holding. The benefit of adopting this option, as expressed in the memorandum, was that it would free up significant financial resources to allow Lotus Green to pay its existing debts, to pay a dividend to its parent and to pursue new development opportunities. As will appear later, Lotus Green had one debt, which was an intra-Group debt. The plaintiff did not pursue through discovery, and did not seek to adduce, any evidence as to what happened to the proceeds of the Share Sales. On the evidence, it seems unlikely that there was any reality in the prospect of the board of Lotus Green being given the discretion to disburse the balance of the proceeds after payment of the intra-Group debt, which, on my reading of the evidence, would have been somewhere between €50m and €60m, in the pursuit of new development opportunities. The memorandum concluded with a recommendation in the following terms:

> "… that offers for all or part of the Company's shareholding in Fyffes in excess of €3.00 per share should be given serious consideration as it affords the Company the opportunity to realise the significant appreciation in the valuation of Fyffes since it was acquired in August, 1995."

258. There was attached to the memorandum a paper, the purpose of which was stated to update the board on developments in Fyffes since the holding had been acquired by Lotus Green. The paper contained information in relation to Fyffes' core business, including the Capespan acquisition, which was derived from public sources. It also referred to wof.com and the announcements in relation to it made by Fyffes in November, 1999 and in January, 2000.

259. Later that evening, 2nd February, Mr. O'Dwyer learned, in the course of a telephone conversation with Mr. Flavin, that Davy had indicated confidence in its ability to put together a bid for Lotus Green's entire holding in Fyffes at €3.00 per share. However, Mr. O'Dwyer's evidence was that he did not get the impression that there was a bid from Davy for the entire stake at that price. He was also aware that on that day Fyffes' share price had closed a €3.32.

260. The meeting of the board of Lotus Green took place at 7.45 a.m. (CET) the following day, 3rd February. It was about three quarters of an hour in duration. All of the directors attended. There was no written agenda. However, the memorandum and attached paper was presented to the board. On the evidence, I am satisfied that the resolution which was passed was that Lotus Green would accept offers of €3.00 or higher for all or part of Lotus Green's shareholding in Fyffes. I am satisfied that it was also resolved that any one of the Dutch directors would have authority to accept an offer on behalf of Lotus Green, but as regards accepting offers, Mr. Diepenhorst was ranked first, then Mr. Roskam and finally Mr. Venneboer. There was no significance in the ranking other than convenience. The authority was to be valid for one month from the date of the meeting, unless extended by resolution of the board. After the meeting, at 8.43 (CET), contact details, work, mobile and home telephone numbers of the Dutch directors and of ING were faxed to Mr. Flavin by Mr. O'Dwyer.

261. In his written statement of evidence, Mr. O'Dwyer stated that the price of €3.00 was set at a rounded discount to the share price that prevailed the previous day. In the course of cross-examination, Mr. O'Dwyer testified that it was not the intention of the board to fix a price which was at a discount to market price. He explained what was intended as follows: "The mandate was to cover a period of weeks and … it was set to ensure that the board had come to a firm benchmark number, not as a discount to anything but just as a firm benchmark number, being a price and that price would pertain … until the next board meeting. It was just purely to ensure that we did not have to be sitting down again having numerous board meetings."Earlier in cross-examination he had stated that the resolution was set at a number from a mandate point of view, that there would be leeway for the board, and it had regard to the fact that share prices can go down as well as up.

262. Immediately after the meeting Mr. O'Dwyer left Amsterdam for Dublin. En route, shortly after 9 a.m. (CET), he telephoned Mr. Flavin and advised him of the decision made by the board of Lotus Green. He also became concerned that a disposal of part of the holding might have an impact on the continuing applicability of Lotus Green's taxation benefit, the participation exemption referred to later, under Dutch law and, while en route, he arranged that advice be obtained from PwC on the matter.

263. After he returned to DCC's headquarters in Dublin, probably around noon on 3rd February, Mr. O'Dwyer addressed the issue of

the number and type of shares which Lotus Green needed to retain in the event of a partial sale in order to preserve the participation exemption under Dutch tax law. It is clear from the evidence that data in relation to Fyffes' issued share capital and Lotus Green's stake in it were furnished to PwC. At around 3 p.m. Mr. O'Dwyer received verbal advice via the telephone from PwC. In broad outline the advice was that, in order to preserve the participation exemption, Lotus Green should retain a block of shares at least equivalent to 5% of the total issued shares (ordinary and preference) in Fyffes. However, as there was some doubt as to whether preference shares were to be treated for determining the minimum shareholding for participation exemption, it was recommended that a sufficient number of ordinary shares be retained so that Lotus Green would still own 5% of the total issued shares. Mr. O'Dwyer's evidence was that, based on this advice, he immediately informed Mr. Flavin that the requirement of Lotus Green was that it would only accept offers for all or half of its shareholding and that the preference shares had to be sold in priority to the ordinary shares. Mr. O'Dwyer did not apprise his fellow board members of the advice or seek their views before telling Mr. Flavin of Lotus Green's requirement. During the second call on the Davy dealing room recordings, which was Mr. Flavin's first conversation with Mr. Godfrey, Mr. Flavin told Mr. Godfrey what he had already informed Mr. McLaughlin, that the sale would be either of the entire holding or exactly half the holding and, if half, the preference shares would have to be included. It was Mr. Godfrey who proposed the solution of the preference shares being converted to ordinary shares at the end of the month, with late delivery on a block of ordinary shares equivalent to the number of preference shares owned by the DCC Group. The issue of converting preference shares with a view to effecting a sale of the shares as ordinary shares was not discussed at the board meeting of Lotus Green that morning, nor were the "B" directors of Lotus Green consulted about this proposal at any time.

264. In relation to Mr. Flavin's endeavour to obtain a premium on the preference shares in the course of his discussions with Mr. Godfrey, Mr. O'Dwyer's evidence was that he was aware that theoretically the market price of the preference shares should have been at a premium to the market price of the ordinary shares to reflect the enhanced dividend entitlement attached to the preference shares. He thought it was likely that he mentioned this to Mr. Flavin. Among the documents discovered by the defendants was a calculation of the yield pick up on the preference shares. The evidence establishes that Mr. Scholefield was the author of this document, although he could not recollect when he prepared it or whether he gave it to Mr. Flavin. When discovery was being made, the document was found on Mr. O'Dwyer's file. Mr. O'Dwyer's evidence was that he did not have the calculation at the board meeting of Lotus Green on the morning of 3rd February and that there was no discussion at that meeting of seeking a premium on the price of the preference shares.

265. Mr. O'Dwyer's evidence was that Mr. Flavin told him about the bid made by Mr. Godfrey in the sixth call on the Davy dealing room recordings at around 16.15 and that he immediately telephone Mr. Diepenhorst giving him details of the offer and the name and telephone number of the contact in Davy. He also told him about the tax advice that the preference shares should be sold in priority to the ordinary shares. The telephone records suggest that the call was made at 16.28 and lasted about six minutes. That led to the eleventh call on the Davy dealing room recordings, from Mr. Diepenhorst to Mr. Godfrey, which, I infer, was made at 16.40.

266. After the first sale was executed the tax advice from PwC was revised. The earlier advice, on the basis of which Mr. Flavin stipulated to Mr. Godfrey that, if half the holding were sold the preference shares would have to be included, had been given on the assumption that the ordinary and preference shares had the same nominal value. In fact, they did not. The preference shares had a much higher nominal value per share (IR£1 equivalent to €1.269) than the ordinary shares (IR£0.05 equivalent to €0.06). As the 5% minimum shareholding for the participation exemption was based on the nominal value of the nominal issued and paid-up share capital, selling all the preference shares would have resulted in the retention of less than the requisite 5%. Mr. O'Dwyer's evidence was that, on the basis of the revised advice, he decided, as an officer of Lotus Green, that the preference shares should not be converted and that existing ordinary shares should be delivered to Davy instead of converted preference shares. The "B" directors of Lotus Green were not apprised of the revised tax advice, nor were they consulted about this decision. The revised advice was received from the Amsterdam office of PwC by telephone on the evening of 3rd February.

267. On the following day, 4th February, the verbal revised tax advice was confirmed by a letter, which was faxed from the Amsterdam office of PwC to Mr. O'Dwyer, and which summarised the position in relation to future sales as follows:

> "A sale shortly after the first sale of the shares in Fyffes by Lotus Green will also be eligible to the participation exemption where, after the first transaction, more than 5% is retained and the facts as described in the ruling have not changed. It is even likely that the participation exemption is also applicable in case the shareholding (following the first transactions) falls below 5% and shortly following the first transactions, additional shares are sold in terms of a clearly documented plan to sell the shareholding in trances (sic) for commercial reasons (i.e. do not want to flood the market)."

268. In making the finding I have made as to the content of the resolution which was passed at the board meeting of Lotus Green on the morning of 3rd February, 2000, I have had regard to the first draft of the resolution. That draft, and indeed subsequent drafts, was prepared in DCC House in Dublin, in accordance with the practice which had prevailed since early 1998. Mr. O'Dwyer's evidence was that the practice developed because of language difficulties in relation to the preparation of the minutes. The minutes of the meeting of 3rd February, 2000, as approved at the next board meeting of Lotus Green, which was held on 30th March, 2000, recorded the resolution as follows:

> "The Directors resolved to accept offers of €3.00 or higher for all or part of the Company's shareholding in Fyffes Plc. The Directors considered that in order to avoid market saturation a disposal in tranches may be appropriate. It was further resolved that any one of [the four named directors] be authorised to accept such an offer on behalf of the Company, such authority to be valid until the date of the next Board meeting, scheduled for 30 March, 2000."

269. Mr. O'Dwyer testified that, although the words "the Directors considered that in order to avoid market saturation a disposal in tranches may be appropriate" originated in the written advice from PwC in Amsterdam on 4th February, 2000, the import of the statement was generally correct, in that the board recognised that it might not receive an offer for all of the shares given market circumstances and, therefore, while it was desirable that the entire holding be sold, that might have to be done in parts.

270. In relation to the formalities for completion of the transaction, the relevant documents were prepared in DCC House in Dublin, faxed to Mr. Diepenhorst in Amsterdam and, having been signed by him, were faxed from Amsterdam to the addressee. The following matters were dealt with in this manner:

> (a) Confirmation to Davy of the acceptance of the offer was sent by fax to Davy at 19.33 CET on 3rd February. It confirmed that delivery of 4,621,901 of the shares would be deferred for 31 days. It was stated that the contract note was to be sent to the business address of Lotus Green in Amsterdam and that the bank details of Lotus Green would be forwarded on the following day.
>
> (b) By fax of 4th February, 2000, from Mr. Diepenhorst to Davy, bank account details were furnished. This fax confirmed

that delivery of the entire block sold would take place on 7th February, 2000 for settlement on 9th February, 2000.

(c) By fax of 4th February, 2000, Mr. Diepenhorst directed Mr. Scholefield to deliver the relevant share certificates to Davy.There were also certain formalities to be completed by DCC and S&L, as the registered owners of the shares sold. These formalities were completed as follows:

(i) On 4th February, 2000, Mr. Scholefield, secretary of DCC and of S&L, notified Fyffes of the disposals pursuant to s. 67 of the Act of 1990. Each notification disclosed the beneficial ownership of Lotus Green. On foot of the s. 67 disclosures, Fyffes made an announcement to the Irish Stock Exchange on 4th February, 2000.

(ii) DCC also made an announcement to the Stock Exchange on 4th February, 2000. That announcement did not disclose the existence of Lotus Green. I will outline the process which led to the final wording of the announcement and I will consider its significance when analysing the evidence later.

(iii) On 7th February, 2000, Crest transfers were executed by Mr. Flavin, as director, and by Mr. Scholefield, as secretary, on behalf of DCC and S&L and they were furnished, together with the share certificates, as Mr. Diepenhorst had directed, to Davy on 7th February, 2000.

271. It is instructive to consider what the board of Lotus Green might have done, but did not do, before passing the resolution to sell all or part of the holding at €3.00 or more on 3rd February, 2000. First, the board did not obtain any advice from a stockbroker or other professional in relation to the price at which the shares should be sold, even though the then prevailing market for Fyffes' shares was at an unprecedented high and even a €0.10 variation up or down on the share price would have involved a variation of in excess of €3.5m up or down on the price which could be achieved for the entire holding. No advice was obtained as to whether Lotus Green should be seeking a higher price for the preference shares than for the ordinary shares. No advice was sought as to the financial implications of a sale of part, as opposed to a sale of the entirety, of the holding. Secondly, no consideration was given to the tax implications under Dutch law of the sale of part, as opposed to the entirety, of the holding. The taxation implications were addressed by Mr. O'Dwyer, but without reference to his fellow directors, after the resolution was passed. Thirdly, no legal or compliance advice was obtained in relation to regulatory issues, in particular, whether Lotus Green was free to deal and whether the registered owners of the shares were free to deal. Mr. Flavin, however, did seek legal advice from William Fry. He also discussed a prospective sale with Mr. Scholefield. I will deal with these two matters in depth in the context of the price-sensitivity issue. However, at this juncture, it is necessary to record that, even though the memorandum prepared by Mr. Scholefield on 1st February, 2000 referred to later might give the impression that Mr. O'Dwyer had sought advice from him on behalf of Lotus Green, I am satisfied on the evidence that that was not the case. Fourthly, the practical, legal and regulatory formalities of completion of a sale were not addressed at all. To take one example, no decision was made as to what was to be done with the proceeds of the sale, which, on any view, were going to be substantial, in the short term.

How the second and third share sales came about

272. The defendants' evidence in relation to the second share sale is that on 8th February, 2000 Mr. Flavin received an unsolicited call from Mr. Barrett offering to purchase 8 million shares at €3.60 per share. Mr. Flavin told Mr. Barrett that he had no authority to deal, but that he would contact Mr. Diepenhorst at Lotus Green. He passed the offer on to Mr. O'Dwyer who passed it on to Mr. Diepenhorst. Mr. Diepenhorst contacted Mr. Barrett and accepted the offer. The third share sale on 14th February followed the same pattern: Mr. Diepenhorst accepted an unsolicited offer from Mr. Barrett via Mr. Flavin for the balance of the ordinary shares at a price of €3.90 per share. Each offer made by Mr. Barrett was effectively at market price: Fyffes share price closed at €3.60 on 8th February and at €3.90 on 14th February.

273. Mr. Barrett's evidence was that after 3rd February he had a number of calls with Mr. Flavin. He probably updated Mr. Flavin on the prevailing share price, and the reaction to the first sale in the market place. He was anxious to keep the dialogue going. Goodbody had ongoing interest. However, they did not have sufficient interest to make a bid until 8th February and when they had, they made the bid. That was the first bid they made after 3rd February. The dialogue between Mr. Flavin and Mr. Barrett continued after 8th February and he made a further bid to Mr. Flavin on 14th February. Mr. Barrett corroborated Mr. Flavin's evidence that Mr. Flavin had told him on 8th February that he had no authority. He did not go directly to Mr. Diepenhorst on 14th February because his approaches on 3rd and 8th February had proved to be effective, in his words "a winning formula".

274. Mr. Diepenhorst's evidence was that after speaking to Mr. Godfrey on 3rd February, he telephoned Mr. Venneboer to apprise the Dutch directors of what had happened. He had no contact with either Mr. Venneboer or Mr. Roskam between 3rd February and 14th February. On 8th February he received a telephone call from Mr. O'Dwyer who gave him the details of an offer made by "Roy". Mr. Diepenhorst had not spoken to Mr. Barrett previously. He was given Mr. Barrett's contact details. He received a further telephone call from Mr. O'Dwyer on 14th February and again was given details of an offer made by Goodbody. On each occasion he contacted Goodbody and accepted the offer on behalf of Lotus Green.

P. Whether Mr. Flavin dealt, caused or procured

Analysis of the evidence

275. The recordings made from the Davy dealing room tapes were put in evidence by the plaintiff. Save where I have otherwise indicated, the evidence which I have summarised above was led by the defendants and was the evidence upon which the defendants based their defence. Before analysing the totality of the evidence, including the content of the tapes, I have a number of general observations to make.

276. First, courts and arbitrators frequently have to make findings of fact in relation to the existence of an agreement, its terms and so forth, usually on the basis of the accounts of the participating parties as to what transpired and, perhaps, whatever documentary evidence is available. It is rare that the finder of fact is able to view a process or part of a process as it happened. The existence of the tapes allows that in this case. In their closing submissions the defendants very properly reminded the court that the transcripts of the tapes should be approached with caution and that in-depth scrutiny of particular words and phrases used in the course of telephone conversations can be apt to mislead. That is true and it is something which I have borne in mind. Nevertheless, the existence of the tapes affords a unique insight into what transpired. The recordings are not merely a wholly reliable record of the calls, but they shed light on what went on before and in the intervals between the calls. The second call, for instance, clearly indicates that the exchanges which occurred between Mr. Flavin and Mr. McLaughlin and Mr. Flavin and Mr. Barrett after the first call were crucial in the formulation of the bid the acceptance of which constituted the first sale.

277. Secondly, I have no doubt that the process which occurred on the afternoon of 3rd February which was reflected on the recordings and established by the evidence was a process of negotiation, in the ordinary meaning of negotiation, namely, discussion aimed at reaching an agreement. It was a negotiation involving three parties: Mr. Flavin, as a prospective seller, and Davy and Goodbody, as prospective buyers of the DCC Group holding in Fyffes. It is a fact that the seller was always going to pay, and did in fact pay, commission which was shared equally by Davy and Goodbody. Be that as it may, I think it is clear on the evidence that each side, whether seller or buyer, was striving to achieve the best advantage from the process and I think it is probable that the same applies to the prospective buyers inter se.

278. Thirdly, on the dealing issue, the court is concerned to establish who dealt on the three specific transactions on 3rd, 8th and 14th February. The bigger picture, for instance, whether Mr. McLaughlin made a bid, in the sense of an offer to acquire which was open for acceptance, for the entire block at €3.00 per share on 2nd February, and whether it was rejected by Mr. Flavin, undoubtedly is indicative of what the main players thought about Mr. Flavin's status in relation to the disposal of the DCC Group stake and his own view of his status. That said, in my view, to answer the question who dealt, it is necessary to focus on the three transactions, in particular, the first, which set the trend for the second and third transactions.

279. Taking an overview of the outcome of the process which led to the first transaction, it is clear that the following elements were expressly agreed:

(a) who the buyer or buyers were;

(b) the number of shares sold;

(c) the type of shares sold;

(d) the price; and

(e) late delivery and late settlement in relation to some of the shares.

280. It was also expressly agreed that whatever entity within the DCC Group could give title to the shares was the seller. On the basis of the evidence that the rate of commission payable was not discussed by anybody, it must be assumed that there was an implied term that the seller would pay the rate of commission appropriate to a transaction of the magnitude in question and to a seller of the calibre of the DCC Group.

281. The evidence, in my view, clearly illustrates that Lotus Green had no real input into the process whereby the express terms were arrived at. On the contrary, the only reasonable conclusion is that Mr. Flavin controlled the whole process, as the following analysis indicates:

(a) The buyer

It was Mr. Flavin who chose to entertain approaches from Davy and Goodbody. It was he who facilitated the unique partnership of Davy and Goodbody to make the joint bid, which came in the sixth call. It was he who chose to pass the joint bid to Mr. O'Dwyer, who, in turn, passed it to Mr. Diepenhorst. No consideration was given at the board meeting on 3rd February by the directors of Lotus Green to who the buyer might be. At one level that is not surprising ,given the nature of the product for sale: shares in a listed company. However, it seems to me that a question put by counsel for the plaintiff to Mr. O'Dwyer in cross-examination pinpoints the reality of the situation. If an investment bank located in Holland had telephoned Mr. Roskam and offered to buy the entire block of shares at more than €3.00 per share on 3rd February, could Mr. Roskam have sold them, Mr. O'Dwyer was asked. Theoretically, he could, Mr. O'Dwyer responded but he rightly pointed out that that was a hypothetical situation. The reality was that no prospective purchaser was going to approach any of the Dutch directors of Lotus Green because the beneficial ownership of Lotus Green in the shares was not a matter of public knowledge. The only offers which were going to come to Lotus Green were offers which Mr. Flavin chose to pass on.

(b) The number of shares

At the board meeting on 3rd February no consideration was given to how many shares would be sold, if the entire holding was not being sold. No consideration was given to the implications from a commercial or from a taxation point of view of selling part only of the holding. In relation to the taxation implications of a partial sale, this was addressed after the board meeting by Mr. O'Dwyer and he passed on the advice obtained from PwC to Mr. Flavin, who took the advice on board and acted in accordance with it. That he did so, in my view, cannot be construed as a decision by Lotus Green as to the number of shares which would be sold. That decision was made by Mr. Flavin in stipulating to Mr. McLaughlin first and, subsequently, to Mr. Godfrey what was for sale, the entire or half, to include the preference shares, and in choosing to pass the offer to acquire half of the holding to Mr. O'Dwyer.

(c) Type of shares

In relation to the type of shares to be sold, while it is clear that the board meeting was apprised of the details of the holding, including the fact that some of the shares were ordinary shares and some were preference shares, the directors gave no consideration to the financial, commercial or taxation implications of selling ordinary shares as opposed to preference shares or vice versa. They gave no consideration to whether the preference shares might attract a premium. They gave no consideration to the possibility that the preference shares might have to be converted into ordinary shares. In my view, it was not within the competence of Mr. O'Dwyer, as the sole 'A' director of Lotus Green, to make a decision which would alter an asset of Lotus Green to the extent that the conversion of the preference shares into ordinary shares would have entailed. The decision as to the type of shares agreed to be sold was not made by Lotus Green. It was made by Mr. Flavin on the basis of the taxation advice. When the taxation advice was revised, the decision to retain the preference shares was made by Mr. O'Dwyer. In doing so, in my view, he was acting as chief financial officer of DCC – prudently it may be added, given the revised tax advice and given that the settlement date was going to be brought forward.

(d) The price

It is when one considers how the price at which the shares were to be sold was arrived at that the absurdity of the defendants' position that Lotus Green, and not Mr. Flavin, brought about the first sale becomes apparent. On the morning of 3rd February the board resolved to accept offers of €3.00 or higher for all or part of the holding. I believe that what was agreed was that this resolution was to be valid for one month. The share price closed at €3.32 the previous afternoon. It is true that it had fallen back to €3.20 by close of trading on that day (3rd February) but over the next month it exceeded €3.20 on close of trading on every day, peaking at €3.98 on 18th February. The form of resolution passed by the board on the morning of 3rd February made sense in the context of the underlying objective, the mitigation of tax, because, prima facie, it was evidence of a decision to sell made by Lotus Green in Holland. Incorporating, as it did, a degree of elasticity in relation to price was also convenient, because of the various commitments of the members of the board. However, it made no sense in commercial terms. The shareholders of DCC would have a genuine ground for grievance if Lotus Green had accepted the first offer that came in at €3.00 or higher after the resolution was passed, whether for all or part of the shares, given that the board had adopted no measures for evaluating an offer, in terms of price, whether by reference to the market price or otherwise, at the time it would come. The reality is that it was never intended that the board of Lotus Green would have to make a value judgment when an offer was passed on to its nominee, whether Mr. Diepenhorst or another director, as to whether it was appropriate to accept the offer having regard to the price being offered for the shares and prevailing market conditions. I have no doubt that it was understood by all involved that, if an offer was passed on, it could be assumed that the price was acceptable to DCC.

(e) Late delivery

In relation to late delivery, and its subsequent abandonment, my observations at (b) and (c) above apply.

282. Even if one accepts the defendants' representation of the fundamentals of how the first share sale came about, namely, that Davy and Goodbody made an offer to buy on the terms I have just outlined and that that offer was accepted, one has to ask who in reality accepted the offer. In my view, in reality, it was Mr. Flavin. It is true that at the end of the sixth call there was a formal step to be taken – Mr. Diepenhorst had to signify acceptance from Holland. There was no question, however, but that this was going to happen. Mr. Flavin knew that and he knew that he could inform Mr. Neil McCann of the position without awaiting confirmation that acceptance had come through from Holland. Both Mr. O'Dwyer and Mr. Diepenhorst knew it. Once the offer came through from Mr. Flavin to Mr. O'Dwyer and was passed by Mr. O'Dwyer to Mr. Diepenhorst, all Mr. O'Dwyer and Mr. Diepenhorst were concerned to ensure was that the price was at least €3.00. The acceptance by Mr. Diepenhorst was a mere formality.

283. In the context of the relationship of Lotus Green and of DCC, it was submitted by the defendants that the decisions facing Lotus Green, principally the decision to sell the shares in early 2000, were decisions which, in essence, were easy to make. In my view, the decisions which Lotus Green took upon itself in relation to the sale of the shares were easy to make, but they did not cause the transactions to occur. The first decision was to pass a resolution fixing a benchmark price above which offers might be accepted, which it did on the morning of 3rd February. The second was, through its nominee director, who in due course happened to be Mr. Diepenhorst, to accept an offer which came through the anticipated channel if it exceeded the benchmark price, which happened on the late afternoon of 3rd February and again on 8th and 14th February. Lotus Green did not assume the task of deciding when, to whom, at what price, in what quantities and of which category of shares there was to be a sale. In engineering an offer from the brokers, which he considered suitable for acceptance, Mr. Flavin effectively made those decisions. He made the hard decisions and the Share Sales would not have occurred but for the decisions he made. In the course of his submissions on the meaning of "to cause or procure" in s. 108(4), counsel for the defendants posed the question: if Mr. Flavin had stepped out of the process at the moment the first call came from Mr. McLaughlin, what would have been the likely result? The answer suggested was that the first deal and the subsequent deals would in all probability have been done, because, as it was put, of the enormous market demand and brokers actively drumming up interest for the shares, on one side, and the readiness of Lotus Green to sell at the appropriate time, on the other side. Perhaps that is right, in the sense that all the ordinary shares might have been sold, but, in my view, that is irrelevant. The relevant point is whether the specific transactions which are the subject of these proceedings would have occurred but for the fact that Mr. Flavin acted as he did. In my view, the answer is that they would not. The first sale occurred because it was skilfully negotiated by Mr. Flavin with parties who were prepared to negotiate with him, Mr. McLaughlin and Mr. Barrett, and their nominees, Mr. Godfrey and Mr. Ashmore. The second and third sales followed suit.

284. The plaintiff submitted that the evidence of the defendants' witnesses was defined by catchphrases which were employed for the purpose of projecting to the court an impression of passivity on Mr. Flavin's part at the time of the share sales. Mr. Flavin was described as a "conduit" for "unsolicited bids" from the brokers and as merely "reacting" to approaches. If the bidders had been referred to Lotus Green by Mr. Flavin, that would have had the effect of putting a "for sale sign" on the holding. The "noise levels were increasing", meaning that the broker interest was increasing. The people in Lotus Green were "keeping their heads down". Lotus Green was putting its requirements out into the market and using Mr. Flavin as a "conduit" for that purpose. In my opinion it is not the case that any of those statements is of itself untrue. However, taken together they give a distorted picture of what happened in reality. In reality the passivity was on the part of the Dutch directors of Lotus Green and it was what DCC expected of them. On the basis of Mr. Diepenhorst's evidence, I infer that it was the role they assumed as members of the board of Lotus Green.

285. A theme which ran through the evidence of the defendants' witnesses was that it was not clear how the price of €3.20 came about. Mr. Flavin's evidence was that up to the time he was testifying he did not know exactly how it was settled, but he assumed that Mr. McLaughlin and Mr. Barrett settled on the price between them. His evidence was that the first time he heard of €3.20, which I interpret as meaning that a price of €3.20 per share would be bid, was from Mr. McLaughlin after Mr. McLaughlin's discussion with Mr. Barrett on the afternoon of 3rd February. I have already recorded Mr. Barrett's evidence of his conversation with Mr. McLaughlin on the afternoon of 3rd February and the fact that he had no recollection of how the bid price was arrived at, but he believed that it was from a conversation he had with Mr. McLaughlin. It seems to me that it is immaterial how the buyers came to make a firm offer of €3.20 per share. What is of materiality is how the offer at €3.20 came to be accepted on behalf of the sellers of the shares. That occurred, in my view, because the price was acceptable to Mr. Flavin and, that being the case, he channelled the offer through Mr. O'Dwyer to Mr. Diepenhorst for formal acceptance on behalf of Lotus Green.

286. The extent to which Mr. Flavin, to the exclusion of Lotus Green, was going to decide whether a sale took place and, if so, on what terms in late January and early February, 2000 is corroborated by actions he took after Mr. McLaughlin had made the initial approaches. As early as 31st January Mr. Flavin contacted DCC's legal advisers, William Fry, for advice in the context of a potential sale of the shares. On the following day, he consulted Mr. Scholefield on compliance issues. Both of these matters will be the subject of further consideration in the context of the price-sensitivity issue. What is significant for present purposes is that, while statutory, regulatory and compliance matters generally were not addressed by Lotus Green, they were addressed by Mr. Flavin.

287. It is also corroborated by his communications with Fyffes, in particular, with Mr. Neil McCann, on 3rd February. Mr. Flavin testified that just before noon on 3rd February he telephoned Mr. Neil McCann to inform him of the growing likelihood of a sale of all or part of the DCC Group shareholding in Fyffes. He also arranged to have a first draft of a stock exchange announcement, which was prepared by Mr. Scholefield, which would issue if the shares were sold, faxed to Mr. McCann. This went through about an hour later at 12.48. That draft, which was dated February, 2000 but did not show the day of the date, assumed that the entire holding would be sold. The operative part stated that the ordinary shares and preference shares "were placed with institutional investors by Davy Stockbrokers" at a price which, of course, was left blank, but drew a distinction between the price for the ordinary shares and the price for the preference shares. It is clear on the evidence that Mr. Flavin had a number of further telephone conversations with Mr. McCann in the early afternoon. At 15.42 a second draft of the proposed stock exchange announcement was faxed to Mr. McCann by Mr. Scholefield. The day of the date was still blank on this draft. However, this draft envisaged that there would be a sale of the number of shares and the categories of share stipulated by Mr. Flavin in the second call: 17,895,697 shares to include all of the preference shares. It still envisaged a different price for the ordinary and preference shares. In this draft, the operative part stated that the shares sold "were placed with institutional investors by Davy Stockbrokers and Goodbody Stockbrokers".

288. It is clear from what passed between Mr. Flavin and Mr. Godfrey in the course of the eighth call that Mr. Flavin intended telephoning Mr. Neil McCann when that call was completed. He did call him at 16.17, before Mr. Diepenhorst had contacted Mr. Godfrey. In his evidence in chief Mr. Flavin testified that in one of his later telephone conversations with Mr. McCann, Mr. McCann suggested a meeting at the Great Southern Hotel at Dublin Airport. Mr. Flavin's evidence was that he explained to Mr. McCann that the matter was out of his hands and that he was speaking to him as a matter of courtesy. Although, in the course of the pre-trial procedures it was indicated by the plaintiff that it was intended to call him, Mr. Neil McCann did not testify because of the state of his health, a situation which the defendants, very properly, accepted. When it was put to Mr. Flavin in cross-examination that, during the eighth call, he was giving Mr. Godfrey a clear indication that the deal was effectively done, he did not accept that proposition and continued:

> "I was seeking clarification as to who are these proposed investors at that stage, who were the proposed investors that were coming in to take up these shares. I was about to put in a phone call to Neil McCann and I wanted to know, to inform him .. I had several phone calls with Neil McCann at this stage that day about the likelihood of a transaction. Now that it was almost certain that a transaction was going to be [consummated], that was my belief at the time, and I believed it was very likely that Lotus Green was going to accept it, .. I wanted not only to be the first to tell him about the actual transaction but I knew he would be interested, correctly he would be interested, as to the .. type of investors coming in and I sought clarification on that."

289. In my view, looked at objectively in the overall context of the evidence (including a memorandum prepared by Mr. Gernon on 4th February, 2000, which records the communications from Mr. Flavin to Mr. McCann on 3rd February and which has been relied on by the defendants on the price-sensitivity issue) the whole tenor of the eighth call is that, before he telephoned Mr. McCann at 16.17, Mr. Flavin considered that the deal was done.

290. Mr. Scholefield's evidence was that, following further discussions with Mr. Flavin on the final wording of the stock exchange announcement after the first sale on the evening of 3rd February, he arranged for the announcement to be sent to the Company Announcements Office for release at 7 a.m. on 4th February. The announcement was made in the name of DCC. It made no mention of Lotus Green. As the earlier drafts had done, it stated that the shares sold were placed with institutional investors and it stated that this was done by Davy and Goodbody at €3.20 per share. In the context of explaining what he meant when he used what he described as extremely clumsy language in the course of the twelfth call to the effect that Davy and Goodbody had been appointed jointly and it was a joint placing, Mr. Flavin referred to the stock exchange announcement and to the fact that it stated that the shares were placed with institutional investors by the brokers. He said that did not mean that the DCC Group had requested the brokers to place them. It was just an expression used and factually the brokers did place them. I have not attached any particular weight to the reference to shares having been "placed" in the stock exchange announcement or in earlier drafts of it in determining who in reality brought about the first share sale. What I have attached weight to is the communication between Mr. Flavin and Mr. McCann during 3rd February, including the timing of the despatch, and the wording of, the various drafts, which is only indicative of Mr. Flavin being in control of the process and believing himself that he was in control.

291. Thus far, I have been analysing the evidence in relation to the first of the Share Sales. In relation to the second and third transactions, in my view, each of the offers made by Mr. Barrett was accepted and became a completed agreement because Mr. Flavin decided that the offer should be transmitted to Mr. Diepenhorst on behalf of Lotus Green via Mr. O'Dwyer. On the evidence, in my view, it is clear that there was no independent evaluation of either offer by anyone on behalf of Lotus Green. Once again, in the case of each offer, acceptance by Mr. Diepenhorst was a mere formality. The fact that each offer was at the prevailing market price does not affect that conclusion.

Conclusions on whether Mr. Flavin dealt, caused or procured

292. The first question which I have to determine is whether, on the evidence, Mr. Flavin in his personal capacity, whether as agent or as principal, dealt, within the meaning of s. 107, in the shares which were disposed of by virtue of the Share Sales. Of the actions comprehended by the definition of "dealing" which I have identified earlier at G. as being pertinent in this case, as Mr. Flavin had neither a legal nor a beneficial interest in the shares, he did not have the capacity either to dispose of them or to make, or offer to make, an agreement to dispose of them as principal. He professed to have no authority to act as agent on behalf of Lotus Green. However, the reality is that he assumed authority to act exclusively in the negotiations leading to the sales. In fact, he assumed total control on the sell side and the prospective buyers did not have any access to any other decision maker, if there was any. I infer from the evidence that there was none. The evidence discloses that Mr. Flavin's executive authority from the board of DCC at the time extended to transactions up to a level of €3m. The only reasonable inference which can be drawn from the evidence is that Mr. Flavin acted with the tacit, if not express, approval of the board of DCC. Having regard to the magnitude of the transaction, I infer from the evidence that he must have had express approval of the members of the board, although it was not formalised in a board resolution. This conclusion is consistent with evidence which I will outline later, when dealing with the relationship of the board of DCC with the board of Lotus Green. The shares in Fyffes were a significant component of the assets of the DCC Group. In my view, on the evidence, Mr. Flavin made the three agreements to dispose of the shares as agent for the DCC Group.

293. Alternatively, if the conclusion that it was Mr. Flavin, as agent for the DCC Group, who made the agreements to dispose of the shares is incorrect, I have no doubt that, on the basis of the proper meaning of "induce" in Part V, which is analysed at G. above, he induced Lotus Green to make the three agreements because he exerted influence over Lotus Green and that influence wholly, not just materially, contributed to the acceptance of the offer to buy on each occasion. An offer conveyed by Mr. Flavin via Mr. O'Dwyer to Mr. Diepenhorst for acceptance by Lotus Green was never going to be rejected.

294. The plaintiff argued that Mr. Flavin also induced Davy to offer to make an agreement to acquire the shares. There is some basis

for the plaintiff's contention that it was Mr. Flavin who fashioned the offer which was ultimately accepted on 3rd February, 2000, in that I believe that it was his decision that the DCC Group would only sell the entire or half of the holding, the preference shares to be included, if it was half. However, in my view, it would not be correct to conclude that the outcome on that day, that a bid was made, was materially brought about by reason of persuasion or the exertion of influence by Mr. Flavin. The outcome was the result of wholly independent decisions made by the Davy and Goodbody personnel.

295. While I have no doubt that, as regards the Share Sales, Mr. Flavin dealt, that dealing was only unlawful if, at the time of dealing, he was in possession of price-sensitive information by reason of his connection with Fyffes, which remains to be considered.

296. In view of the finding that Mr. Flavin dealt, the issue whether he caused or procured any of the corporate defendants to deal, is redundant. However, for completeness, I hold that the evidence supports a finding that, applying the principles set out at I. above, Mr. Flavin both caused and procured the dealing which resulted in the Share Sales.

Q. Facts relevant to issues (2), (3) and (4) at M. above.

Lotus Green: how it became part of the DCC Group and acquired its stake in Fyffes.
297. The facts set out hereunder in relation to the incorporation and constitution of Lotus Green, its acquisition by, and structure within, the DCC Group and its acquisition of the DCC Group shareholding in Fyffes are partly extrapolated from a statement of facts put in evidence by the plaintiff at the request of the court. The information in the statement of facts was derived from minutes, stock transfer forms and other documents. It was presented in the terms in which it appeared in those documents. The statement was submitted on the basis that the parties were not in full agreement as to the accuracy and legal effect of the information set out in it and reserved their rights in that regard. However, as I understand the ultimate position of the defendants, it is that the facts and matters are agreed, although not their consequences in fact or in law. In any event, on the basis of the evidence, I am satisfied that the facts set out below are true and accurate and I so find.

298. Lotus Green was incorporated in the State on 22nd February, 1995. It would appear that it was, in effect, a "shelf" company which was acquired by the DCC Group on 11th May, 1995.

299. The authorised share capital of Lotus Green was IR£100,000 divided into 100,000 shares of IR£1 each. The subscribers to the memorandum of association took the initial issued share capital, two shares of IR£1 each. With effect from 26th May, 1995, those shares were transferred as follows:

(1) one ordinary share of IR£1 to Marjove Ltd. (Marjove); and

(2) one ordinary share of IR£1 to DCC Nominees Ltd. (Nominees), which, by a declaration of trust dated 26th May, 1995, declared that it held that share in trust for Marjove.

300. On 10th August, 1995, the one ordinary share of IR£1 held by Marjove was transferred to DCC International Holdings BV (BV). At the same time, Nominees declared that it held the other ordinary share of IR£1 as nominee of, and in trust for, BV.

301. Some years later, in order to comply with a new Dutch law, described in the evidence as a regulation on "formal foreign companies", the issued share capital of Lotus Green was increased. Pursuant to a resolution passed at a meeting of the board of Lotus Green on 27th March, 1998, 14,170 ordinary shares of IR£1 each were issued to BV for a total consideration of NLG39,998. This brought the issued and paid-up capital above NLG40,000, the new limit for registration under the new regulation.

302. Lotus Green was, accordingly, a wholly-owned subsidiary of BV, which, in turn, was a wholly-owned subsidiary of DCC. BV, which had been incorporated in 1992, had other concerns beside Lotus Green: it was the company within the DCC Group which owned and controlled the DCC Group's assets in the United Kingdom and other concerns in continental Europe.

303. Pursuant to a resolution of an extraordinary general meeting of Lotus Green held on 25th August, 1995, it was resolved that the articles of association of Lotus Green be amended by, *inter alia*, the insertion of provisions to the following effect:

(a) that all general meetings of the company should be held in the Netherlands;

(b) that all directors' meetings should be held in the Netherlands;

(c) that the company should have 'A' directors and 'B' directors;

(d) that only persons residing in the Netherlands should be appointed 'B' directors;

(e) that a majority in number of all directors should at all times be 'B' directors;

(f) that no act, contract or transaction should be binding on the company unless approved or authorised by at least one 'A' director and one 'B' director acting together;

(g) that the seal of the company should include the words "The Netherlands" and should be kept and used only in the Netherlands;

(h) that the head office of the company should be situated in the Netherlands; and

(i) that all books and records of the company, except those required by law to be kept at the registered office of the company, should be kept at its head office.

304. At all material times from 25th August, 1995 up to the middle of 2000, there were three 'B' directors of Lotus Green: Mr. Roskam, Mr. Venneboer and Mr. Diepenhorst, all of whom were resident in the Netherlands. Throughout the same period Mr. O'Dwyer was an 'A' director. During two successive periods between 25th August, 1995 and 4th May, 1998, there was an additional Irish 'A' director. However, on the evidence, the second 'A' director never attended a board meeting of Lotus Green .

305. With effect from 25th August, 1995, a Dutch company, ING (Nederland) Trust, became the secretary of Lotus Green

306. It is undoubtedly the case on the evidence that the decision of DCC in 1995 to hive off the DCC Group shareholding in Fyffes was wholly tax driven. Further, Lotus Green was acquired and structured solely to effect that purpose, notwithstanding that the minutes of the board meeting of DCC at which the decision was made recorded the purpose as "corporate restructuring". The tax planning scheme, which was designed so that capital gains tax in this jurisdiction and in the offshore jurisdiction would be avoided on the ultimate sale of the DCC Group shareholding in Fyffes, involved the following four companies:

(1) Marjove, a company incorporated in the State, which was to have a share capital divided into 76 "A" ordinary shares and 24 "B" ordinary shares, the shares ranking *pari passu* in all respects, including voting rights, save that the "A" shares would be entitled to repayment only at par on a winding-up, leaving the other assets of the company available to the holders of the "B" shares on winding-up.

(2) An Irish company in the DCC Group, DCC Properties Limited (Properties), which was to acquire the "A" ordinary shares in Marjove.

(3) A Dutch company in the DCC Group, BV, which was to acquire the "B" ordinary shares in Marjove.

(4) Lotus Green, an Irish registered company, which initially was resident in Ireland for tax purposes and was to be a wholly-owned subsidiary of Marjove.

307. In broad terms, from a taxation perspective, the first objective was that Marjove and Lotus Green would be part of the DCC tax group for the purposes of capital gains tax in this jurisdiction, so that the sale of the shares in Fyffes by DCC and S&L to Lotus Green would not give rise to capital gains tax liability in this jurisdiction. The second objective was to get Lotus Green out of that tax group without incurring capital gains tax liability in this jurisdiction. This objective was to be achieved by the liquidation of Marjove, followed by a distribution in specie of its assets – IR£76 to Properties and the shares in Lotus Green to BV. Under the then prevailing tax legislation, if a company ceased to be a member of a capital gains taxation group as a consequence of the winding-up of another member of the group, no gain would crystallise for tax purposes. The third objective was that Lotus Green would change its residence for tax purposes from Ireland to Holland. This event would not give rise to capital gains tax liability in this jurisdiction as Lotus Green would have already left the DCC tax group for capital gains tax purposes. The final objective was that Lotus Green would qualify for participation exemption in the Netherlands, so that no capital gains liability would arise in the Netherlands on the eventual disposal of the DCC Group's holding of Fyffes shares.

308. The steps taken to achieve the foregoing objectives were as follows:

(1) As a result of the series of meetings held on 26th May, 1995 –

§ Lotus Green became a wholly-owned subsidiary of Marjove, and

§ Properties and BV respectively acquired the "A" shares and the "B" shares in Marjove.

(2) On 30th June, 1995, the Dutch tax authorities gave clearance for a participation exemption for Lotus Green in relation to its proposed shareholding in Fyffes,

(3) On 9th August, 1995, two share purchase agreements (the Agreements) were executed in favour of Lotus Green: one by DCC for the sale of the entirety of its holding of ordinary and preference shares in Fyffes at the price of IR£30,412,110.68; and the other by S&L for the entirety of its holding of ordinary shares in Fyffes at the price of IR£8,050,875.00.

(4) Marjove was voluntarily wound up on 20th August, 1995 and its shareholding in Lotus Green was distributed in specie to BV.

(5) As has been stated earlier, on 25th August, 1995, the articles of association of Lotus Green were amended to effect the transfer of its residence to Holland.

309. The manner in which the purchase by Lotus Green was financed was that on 9th August, 1995 Lotus Green obtained an interest-free loan from Properties for the combined purchase prices provided for in the Agreements – IR£38,462,985.68. That sum was borrowed by Properties from Bank of Ireland. When Lotus Green paid the combined purchase prices, which was equivalent to that sum, to DCC and S&L on foot of the Agreements, those companies then made an interest-free loan to Properties, which enabled Properties to discharge its indebtedness to Bank of Ireland. All those transactions were effected on 9th August, 1995.

310. The position, accordingly, was that on 9th August, 1995 Lotus Green executed the Agreements for the acquisition of the shareholding of the DCC Group in Fyffes and paid the entire purchase money. However, it was indebted to Properties for the entire purchase money under the loan agreement of that day, which stipulated that

(i) the term of the loan was fifteen years,

(ii) the loan was interest-free for the first year of the term, with the parties to agree each subsequent year whether, and at what rate, interest would apply thereafter,

(iii) the purpose of the loan was to finance the purchase of the shares, and

(iv) the loan was repayable at the end of the term, or earlier in certain circumstances, including the disposal by Lotus Green of all its assets for cash.

311. The loan agreement also provided that the provisions as to repayment of the loan would be subordinate to rights of all other creditors of Lotus Green (other than creditors with subordinated rights). By a supplemental agreement made on 25th August, 1995, the loan was redenominated into Dutch guilders, the principal amount thereof thenceforth being NLG100,138,382-20.

312. Taking an overview of the evidence, in my view, there is no doubt that, between 11th May, 1995 and 25th August, 1995, every decision of, and every action taken by or on behalf of, Lotus Green was managed, controlled and facilitated by DCC. While the defendants did not concede that such was the case, they submitted that the date of the change of residence of Lotus Green marks,

in essence, the ground zero for the issues concerning Lotus Green in these proceedings. I think that proposition is substantially correct, although it needs to be qualified. The first qualification is that recognition has to be given to the fact that the interest Lotus Green acquired in the shares came to it in implementation of a tax avoidance scheme. However, nothing emerged in these proceedings to suggest that that was other than a perfectly legitimate exercise. Secondly, and more importantly, it came with what might be colloquially referred to as "baggage": certain aspects of its future structure and the manner in which it would operate were pre-ordained by DCC.

Lotus Green: its position from 25th August, 1995 onwards.

313. The stance adopted by the defendants was that, on the execution of the Agreements and on the payment by Lotus Green to DCC and S&L of the purchase money due to them respectively, Lotus Green became the beneficial owner of the shares. While counsel for the plaintiff accepted that the normal construction of such events is that the beneficial ownership in the asset is transferred to the purchaser, it was suggested that in this case questions arise as to whether the Agreements, being for the purchase of shares in a public company, as a matter of law, would be specifically enforceable and whether the manner of financing the transaction, what was called a "circular loan arrangement", could result in the transfer of the beneficial interest.

314. I have no doubt that, if there had been a dispute between the parties thereto and if the issue of the specific enforceability of the Agreements had arisen, a court would have ordered specific performance. If authority is needed for that proposition it is to be found in Pernod *Ricard v. FII (Fyffes)Plc*. (High Court, Costello J., 21st October, 1988, unrep., affirmed by the Supreme Court on 11th November, 1988, unrep.), cited in Farrell on **Irish Law of Specific** Performance (Butterworths 1994) at para. 1-23. As to the method of financing the acquisition by Lotus Green, there is no doubt that the substance of the transactions in August, 1995 was that assets and liabilities were moved around among companies in a group of companies. However, that was done properly in the context of the separate corporate identity of each of the companies in the group. At the end of the process, in my view, Lotus Green had acquired all of the equitable interest in the shares, but was indebted to Properties in a sum in excess of NLG100m. Accordingly, in my view, after 25th August, 1995, Lotus Green was the beneficial owner of the shares.

315. While, as and from 25th August, 1995, the Dutch resident Lotus Green, was the beneficial owner of the shares, it did not have the legal title, although it could have called for it. This would have involved getting stock transfers in the prescribed form executed by DCC and S&L and custody of the share certificates. The reasons advanced by the defendants for the failure of Lotus Green to call for the legal title were that there would have been stamp duty exigible on the stock transfers, which is true, and, echoing rationalisation advanced for Mr. Flavin not referring Mr. McLaughlin to Lotus Green on 27th January, 2000, that the DCC Group would be putting a "for sale" sign on the shares, if Lotus Green's ownership became public. It is difficult to avoid the conclusion that the latter reason constitutes ex post facto rationalisation. It is difficult to understand how Lotus Green's ownership could not have been presented publicly as "corporate restructuring". Therefore, the fact that, after 25th August, 1995, Lotus Green did not get legal title to the shares is a factor of some significance in the overall context of the issues affecting Lotus Green in these proceedings.

316. The Dutch resident Lotus Green inherited a situation in which, just over two weeks previously, it had become the beneficial owner of in excess of a 10% stake in Fyffes, which had not been notified to Fyffes in accordance with s. 67 of the Act of 1990. DCC obtained advice on the necessity to give notification under s. 67 from William Fry and the advice was contained in a letter of 21st July, 1995 from Mr. Alvin Price of that firm to Mr. Scholefield. The advice was that the Act of 1990 did not specifically address whether intra-group transfers of interests in shares were notifiable, but in the case under consideration, as the true owner was the DCC Group, and Fyffes and the public had already been very clearly notified of that fact in accordance with the requirements of the Act of 1990, the Act of 1990 should not be construed in a manner which would require a further notification of essentially the same information. It was stressed that, whether to notify or not, was strictly an issue for the DCC Group, and Fyffes had no input in the matter, which was similar to the view expressed by Fyffes' legal advisers, Arthur Cox, in a letter to Mr. Scholefield of 19th July, 1995. The non-notification of the acquisition by Lotus Green of the beneficial ownership of the shares was characterised by the plaintiff as an example of the defendants viewing Lotus Green as having a legal personality that was interchangeable with that of DCC. Aside from that it was suggested that it was significant that the matter was not considered by the board of Lotus Green, given the ramifications for Lotus Green of non-compliance with s. 67: it would not be able to enforce any right or interest of any kind whatsoever in respect of the shares by action or legal proceedings (s. 79(3) of the Act of 1990).

317. The advice from William Fry addressed Lotus Green's duty of disclosure under s. 67 and must be seen as advice to Lotus Green as a company in the DCC Group. In not giving notification under s. 67, Lotus Green acted in accordance with the legal advice it had obtained. Whether that advice was right or wrong is immaterial. What is material is that its existence explains why Lotus Green did not give notification under s. 67. In my view, the fact that no notification was given does not bear on the issues in this case.

318. When Lotus Green became resident in the Netherlands, the shares attracted the benefit of the participation exemption, the effect of which was that any capital gain which arose on the sale of the shares at a future time would be exempt from capital gains tax under Dutch law, if the participation exemption were still in force. From a tax perspective, two concerns arose after 25th August, 1995. The first was ensuring that the participation exemption was operative when the shares were being sold. As the outline of the evidence as to Lotus Green's involvement in the Share Sales set out above illustrates, this concern came sharply into focus on 3rd February, 2000 when the sale of part of the holding was being contemplated. The second concern was that the Revenue Commissioners in this jurisdiction might not accept that the residence of Lotus Green had ceased to be within this jurisdiction.

319. The possibility of a challenge from the Irish tax authorities was considered before the scheme was implemented. As early as 2nd May, 1995, Coopers & Lybrand advised of the need to take great care to ensure that the transfer of residence would stand up to Revenue assault. The advice, contained in a letter dated 2nd May, 1995 to Mr. O'Dwyer, was that it would be vital to be able to demonstrate that effective management and control of Lotus Green was in The Netherlands. All board meetings would have to take place in The Netherlands and it was emphasised that great care would have to be taken to ensure that the company was not de facto controlled from Ireland. Three years later, when there had been an improvement in the Fyffes share price and a sale of the holding was a possibility, a similar theme ran through the advice given by Coopers & Lybrand. In a letter of 1st May, 1998 to Mr. O'Dwyer, it was pointed out that it was important that it could be demonstrated that any decisions in relation to Fyffes were made by the board of Lotus Green. The advice was that, while it was perfectly reasonable that the board should receive suggestions from the parent organisation, it was important that they were not put in a position "of merely rubber stamping decisions already made". They should be briefed, put in a position to exercise independent judgment and make the final decision. It was submitted on behalf of the defendants that the evidence should be assessed on the basis that the true import of the advice was taken on board and followed. The plaintiff's case was that the evidence demonstrates that the defendants were more concerned with ensuring that the written record would pass muster than ensuring that the actuality was in conformity with the advice.

320. The court is concerned with how Lotus Green operated within the DCC Group from May, 1995 to March, 2000, because the plaintiff has been constrained to advance the arguments that Mr. Flavin was a shadow director of Lotus Green, that Lotus Green acted as agent for DCC and S&L in relation to the holding and disposal of the shares in Fyffes, and that Lotus Green should be treated

as a single entity with DCC and S&L for the purpose of meeting the liability of DCC and S&L to account under s. 109. The plaintiff has been constrained to advance those arguments to counter the defences that Lotus Green has no liability to account under s. 109 because it did not deal unlawfully under s. 108 and that, even if DCC and S&L are liable to account under s. 109, there is nothing to account for, those corporate defendants not having made any profit out of the Share Sales. In broad terms, a fundamental question at the core of the legal issues to which those arguments and contentions give rise is whether, in relation to its holding and disposal of the shares, Lotus Green functioned independently of DCC in substance and reality and not merely in form.

321. Through cross-examination and in its submissions, the plaintiff has conducted a very comprehensive survey of the activity and corporate life of Lotus Green during the first five years of its existence and it has demonstrated that Lotus Green was largely effectively administered from DCC House in Dublin. On the evidence, it would appear that the matters which were dealt with in the Netherlands were regulatory and taxation matters governed by the law of the Netherlands. However, in my view, cognisance must be taken of the fact that Lotus Green was part of the DCC Group and the fact that it was in a position to, and did, avail of the synergies which that position afforded. That does not necessarily mean that it did not function independently of DCC. The fact that administrative, secretarial and treasury services were provided for Lotus Green in the Group headquarters is not indicative of Lotus Green being managed or controlled by DCC. To take one example, the plaintiff argued that the fact that the process of increasing the issued share capital of Lotus Green in March, 1998 was initiated by an in-house accountant, who was an employee of DCC, was evidence of control of DCC. What the evidence discloses is that, as a result of a change in Dutch law, to which I have already alluded, in order to be registered as a "formal foreign company", a company had to have an issued and paid-up share capital of NLG40,000. On the basis that such registration would strengthen arguments in relation to the Dutch residency of Lotus Green, a special meeting of the board of Lotus Green was called to consider a resolution to bring the issued share capital of Lotus Green up above that limit. It seems to me perfectly natural that the process which led to the resolution, which was passed, should be initiated in Group headquarters.

322. The crucial question, in my view, is whether, on the evidence, the board of Lotus Green functioned independently of DCC and Mr. Flavin in making the decisions in relation to the business of Lotus Green which were matters for the board. In reality, the business of Lotus Green was wholly centred on the shares – exercising its rights as shareholder, receiving dividends, paying a dividend to its parent, BV, and ultimately deciding whether to hold or dispose of the shares. Before addressing that crucial question, I will deal with two related points made by the plaintiff in support of the proposition that, as it suited their purpose, the defendants either blurred, or relied on, the distinction between Lotus Green, on the one hand, and DCC or the DCC Group, on the other hand.

323. The first point arose out of the fact that, when applying to the Dutch tax authorities on 1st June, 1995 for clearance for participation exemption for Lotus Green, Coopers & Lybrand in Amsterdam stated that the DCC Group participated in the management of Fyffes in a number of ways, the first being through its representation on the board of Fyffes, which was through Mr. Flavin. The second point arose from the fact that in the period under consideration, for accounting purposes, the DCC Group treated its investment in Fyffes as an associated undertaking. This treatment was contingent on the DCC Group getting a letter from Fyffes annually indicating that it exercised significant influence over the operating and financial policies of Fyffes. The plaintiff's argument was that this influence was exerted through the medium of Mr. Flavin's presence on the board of Fyffes. All I find it necessary to say about these points is that they seem to me to have a rather tenuous connection with the issues with which I am now concerned. The fact is that Mr. Flavin was elected to the board of Fyffes at Fyffes' AGM like any other director. His duty as a director was owed to Fyffes. The fact that the evidence shows that he did not defer to and was not "led and said" by the board of Lotus Green in the performance of that duty, in my view, is irrelevant to the resolution of the issues in this case. In any event, the shareholding of which Lotus Green was the beneficial owner was an asset of the DCC Group.

324. In considering the crucial question whether the board of Lotus Green functioned independently, it is necessary to explore two distinct aspects of the relationship of the two companies: how the board of DCC, the ultimate parent, treated the board of Lotus Green; and the interface between the executives of DCC and the board of Lotus Green.

Relationship of Board of DCC and Board of Lotus Green
325. It is clear on the evidence that, from 1996 onwards, the board of DCC adopted a recommendation of Mr. Flavin that DCC's continued shareholding in Fyffes was no longer a correct strategic position and that the asset should be realised when the time was opportune. It was suggested by the defendants that the new strategy dated back to 1995. However, there is no evidence in the form of a board resolution to support this. The decision of the board at its meeting on 31st July, 1995, approving the sale to Lotus Green, is recorded in the minutes as an intra-group transfer of the beneficial ownership in the Fyffes shares, which Mr. Flavin advised the board was for corporate restructuring purposes. Mr. Flavin's evidence of the position of the board of DCC in relation to this asset, which at the time represented about 15% of the market capitalisation of DCC on the stock market, was that the board of DCC reserved to itself, on the recommendation of the chief executive, the overall strategy, which was renewed annually as a result of a careful annual strategic review and was reaffirmed in 1999. The asset was a marketable security. What was delegated to the board of Lotus Green, he testified, was the execution authority in the event of a sale, so that a decision as to whether to accept any offer would be a matter exclusively for the board of Lotus Green. That delegation was made in the full knowledge of the calibre of the members of the board of Lotus Green. From the perspective of Lotus Green, Mr. Diepenhorst, who was the only Dutch director of Lotus Green who testified, saw Lotus Green's function in relation to the shares as follows: to receive under the participation exemption the dividends tax-free; to receive eventually the proceeds of sale tax-free; and to carry the shares.

326. The plaintiff sought to make something of the fact that DCC, if it had changed its strategy and decided that it was strategically beneficial to retain the holding in Fyffes, could have overcome any resistance it encountered from the board of Lotus Green by changing the board, or even putting Lotus Green into liquidation. Mr. Diepenhorst, recognising the corporate reality of the position of Lotus Green, acknowledged that, if DCC had changed its strategy and decided to retain the holding, and, if the board of Lotus Green had been properly informed, it would have accepted the change. That, of course, did not happen. The fact that it could have happened, did not mean that Lotus Green was any less capable of functioning independently of its parent than a subsidiary company usually is.

327. The plaintiff also focused on events in the spring of 1998, when there was a marked improvement in Fyffes' share price. At the start of 1998 it stood at €1.35, by 31st March it was at €2.32, by the end of April it was at €2.45 and it peaked on 5th May at €2.67. The board of DCC carried out its annual review of strategy at the end of March that year. The manuscript notes taken by the secretary, Mr. Scholefield, at the meeting, which took place on 30th March, 1998, recorded a discussion about the Fyffes holding, noting that it was then worth IR£60 m., against an acquisition cost of IR£24 m. The note also recorded the following elements of the discussion: "sale into the market"; "acceptable party to the Board"; "if someone came bidding us for the stock"; "If the opportunity arises"; "Executive discretion to a [market] party or a party acceptable to the Fyffes board". The content of the manuscript note was not recorded in the minutes of the meeting. The next meeting of the board was held on 8th May, 1998. The minutes of that meeting recorded a discussion in relation to the Fyffes holding which, according to the minute, arose in the context of a discussion on the results of DCC Foods, another company in the DCC Group. The minute recorded that Mr. Flavin noted that the board of Lotus

Green was then currently reviewing its strategy in relation to its interest in Fyffes. It was noted that the then current market value of the holding was approximately IR£75 m., compared to its carrying value on DCC's consolidated balance sheet at 31st March, 1998 of IR£21.479 m. Contemporaneous manuscript notes taken by Mr. Scholefield at that meeting recorded a discussion, which focused on the fact that Lotus Green was managed and controlled in Holland, that it was taken offshore and that there would be no capital gains tax liability.

328. The objective of the plaintiff in focusing on those events and documents was to invite the court to draw the inference that, at the meeting on 30th March, 1998, the board of DCC decided to sell the holding in Fyffes and that Mr. Flavin should have executive discretion in relation to the sale. I do not think that that would be a proper inference to draw. However, I am satisfied, on the evidence, that there was a discussion of the possibility of a sale, the circumstances in which it might arise and how it might be effected. It is remarkable that nobody at the meeting realised the significant fact that the beneficial ownership in the holding had been transferred to Lotus Green and that the board had to be expressly reminded of that fact at the next meeting. It is clear on the evidence that, in the light of the share performance, serious consideration was given to the disposal of the holding between the two meetings.

329. It is also clear that the relevant personnel within the DCC Group came to realise that to reap the tax advantage which putting the investment offshore was designed to achieve would necessitate following the tax advice. In this context Mr. O'Dwyer sought the advice of Coopers & Lybrand on 24th April, 1998. The matter was obviously treated urgently and Coopers & Lybrand furnished preliminary advice on 27th April, followed by further advice on 1st May in the letter to which I have referred earlier.

330. At a meeting of Lotus Green held on 6th May, 1998, the first step towards a prospective sale was taken. As recorded in the minutes, the chairman of the meeting, Mr. Roskam, requested Mr. Venneboer and Mr. O'Dwyer to prepare a paper for the board outlining the strategic options available in relation to the Fyffes holding at that time. Events overtook, in that, after peaking, the share price declined, and the urgency evaporated. The next meeting of the board of Lotus Green was held on 28th July, 1998 and the minutes of that meeting recorded that Mr. Venneboer and Mr. O'Dwyer presented a paper outlining the strategic options available in relation to the holding in Fyffes and the board accepted the recommendation set out therein. I think the recommendation may be fairly paraphrased as one to put the matter on hold, although there was a rider that "it might be wise to take a profit on part or all of the investment if the share price increases to around IR£2.00 (€2.54) per share".

331. During the period between the two board meetings of DCC, between 30th March, 1998 and 8th May, 1998, there was contentious correspondence between Mr. Flavin and Mr. Neil McCann arising from the election of the DCC Group to take the scrip dividend to which I will refer later, the source of the contention being Fyffes' assertion that Mr. Neil McCann's permission was a prerequisite to the entitlement of the DCC Group to elect for the scrip dividend. In a letter of 30th April, 1999 to Mr. McCann, Mr. Flavin stated that the decision-making process for the purchase or sale of shares in Fyffes was not under his control and that he was not even a member of the board of the company that would make a decision on a sale of the Group's existing holding. He reiterated that position in a subsequent letter of 5th May, 1998. Whatever the state of awareness on the part of Mr. Flavin of the implications of the beneficial ownership of the holding having been transferred to Lotus Green on 30th March, 1998, by 8th May, 1998 he was fully aware of the implications.

332. The board of DCC had no formal involvement in the share sales in February, 2000. As to what the individual members of the board knew about what was happening, the court has heard the evidence of Mr. Flavin, Mr. Crowe and Mr. Barry. Mr. Flavin's evidence was that he kept the chairman of DCC, Mr. Spain, informed of the approaches from Davy and Goodbody. He kept Mr. Spain informed of what was going on. However, he neither sought Mr. Spain's approval nor did Mr. Spain give approval. Mr. Flavin did not recollect informing any of the other non-executive directors of what was going on. The only non-executive director who testified was Mr. Barry. His evidence was that the first he heard of the first sale was when Mr. Flavin telephoned him to advise him of the sale and the imminent stock exchange announcement. He did not recollect any conversations with Mr. Flavin in relation to the sale of the shares before that. Mr. Crowe, who was an executive director, recalled Mr. Flavin telling him, probably on 2nd February, 2000, of the approaches from stock brokers seeking to purchase the Fyffes shares. He also recalled Mr. Flavin saying that the decision on any offer was a matter for the Dutch or something to that effect. The impression he gave was that Mr. Flavin's remarks were very much *en passant*. Mr. Crowe heard of the first sale soon after it occurred, probably on 4th February.

333. There is no evidence that the board of DCC as an organ in a formalised manner expressly approved of the Share Sales or the manner in which they were effected in February, 2000. However, as I have stated in the context of the issue of whether Mr. Flavin dealt, I infer that the board tacitly approved of Mr. Flavin acting as agent of the DCC Group in the sale of the shares. I also consider that it is probable that he did so with the informal express approval of the members of the board. I do not think it reasonable to infer that the board of a public company would countenance the disposal of an asset worth over €100m in the manner suggested by the defendants in these proceedings.

334. Finally, in relation to the relationship between the board of DCC and the board of Lotus Green, I come back to the impedimenta subject to which the Dutch resident Lotus Green acquired with the shares. It inherited the corporate structure which, through the articles of association of the company, ensured that a sole 'A' director could veto any transaction proposed to be entered into by Lotus Green, although that structure was originally designed to ensure for tax purposes that control would, and would be seen to, reside in Holland. While the board of DCC was not concerned on an ongoing basis with the detail of the corporate structure of Lotus Green, it is clear, on the evidence, that there was an awareness of the structure even among the non-executive directors of DCC. Mr. Barry, when questioned as to what control he envisaged DCC having over the holding once it was transferred to Lotus Green, stated that DCC took a calculated commercial risk in transferring the holding. The control it exercised was that there were 'B' shareholders and 'A' shareholders and each side had a veto over the other. While he referred to shareholders, he obviously meant directors.

Interface between the executives of DCC and the Board of Lotus Green

335. In considering the interface of the executives of DCC with the board of Lotus Green, I propose first analysing the evidence on the topic that was referred to during the hearing as the scrip dividend issue. During the currency of Lotus Green's beneficial ownership of the holding in Fyffes, Fyffes had a scrip dividend plan under which ordinary shareholders in a particular year had the option of taking all or part of the final dividend payable to them in the form of fully-paid new ordinary shares, rather than in cash. Up to February, 1998, the issue as to whether to elect to take the dividend by way of shares or in cash did not arise in relation to the holding of the DCC Group: a cash dividend was taken. On 10th February, 1998, DCC and S&L, the registered holders of the stock, received the forms of election and mandate in relation to the final dividend for the year ended 31st October, 1997. The two most vital pieces of information in the accompanying letter were that the new shares would be allocated at a market price of IR£1.34 and notice of election had to be with Fyffes by 3rd March, 1998. On 16th February, 1998 the relevant documentation was sent by fax from DCC to ING (Nederland) Trust, the secretary of Lotus Green. On the same day Mr. Scholefield and Mr. O'Dwyer furnished a note to Mr. Flavin which tabulated the effect of taking or not taking up the scrip on the DCC Group stake in Fyffes, in particular, the impact of a

decision either way on the relative size of the stake as a percentage of Fyffes' issued ordinary share capital. As things stood, the fully diluted percentage was 10.09%. If the scrip was not taken up, but all the other shareholders did take it up, the fully diluted percentage would fall to 9.99%, whereas, if the scrip was taken up, the fully diluted percentage would remain at 10.09%.

336. On the basis of the documentary evidence, the next thing that happened was that on 2nd March, 1998 Mr. Flavin recorded in a file memorandum that he had telephoned Mr. Neil McCann that day "to inform him that we were taking up our final dividend in respect of the year ending 31 October, 1997 in shares". A copy of the note of 16th February, 1998 was attached to the memorandum. On 3rd March, 1998, Mr. Neil McCann sent a fax message to Mr. Flavin suggesting that Mr. Flavin should drop him a note requesting permission to accept the shares in lieu of the cash dividend, referring to an agreement which had been entered into between the parties in November, 1993, which was referred to in the course of the evidence as the "standstill" agreement, under which, at Fyffes' request, DCC undertook not to increase its shareholding above circa 10.5%. It was that fax which was the genesis of the contentious correspondence to which I have referred when discussing the events of 1998 earlier. The completed forms to elect to take the dividend in the form of shares, duly executed on behalf of DCC and S&L by Mr. Flavin and Mr. Scholefield, were sent by courier to the registering authority on 3rd March, 1998. Nothing much turns on this because DCC and S&L were the registered owners of the shares.

337. The documentation which purports to show that the election was made by Lotus Green bears the date of 18th February, 1998, although the documentation was generated later, in late March. The documentation consisted of a formal written resolution signed by the 'A' and 'B' directors resolving to elect to take shares in lieu of a cash dividend and to authorise DCC and S&L to return the completed forms, and letters from Mr. Diepenhorst, as a 'B' director, notifying Mr. Scholefield, in his capacity of company secretary of DCC and S&L, of the resolution. The explanation proffered by the defendants for this was that Mr. O'Dwyer communicated by telephone with the Dutch directors on 18th February, 1998. Each indicated his assent to taking the scrip. The paperwork subsequently put in place reflected that.

338. It was urged by the plaintiff that the evidence that the board of Lotus Green resolved to take the scrip on 18th February, 1998 was unreliable. The gravamen of this submission, as I understand it, is that the telephone calls to the Dutch directors did not take place. Further, it was urged that the reason advanced by Mr. Flavin for his interest in the issue, that he was concerned to ensure from the perspective of DCC that the DCC Group holding in Fyffes was maintained at a level of not less than 10% and, if necessary, DCC could purchase more shares in the market to redress any imbalance caused by a decision of Lotus Green, lacked credibility.

339. On a superficial level, the decision in relation to whether to elect to take the dividend in shares or in cash was a simple one. The strike price converted to euro was €1.70. On 16th February, 1998, the share price was at €1.84 and it was at the same level on 18th February. Between 18th February and 2nd March, the share price fluctuated but it was at all times considerably in excess of €1.70. On 3rd March it was at €2.01. There was an obvious benefit in electing to take the scrip on 18th February but that was a situation which might have altered between that date and 3rd March, if the share price had gone below €1.70. As I have stated earlier, only one of the Dutch directors of Lotus Green, Mr. Diepenhorst, testified. He remembered a conversation with Mr. O'Dwyer in relation to the matter and he assumed that it occurred on 18th February, as that was the date on the resolution. When it was put to him that it made no sense to make the decision in relation to the election on 18th February, his response was that, if the need arose, the decision could be reversed because the system of resolutions outside a meeting was available. That observation, of course, highlights the procedure for arriving at board decisions outside a meeting. In the articles of association of Lotus Green there was a modified form of Regulation 109 of Table A of the Act of 1963. Regulation 109 provides that a resolution in writing signed by all of the directors for the time being entitled to receive notice of a meeting of the directors shall be as valid as if it had been passed at a meeting of the directors duly convened and held. The modification in the articles of association of Lotus Green was that any such resolution might consist of several documents in the like form, each signed by one or more of the directors for the time being entitled to receive notice of meetings of the directors. There was a separate provision in the articles for a meeting "by means of conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other …". The document which bore the date 18th February, 1998 was not a written resolution of that date. However, that technicality is of no significance in the resolution of the issue with which I am now concerned.

340. The issue is whether the evidence demonstrates that, in reality, the decision to elect to take the scrip was Mr. Flavin's decision. I think the evidence points that way, for the following reasons. A matter of paramount importance to the DCC Group was to ensure that its holding in Fyffes was maintained at a level of not less than 10% of the capital of Fyffes. If, as was the case from 16th February onwards (and, indeed, as was the case from 10th February onwards) there was a financial incentive to Lotus Green in taking the scrip rather than cash, all the other shareholders enjoyed the same advantage and the probability was that they would elect for shares, rather than cash. While I accept the evidence that telephone calls were made to the Dutch directors on 18th February, on the basis of Mr. Diepenhorst's evidence, I am not satisfied that the Dutch directors were apprised of the factors which would determine, as of 3rd March, what would be a decision which would be in the interest of Lotus Green and, by extension, in the interest of the DCC Group as a whole, so as to enable them to make an independent decision. Mr. Flavin was aware of all of the relevant factors, including Fyffes' share price as of 2nd March, 1998, and I believe that on the basis of that knowledge he was instrumental in the taking of the scrip. I infer from the evidence that the board of Lotus Green "rubber stamped" that decision. The fact that Mr. Flavin appended the note of 16th February to his file note of 2nd March bears this out. The notion that DCC would have gone to the market and purchased shares, if it transpired that Lotus Green made a decision adverse to the interest of the DCC Group as a whole in relation to the dividend, in my view, is ex post facto rationalisation. Given that the strategy of DCC was to exit from Fyffes, it is implausible that the acquisition of further shares in Fyffes would have been contemplated, when that could have been avoided by taking the dividend in shares, rather than in cash. In any event, on the evidence, it is not clear that there was a real awareness on the part of Mr. Flavin at this time of the importance, from a tax perspective, of decisions in relation to the holding being made by Lotus Green independently. That awareness, I believe, only resulted from a consideration of a possible sale in late April, 1998.

341. It was part of the plaintiff's case that DCC, or Mr. Flavin, or both controlled Lotus Green, and that Lotus Green succumbed to instructions to alter material written records, or to create written records which did not reflect the reality of what happened, for tax purposes. Apart from examples I have already addressed, in relation to the Share Sales and the scrip dividend issue, the plaintiff relied, in particular, on the following examples:

> (a) The minutes of a board meeting of Lotus Green held on 12th December, 1996, as approved at the next meeting, which was on 17th April, 1997, recorded that at the December meeting Mr. O'Dwyer had proposed and it was resolved that an interim dividend of NLG2,990,000 be paid to the parent (BV) on 20th December, 1996. In fact, the payment of a dividend had not been an agenda item for the December meeting and it had not been discussed at the December meeting. It was acknowledged by Mr. O'Dwyer that that was the case. The intra-Company dividend item was not on the agenda through error and it was not on the agenda of the board meeting of BV, which was held in Amsterdam on the same day, by error. When the error was discovered, the position was rectified by agreement of the board.
>
> (b) The plaintiff cited two instances in which it was alleged that the approved and signed minutes of the board meeting

did not reflect what actually occurred at the meeting, where the item of business in issue was a revision of bank mandates, the meetings having been held on 10th December, 1997 and 16th December, 1999. Mr. O'Dwyer did not accept that this happened. It if did, in my view, it is not of any significance in the context of the issues in these proceedings. The bank accounts in question were only one facet of the banking arrangements of the DCC Group. The corporate and commercial reality was that, like any other subsidiary in a group of companies, Lotus Green was going to have to fall in line with the requirements of the bankers of the DCC Group and the strictures of good corporate governance of the Group as a whole.

342. In relation to the various examples which the plaintiff cited as representing alterations to documentation of Lotus Green, or the creation of documentation not reflecting the reality of what had happened, at the behest of DCC or Mr. Flavin, or both, the defendants' contention was that, if what was alleged happened, it did not happen at the instigation of either DCC or Mr. Flavin. In relation to the example which admittedly happened, the retrospective documentary approval of the dividend from Lotus Green to BV referred to at (a) above, it was submitted that this was done at the instigation of Mr. O'Dwyer, but it would be wrong to identify Mr. O'Dwyer with DCC in this context, because he was acting as a director of Lotus Green. This line of argument was a constant theme in the defendants' defence. It is true that Mr. O'Dwyer had different roles in relation to the events with which these proceedings are concerned: he was chief financial officer of the DCC Group and he was an 'A' director of Lotus Green, and, in the crucial period, the only 'A' director of Lotus Green. The general thrust of Mr. O'Dwyer's evidence was that, in performing certain functions, he was acting as a director of Lotus Green, rather than as an employee of DCC. While Mr. O'Dwyer no doubt honestly believed that to be the case, in my view, that type of subjective analysis cannot bind the court. Insofar as the defendants invited the court to infer that Mr. O'Dwyer could segregate the two roles and could do so to the extent of participating in a decision of Lotus Green independently of, and without regard to, the interest of the DCC Group as a whole, on an objective analysis of the position of Lotus Green within the DCC Group, of the *raison d'être* for the existence of Lotus Green and of the position of Mr. O'Dwyer as an employee and an executive of the ultimate parent, I do not think it would be appropriate to draw such inference.

343. Through cross-examination of the defendants' witnesses and in their submissions, the plaintiff's counsel pinpointed numerous instances in which executives and employees of DCC were instrumental in bringing about decisions of the board of Lotus Green after the company became resident in The Netherlands, some of which it was suggested could not be regarded as being beneficial to the interest of Lotus Green. One matter, which was highlighted in the reply of counsel for the plaintiff to the defendants' final submissions, was the fact that in July, 1998 the board of Lotus Green agreed to replace its existing interest-free loan with a loan from its immediate parent, BV, which was interest-bearing. The objective of the exercise was to obviate exposure on the part of BV to Dutch capital duty. It is undoubtedly the case that, viewed from the perspective of Lotus Green solely, it would be more beneficial to Lotus Green to have the benefit of an interest-free loan than be burdened with an interest-bearing loan. However, the fact is that Lotus Green was a member of a group of companies and, in that context, I do not think that a decision of the board of Lotus Green which, in fiscal terms, was beneficial to the Group as a whole connotes lack of independence on the part of the board.

Summary

344. In summary, in my view, the factors which suggest that the board of Lotus Green did not function independently of DCC and Mr. Flavin in making decisions in relation to the holding and disposal in Fyffes are:

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

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

(c) the manner in which the shares came to be sold in February, 2000, which I have already dealt with at O. above.

R. Applicaton of Section 108(9) to DCC and S&L

345. Having considered the submissions made, and the authorities cited, by the parties at H. above, I concluded that s. 108(9) must be given a purposive interpretation having regard to the provisions of the Directive.

346. Before applying s. 108(9) to the relevant facts in this case, I think it would be useful to consider the proposition advanced by the defendant in a hypothetical context. Let us suppose that A Limited agrees to sell to its wholly-owned subsidiary, B Limited, its shareholding in C Plc, the purchase price is paid but a stock transfer is not executed and A Limited remains the registered owner of the shares in the register of C Plc. Mr. X, who is an executive director of A Limited and is also a member of the board of C Plc, but is not an officer of B Limited, has non-public, price-sensitive information in relation to C Plc by reason of his connection with that company. B Limited sells the holding and, at its behest, A Limited executes a stock transfer in favour of the purchaser and hands over the share certificate. The following day, when the inside information becomes public, the share price of C Plc collapses. The purchaser claims compensation against A Limited and B Limited under s. 109(1)(a). The defence of A Limited to the claim is that its involvement in the transaction was not unlawful because it came within s. 108(9), relying on the fact that there was no overlap of membership between the board of B Limited and the board of A Limited. It seems to me, as a matter of common sense, that, to allow that defence would be likely to render the implementation of the Directive less effective, while not contributing at all to the legitimate objective of not preventing market makers pursuing their normal business, or stockbrokers from carrying out orders. In my view, to allow the defence would be likely to subvert the provisions of Part V.

347. Apart from that, however, even on a literal interpretation of s. 108(9), in my view, DCC and S&L cannot avail of the defence provided for in s. 108(9) for the following reasons:

(1) DCC and S&L did not participate into the Share Sales as agents for Lotus Green. I have already found that after August, 1995 Lotus Green was the beneficial or equitable owner of the shares, but the legal title remained in DCC and S&L and, accordingly, each held the shares as a constructive trustee. On the authority of the decision of the Supreme Court in *Bayworld v. McMahon O'Brien Downes* referred to at H. above, in my view, DCC and S&L were not involved in the Share Sales as agents of Lotus Green. They were involved as principals and were subject to the law, including the provisions of the Companies Acts, and, in the case of DCC, stock exchange regulation.

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

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

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

S. Was Mr. Flavin a shadow director of Lotus Green
349. I think it is worth reiterating the reason why this issue arises. It is because of the defendants' contention that the profit from the Share Sales accrued to Lotus Green solely, and that, while Lotus Green dealt, its dealing was not unlawful because Mr. Flavin, whom it is alleged by the plaintiff had price-sensitive information by reason of his connection with Fyffes, was not a *de iure* director or an employee of Lotus Green.

350. Having outlined at Q. above the evidence which the plaintiff asserted supported, *inter alia*, the argument that Mr. Flavin was a shadow director of Lotus Green, I identified three factors which suggest that the board of Lotus Green did not function independently of DCC and Mr. Flavin in making decisions in relation to the holding and disposal of the DCC Group shareholding in Fyffes. Two of those matters related directly to Mr. Flavin: the manner in which the election to take the scrip dividend occurred in March, 1998; and the manner in which the Share Sales came about in February, 2000.

351. At J. above I have analysed the submissions made, and the authorities cited, by the parties, on the meaning of "shadow director" as defined in s. 27 of the Act of 1990. The net question which arises on the application of s. 27 to the facts in this case is whether the evidence shows that Mr. Flavin was a person in accordance with whose directions or instructions Lotus Green was accustomed to act. Although I have found that Mr. Flavin was responsible for the major decisions made by Lotus Green in relation to the DCC Group shareholding in Fyffes, the election to take the scrip dividend and the Share Sales, I have come to the conclusion that the evidence does not establish that the directors of Lotus Green were accustomed to act in accordance with his directions or instructions. In my view, in relation to those two decisions, it was not merely a question of Lotus Green acting on the directions or instructions of Mr. Flavin. As I have already stated, in my view, he totally controlled both processes to the extent that the involvement of Lotus Green was a mere formality. However, while those instances were probably the most important decisions that were made in the corporate life of Lotus Green up to 14th February, 2000, they were specific instances. The evidence does not establish the level of real influence on an ongoing basis which is a requirement of s. 27.

352. While, on the basis of my determination as to the proper construction of s. 108(3) at E. above, the issue whether DCC was a shadow director of Lotus Green is no longer a live issue, for the purpose of distinguishing the position of Mr. Flavin and DCC, I would make the following observations. DCC chose to appoint the chief financial officer of DCC to the board of Lotus Green as a sole "A" director in circumstances where, under the provisions of the articles of association of Lotus Green, that director had effectively a veto over the actions of the board. That appointment in those circumstances enabled DCC, through Mr. O'Dwyer, to exercise a level of real influence over the corporate affairs of Lotus Green on an ongoing basis. That state of affairs could have been avoided, and DCC could have ensured that the board of Lotus Green would be, and would be seen to be, independent of DCC had it appointed one or more persons to be "A" directors who were independent of DCC. By the course it chose, DCC rendered the making of an objective assessment as to whether Lotus Green was acting under the directions or influence of DCC, exerted through Mr. O'Dwyer, or acting independently of DCC, very difficult. If it was a live issue, I would incline to the view that DCC was a shadow director of Lotus Green.

T. Lotus Green as agent of DCC and S&L/single entity

Recapitulation of the issue
353. In analysing the submissions made, and the authorities cited, by the parties in relation to what I have referred to in the shorthand I adopted as the agency argument and the single entity argument at K. above, I have explained why the plaintiff was constrained to advance these arguments. I do not propose to traverse that ground again, save to reiterate that the objective of the plaintiff in advancing the arguments was to ensure that, in the event that it had established that DCC and S&L had dealt unlawfully under the provisions of Part V and, in consequence, were liable to account under s. 109, the plaintiff would not be effectively deprived of the remedy of an account because, as the defendants contended, DCC and S&L made no profit from the Share Sales, because of the fragmentation of the ownership of the shares between DCC and S&L, as legal owners, and Lotus Green, as the beneficial owner.

Agency
354. As I stated in my conclusions on the agency argument at K. above, if the court is to use the device of inferring an agency to obviate an injustice, to do so must be consistent with the factual situation. Therefore, the question which arises here is whether it would be consistent with the facts as established to find that, as regards the holding and disposal of the shares and, in particular, the acquisition of the profit from their disposal, Lotus Green acted as agent of DCC and S&L. Because of the degree to which the concept of agency has been canvassed by both sides in this case, to the extent that Antonio's caustic remark about Shylock, that "the devil can cite Scripture for his purpose" springs to mind, I am conscious of the necessity to adopt a consistent approach on this aspect of the matter. I think the correct analysis of the factual situation is that, at the time of the Share Sales, two distinct interests subsisted in the shares: the legal interest which was vested in DCC and S&L; and the beneficial ownership which was vested in Lotus Green. When DCC and S&L dealt, as it is admitted they did, each was a trustee and each dealt as principal. When Lotus Green dealt, as it is admitted it did, its dealing related to the beneficial ownership and it dealt as principal. I do not think it is consistent with the factual situation to infer that Lotus Green held the shares, dealt and acquired the profit as agent for DCC and S&L, any more than it is to find, as a matter of fact, that S&L and DCC dealt as agent for Lotus Green. Therefore, I do not consider it appropriate to adopt the agency device in this case.

Single entity
355. In stating my conclusions on the single entity argument at K. above, I stated that DCC and Lotus Green should be treated as a single entity if the plaintiff has established that –

(a) an evidential basis exists for finding a factual identification of the acts of Lotus Green and DCC as regards the holding and disposal of the Fyffes shares, and

(b) not to so treat the two corporate defendants would allow the DCC Group to evade its obligations under Part V.

356. In relation to the first requirement, the starting point, in my view, in arriving at a correct analysis of the factual situation is that

the three corporate defendants were companies within the DCC Group. The Fyffes shares were an asset of the DCC Group and the holding was treated as an associated undertaking in the consolidated balance sheet of the DCC Group. At P. above, I have found on the facts that Mr. Flavin made the agreements which formed the basis of the Share Sales and he did so as agent of the DCC Group. In dealing in relation to the shares within the meaning of Part V, as it is admitted they did, the three corporate defendants did so in consequence, and in implementation, of those agreements. Between them they transferred the legal title to, and the beneficial ownership in, the shares to the buyers pursuant to those agreements. The profit in issue in these proceedings accrued from those agreements and their completion by the corporate defendants, that is to say, from the transfer by them of the legal and beneficial ownership in the shares which were a Group asset. I am satisfied that there was a factual identification of the acts of Lotus Green and DCC and S&L in relation to the generation of the profit from the Share Sales.

357. In relation to the second requirement, it is pertinent to restate the following findings and propositions:

> · In the light of the determinations I have made in relation to the proper construction of Part V, the only basis on which Lotus Green could have been liable to account under s. 109 was that it dealt in a manner which was unlawful by virtue of s. 108(6). · To make a finding that Lotus Green was so liable, it would have been necessary to find that the plaintiff had established that Mr. Flavin was a shadow director of Lotus Green. I have found at S. above that the plaintiff has not established that Mr. Flavin was a shadow director of Lotus Green.
>
> · Therefore, it follows that, even if the plaintiff has established the issue which remains to be dealt with, that, at the time of the Share Sales, Mr. Flavin was in receipt of price-sensitive information by reason of his connection with Fyffes, the dealing by Lotus Green was not unlawful by virtue of s. 108(6) and Lotus Green is not liable to account under s. 109.
>
> · I have held at R. above that DCC and S&L cannot avail of the defence provided in s. 108(9). Therefore, if (and this issue remains to be dealt with) Mr. Flavin had price-sensitive information by reason of his connection with Fyffes at the date of the Share Sales, DCC and S&L dealt unlawfully under s. 108(6) and are liable to account under s. 109. But the defendants' case is that no profit accrued to DCC and S&L from the Share Sales, so that there is nothing to account for.

358. If DCC and S&L are liable to account, and if the defendants are correct in their contention that the profit accrued to Lotus Green solely because it was the sole beneficial owner of the shares, not to treat Lotus Green, DCC and S&L as a single entity for the purpose of affording the plaintiff an effective remedy under s. 109 would allow the DCC Group to evade its obligations under Part V. I think that, as a matter of law and fact, the profit accrued to Lotus Green solely. Therefore, in my view, for the purposes of affording an effective remedy under s. 109, the three corporate defendants should be treated as a single entity. To revert to the start of the analysis of the legal principles at K. above, that determination falls within the fourth proposition in the passage quoted from Keane. Any other determination would have unjust consequences for the plaintiff as an outsider, if it has a statutory remedy under s. 109.

359. Whether it has a statutory remedy under s.109 turns on the outcome of the price-sensitivity issue, which I will now deal with.

U. The overriding issue: the price-sensitivity issue

The Issue

360. Put in the factual context of these proceedings, the issue is whether, by reason of his connection with Fyffes, on 3rd February, 8th February and 14th February, 2000, Mr. Flavin had in his possession information that fulfilled the criteria for price-sensitivity provided for in s. 108(1) – that it was not generally available, but, if it had been, it would have been likely to materially affect the price of Fyffes' shares.

361. There are a number of aspects of the issue which are not in dispute. First, the information which the plaintiff alleges constituted price-sensitive information was the information in relation to trading and profits contained in the November and December Trading Reports, which I have quoted in the introduction. Secondly, Mr. Flavin had that information on the relevant dates and he had it by reason of his connection with Fyffes as a director of that company. Thirdly, the content of the November and December Trading Reports on which the plaintiff relies was information in the sense in which that term is used in s. 108(1). Fourthly, the two documents were not generally available nor was the specific information quoted in the introduction, which it was alleged was price-sensitive. Therefore, the court is not required to make a determination in relation to the factual component of the concept of price-sensitivity embodied in s. 108(1). The determination for the court is whether the plaintiff has established the hypothetical proposition embodied in the concept – that, if the information had been generally available, it would have been likely to materially affect the price of Fyffes' shares. An aspect of that determination is the accuracy and relevance of the defendants' proposition that substantially similar information was generally available at the date of the Share Sales, in consequence of which it was not likely that the information contained in the November and December Trading Reports, if available, would have materially affected the share price.

362. Consideration will be given first to the legal principles which govern the application of s. 108(1), with a view to identifying the test which the court has to apply to the facts proven to determine the price-sensitivity issue.

Legal principles

363. There is very little guidance in Part V of the Act of 1990 as to how the hypothetical element of the price-sensitivity test posited in s. 108(1) is to be applied. As this case is the first case in which any of the civil remedies provided for in Part V has been invoked, there is no authority in this jurisdiction to assist the court.

364. Counsel on both sides have referred the court to authorities from other jurisdictions in which issues similar to the issues raised by the price-sensitivity test contained in Part V have been considered, suggesting that they provide guidance as to how s. 108(1) is to be interpreted and applied.

365. Having considered the authorities, I find it necessary to refer only to those which are of most relevance in understanding the concept of price-sensitivity in s. 108(1) and in adopting a proper approach to the application of the statutory hypothesis. Of particular relevance are authorities which give guidance as to the meaning of "likely", "generally available", and "materially" in the context in which those terms are used in s. 108(1).

The Authorities

366. Both sides referred to what counsel for the defendants called the seminal decision in the United States of America – the decision of the United States Court of Appeals, Second Circuit in *SEC v. Texas Gulf Sulphur Company* 401 F.2d 833 [1968]. This decision is a

useful starting point because it is possible to divine from the judgment the appropriateness of using the jurisprudence of the Federal Courts of the United States as a guide. The case concerned alleged violations of the provisions of s. 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)-5 promulgated pursuant to it. Rule 10(b)-5 provided that it should be unlawful for any person, *inter alia*, "to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading" in connection with the purchase or sale of any security. Delivering the judgment of the Court, Waterman J. explained the policy underlying s. 10(b) and Rule 10(b)-5 in the following passage in the judgment at p. 848:

> "Whether predicated on traditional fiduciary concepts … or on the 'special facts' doctrine, … the Rule is based in policy on the justifiable expectation of the securities marketplace that all investors trading on impersonal exchanges have relatively equal access to material information."

367. Later, at p. 858, Waterman J. elaborated on that theme in the following passage:

> "The dominant congressional purposes underlying the Securities Exchange Act of 1934 were to promote free and open securities markets and to protect the investing public from suffering inequities in trading including, specifically, inequities that follow from trading that has been stimulated by the publication of false or misleading corporate information releases."

368. It is clear from the foregoing passages that the same legislative purpose informed the provision under consideration there as informed the Directive and its implementation in Part V of the Act of 1990. However, the manner in which the legislative purpose is given expression differs in the two jurisdictions. Waterman J. explained the effect of Rule 10(b)-5 in the following passage at p. 848:

> "An insider is not, of course, always foreclosed from investing in his own company merely because he may be more familiar with company operations than are outside investors. An insider's duty to disclose information or his duty to abstain from dealing in his company's security arises only in 'those situations which are essentially extraordinary in nature and which are reasonably certain to have a substantial effect on the market price of the security if [the extraordinary situation is] disclosed'."

369. The so-called "disclose or abstain" rule applies to inside information in the United States federal law. The issue which the United States courts have to address is the issue of materiality of information in a wide range of circumstances. The issue which s. 108(1) raises within the narrow confines of dealing is the materiality of the share price effect of the information. However, as the last quoted passage, which has been reiterated in other authorities to which I will refer later, indicates, in U.S. federal law, where relevant to the circumstances, the concept of materiality of information is linked to share price effect.

370. Counsel for the plaintiff submitted that the court should adopt certain principles enunciated by Waterman J. First, in the context of addressing the type of information which is price-sensitive, counsel for the plaintiffs referred to the following passage at p. 849:

> "Thus, material facts include not only information disclosing the earnings and distributions of a company but also those facts which affect the probable future of the company and those which may affect the desire of investors to buy, sell or hold the company's securities."

371. Secondly, in the context of materiality of information in relation to future events, he also referred to the succeeding passage in which Waterman J. stated as follows:

> "In each case, then, whether facts are material within Rule 10(b)-5 when the facts relate to a particular event and are undisclosed by those persons who are knowledgeable thereof will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity."

372. Thirdly, on the question of what amounts to disclosure of material information which, in broad terms, is the analogue of information being generally available within the meaning of s. 108(1), he cited the following passage from the judgment at p. 854, which was also cited by counsel for the defendants:

> "Before insiders may act upon material information, such information must have been effectively disclosed in a manner sufficient to insure its availability to the investing public."

373. Counsel for the plaintiff also referred to a passage in footnote 18 in which the court, while stating that it did not have to discuss the necessity of considering the advisability of a 'reasonable waiting period' during which outsiders might absorb and evaluate disclosures, noted that –

> "… where the news is of a sort which is not readily translatable into investment action, insiders may not take advantage of their advance opportunity to evaluate the information by acting immediately upon dissemination."

374. The meaning of materiality was considered by the U.S. Supreme Court in *TSC Industries Inc. v. Northway Inc*. 426 U.S. 438. The provision of the Act of 1934 at issue there was s. 14(a) and the rules promulgated thereunder, which bar the use of proxy statements that are false or misleading with respect to presentation or omission of material facts. In the substantive action, a TSC shareholder, Northway, claimed damages against TSC and another company which had issued a joint proxy statement recommending approval of a proposal for the exchange of TSC stock for stock of the other company. The basis of the claim was that the proxy statement was incomplete and materially misleading. Delivering the opinion of the Court, Marshall J. dealt with the question of materiality at p. 445, stating as follows:

> "The question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor. Variations in the formulation of a general test of materiality occur in the articulation of just how significant a fact must be or, put another way, how certain it must be that the fact would affect a reasonable investor's judgment."

375. The court held that the standard of materiality applied by the lower court (the material facts included "all facts which a reasonable shareholder might consider important" – the emphasis added in the judgment of Marshall J.) was inappropriate.

376. On the appropriate general standard of materiality in the context of the Rule under consideration, the proxy solicitation context, Marshall J. stated as follows at p. 449:

> "The general standard of materiality that we think best comports with the policies of Rule 14(a)-9 is as follows: An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. … It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."

377. Marshall J. stated that the issue of materiality may be characterised as a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts.

378. In *Basic Inc. v. Levinson* 485 U.S. 224, the United States Supreme Court held that the standard of materiality set forth in the *TSC Industries* case was appropriate in the context of s. 10(b) and Rule 10(b)-5 of the Act of 1934. The factual basis of the case was that persons who had sold stock during a period prior to the formal announcement of a merger alleged that material misrepresentations had been made due to denial of merger negotiations prior to the official announcement. Having expressly adopted the *TSC Industries* case standard of materiality, Blackmun J., delivering the opinion of the Court, stated that the application of the materiality standard to preliminary merger discussions was not self-evident. In dealing with an argument which had been advanced that preliminary merger discussions should not be regarded as material until "agreement-in-principle" as to the price and structure of the transaction had been reached between the would-be merger partners, and rejecting policy-based rationales which had been advanced in support of the argument, Blackmun J. made the following observations at p. 234, to which this court has been referred by the defendants' counsel:

> "The role of the materiality requirement is not to 'attribute to investors a child-like simplicity, an inability to grasp the probabilistic significance of negotiations,' … but to filter out essentially useless information that a reasonable investor would not consider significant, even as part of a larger 'mix' of factors to consider in making his investment decision. *TSC Industries* ..."

379. The analysis which the Court ultimately adopted was derived from a decision of the Second Circuit in 1976 (*SEC v. Geon Industries, Inc*., 531 F. 2d. 39) in which the *Texas Gulf Sulphur* probability/magnitude approach had been applied in the specific context of preliminary merger negotiations. The court then set out a non-exhaustive list of matters a fact finder would need to look at in considering the materiality of merger discussions. It concluded on the materiality issue as follows, at p. 240:

> "As we clarify today, materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information. The fact-specific inquiry we endorse here is consistent with the approach a number of courts have taken in assessing the materiality of merger negotiations."

380. The "reasonable investor" approach was adopted by a court of first instance in Singapore in considering a statutory price-sensitivity test almost identical to the test in s. 108(1), a test which required that the information "if generally available would be likely materially to affect the price of securities". In that case, *Public Prosecutor v. Allen Ng Poh Meng* [1990] 1 M.L.J. v, Foenander S.D.J. in dealing with the "materiality" element of the test stated as follows at p. x:

> "The section provides that the information may well *materially* affect the price. It may be that what is a material price increase in one case may not necessarily be a material price increase in another case. It all depends on the share and the circumstances obtaining at the time.
>
> However, the standard by which materiality is to be judged is whether the information on the particular share is such as would influence the ordinary reasonable investor in deciding whether or not to buy or whether or not to sell that share. A movement in price which would not influence such an investor, may be termed immaterial. Price is, after all, to a large extent determined by what investors do. If generally available, it is the impact of the information on the ordinary reasonable investor, and thus on price, which has to be judged in an insider dealing case …
>
> The test is an objective one."

381. The foregoing observations were made in somewhat unusual circumstances. Mr. Ng was prosecuted under the relevant legislation for insider trading as a tippee. At the end of the prosecution case counsel for Mr. Ng had applied for a direction. The application was refused. In the course of his cross-examination Mr. Ng decided to change his plea to guilty. The observations of Foenander S.D.J. which I have quoted recorded his reasons for having refused the direction.

382. The "reasonable investor" approach was also adopted by a Malaysian appeal court in *Public Prosecutor v. Chua Seng Huat* [1999] 3 M.L.J. 305. The accused, Chua, was charged with statutory insider-trading offences in relation to two sales of shares of a company, KHI. The shares were owned by another company, KHM. Chua was the managing director of KHM and he was also managing director of the Kim Hin Group of Companies. It was alleged that Chua at the time of the sales had information on the decline in operating profits of the Kim Hin Group. Under the Malaysian statute, the price-sensitivity test was whether the information "if generally known might reasonably be expected to affect materially the price of the subject-matter of the dealing on a stock exchange". The court was referred to both *Basic Inc. v. Levinson* and the *Texas Gulf Sulphur* case. It adopted the test "formulated" in *Basic Inc. v. Levinson*, that materiality "will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in the light of the totality of the company activity". In his judgment, in a passage on which the defendants relied, Ian Chin J. of the Malaysian High Court profiled the reasonable investor as follows at p. 327:

> "Whether it is material will be looked at objectively from the view of a 'reasonable investor' but this begs the question of who is this 'reasonable investor'. Surely, not a person with all the qualifications and knowledge [an expert witness who had testified] had which were derived from specific researches but he can still be one if shorn of those researches he made. On the other hand, it could not be those daily retailers who are out to make a quick profit who generally would not know much and would not bother about the matters or factors which prompt an investor to buy or sell shares and when to do so. In my view that investor should be someone who is in between those two types of persons I have described. He must be, this is the term I would use, an investor who possesses general professional knowledge as opposed to the said daily retailer or a person who has made specific researches."

383. Ian Chin J. then went on to outline the knowledge and ability the reasonable investor with general professional knowledge would have, based on the testimony of one of the expert witnesses.

384. The sales which were the subject of the charges against Chua were conducted on 23rd May and 26th June, 1995. One of the issues in the *Chua* case was whether the information contained in management accounts for the months from January to April, 1995 which, on the evidence, Chua had before the second sale took place, if generally known, might reasonably have been expected to affect materially the price of the shares. The court, which was an appeal court, found that the lower court had looked at the matter of the information conveyed by the management accounts from the point of view of *Chua* rather than that of a reasonable investor, so that the question of materiality had been looked at subjectively. It was held that that was a misdirection on the part of the lower court. What had to be shown by the application of the *Basic Inc. v. Levinson* test was that the indicated decline in profit would probably occur and that it would be of a sufficient magnitude compared to the totality of the company's activity. On the facts, the court found that the probability existed that there would be an unexpected or drastic decline in the operating profits of the KHI Group of Companies as indicated in the management accounts. An investor who possessed general professional knowledge would have been able to know that by reading the management accounts. Therefore, the court held, the test of materiality had been satisfied.

385. Before leaving the *Chua* case I have two further observations to make. First, I agree with counsel for the defendants that the reference to what "might reasonably be expected" in the statutory definition which was being applied by Ian Chin J. did not render it more readily susceptible to the implication of the reasonable investor test than the provision in s. 108(1). If one puts the two provisions side by side that phrase plays the same role as "likely" does in s. 108 and it does not qualify the concept of materiality. Secondly, the decision illustrates that management accounts are potentially price-sensitive, which, in any event, the defendants acknowledged.

386. I move on now to authorities which address the relevance of what happened in the market after the date at which price-sensitivity is to be determined.

387. The plaintiff referred the court to the decision of the English High Court in *Chase Manhattan Equities v. Goodman* [1991] B.C.L.C. 897. One of the issues in that very complex case was whether a share sale was illegal as being in breach of the legislation then in force in the United Kingdom, the Companies Securities (Insider Dealing) Act, 1985. That Act contained a definition of "unpublished, price-sensitive information" which posed the hypothesis in terms "but … would if it were generally known to [those persons who are accustomed or would be likely to deal in those securities] be likely materially to affect the price of those securities". The transaction in issue, a sale of shares in Unigroup plc, took place on 5th October, 1987 and was, in effect, a transaction between Goodman and the plaintiff, the Court having held that a transfer executed by Goodman on 1st October, 1987 in favour of a third party was a sham, in the sense that it did not deprive Goodman of the beneficial ownership of the shares. The information which Goodman had on 5th October which was alleged to be price-sensitive was that he was about to resign as a director of Unigroup and that he was claiming that a debt entered in the accounts of Unigroup as being due from another company, Dewfield, was in actual fact owed by Unigroup to Dewfield, which, if true, would have dramatically altered the state of Unigroup's balance sheet. On the morning of 8th October, 1987 the Stock Exchange suspended dealing in Unigroup's shares at the request of the directors of the Unigroup. The proceedings in which the issue of a breach of the Act of 1985 was alleged were initiated on 16th October, 1987. The results of Unigroup for the period ending 30th June, 1987, which were published on 22nd February, 1988, included a provision of over Stg£1m. in respect of the claim of Dewfield. On 29th February, 1998 the suspension was lifted by the Stock Exchange. Before the suspension, on 7th October, 1987, the shares traded at Stg172p. After the suspension was lifted, they traded at around Stg50p to Stg55p. In his judgment Knox J. found, on the facts, that Goodman had been aware that three matters, including the two matters to which I have referred, constituted unpublished, price-sensitive information. He continued (at p. 931):

> "Although it clearly was unpublished in that it was not generally known to those persons who were accustomed to deal in the company's shares and notably was not known to [the plaintiff], market makers in the shares, the information except for the fact that Mr. Goodman was on the brink of resignation was known to the other members of the board … Finally I am satisfied that all three of the matters listed above would if generally known have been likely materially to affect the price of the company's shares. The proof of that pudding is in the eating in that when the suspension which followed almost immediately, was lifted the price of the company's shares was very sharply down."

388. Counsel for the defendants, while acknowledging that the "proof of the pudding" approach might be legitimate in a straightforward case if a plaintiff proved, first, that market conditions on the actual day of release of the information previously confidential were identical to the market conditions on the date of dealing and, secondly, that the information was the same, referred the court to two decisions of the United States courts which, he contended, demonstrate the danger inherent in determining price-sensitivity by reference to a market post-event. These authorities also illustrate the relationship in appropriate contexts in U.S. federal law between stock price movement and materiality of information.

389. The first is *SEC. v. Bausch & Lomb Inc*. 565 F. 2d8 [1977]. In that case, in which the Securities and Exchange Commission sought a permanent injunction, it was alleged that the chairman of the board of Bausch & Lomb, Schuman, had improperly tipped securities analysts as to earning estimates and other information not available to the general public. Section 10(b) of the Act of 1934 was in issue. The factual background and timeframe in that case was that, due to sales of a new product, the first soft contact lens, which was marketed as "Soflens", in the second half of 1971, the earnings of Bausch & Lomb skyrocketed and its share price soared on the stock exchanges. However, in the early months of 1972 issues arose as to the safety and effectiveness of Soflens. The possibility of a rival product coming on the market was also damaging to Bausch & Lomb. The share price went into decline. On 15th March, 1972 Schuman embarked on a series of interviews with financial analysts, which continued through 16th March. The share price dropped further on 16th March. In addressing the issue of materiality, the court referred to the *Texas Gulf Sulphur case* as authority for the proposition that only when information is "extraordinary in nature" and "reasonably certain to have a substantial effect on the market price of the security" if it is publicly disclosed does a duty arise to make the information generally available. It pointed out that it becomes the judge's task to determine whether the particular information conveyed would have been important to a reasonable investor in determining whether to buy, sell or hold a security. The court quoted the *TSC Industries* test of materiality and stated that the lower court had applied the appropriate standard of materiality.

390. The passage from the judgment of the court, which was delivered by Kaufman C.J., which the defendants relied on as indicating the necessity for caution in adopting the "proof of the pudding" approach is the following passage (at p. 15):

> "Before dissecting separately each item of allegedly material information, we will lay to rest the SEC's facile inference that since B&L's stock dropped 11¾ points on March 16th with an unprecedented volume of 348,000 shares traded, all the information conveyed by Schuman must *per se* have been material.
>
> The seemingly substantial decline in the value of B&L's stock on March 16th, was not an uncommon phenomenon in the company's recent history. B&L's shares had been generally falling in value since early February, and in the three weeks preceding the interviews, prices had plunged 40 points. …

> Several reasons accounted for the general decline, the most prominent being adverse medical reports on the safety of soft contact lenses which were accorded extensive coverage in the *Wall Street Journal* and other sources of financial news. Moreover, reports abounded that B&L might soon face substantial competition.
>
> Leakage in the Soflens shippings vials in early March, and ensuing delays in shipment, likewise received considerable publicity. Smith Barney & Co.'s withdrawal of its 'buy' recommendation on B&L in late February further dampened investment ardor with the company's stock. In short the market was extremely bearish on B&L."

391. The defendants submitted that the foregoing passage demonstrates the danger inherent in determining price-sensitivity by reference to a market-post event where market conditions are influenced by other factors, particularly where the market is bearish.

392. I note in passing that counsel for the plaintiff referred to the decision of the Second Circuit in the *Bausch & Lomb* case for the purpose of illustrating that earnings estimates of a company are in a class which may materially or significantly affect the price of the company's securities. The court did hold that Schuman had "violated the sanctum of materiality by divulging the corporation's first quarter earnings forecast to an analyst" on 16th March. However, it held that the SEC had failed to establish an essential proof for injunctive relief – that there existed a reasonable likelihood of future wrongdoing by Bausch & Lomb or Schuman. Recognising the predicament in which a corporate executive may find himself in an encounter with a financial analyst, analogising it to "a fencing match conducted on a tightrope", Kaufman C.J. observed at p. 10:

> "But, since the importance of a particular piece of information depends on the context in which it is given, materiality has become one of the most unpredictable and elusive concepts of the federal securities laws."

393. The second authority on which the defendants based their caveat in relation to the "proof of the pudding" approach is a later decision of the United States Court of Appeal, Second Circuit – the decision in *Elkind v. Liggett & Myers Inc*. 635 F2d 156 [1980]. This was a class suit on behalf of purchasers of the stock of Liggett & Myers Inc. (Liggett) against the company in which it was alleged that there was a failure to disclose certain material information in relation to earnings and operations and that there had been wrongful tipping of inside information to certain persons who then sold the Liggett stock on the open market. The plaintiffs did not succeed on the first element of the claim but they did partly succeed on the second element of the claim. The portion of the judgment which the defendants' counsel suggested should guide this court was concerned with the method of quantification of the damages.

394. The facts set out in the judgment disclose that Liggett was a diversified company with a traditional business in the tobacco industry and other businesses such as liquor, pet food, cereals, watch-bands, cleansers and rugs.

395. It had a record year in 1971 and what was described as an "equally auspicious" first quarter in 1972. The first quarter figures were released on 3rd May, 1972 and showed earnings of $1 per share compared to $.81 per share in the first quarter of 1971. However, as it was put in the judgment, despite the company's outward appearance of strength, Liggett's management was less sanguine intramurally. The April earnings showed a decline against the previous April. On 15th May the board revised earnings projections downward. May earnings rebounded somewhat. At meetings with analysts Liggett officials took a more negative tone than previously, for example, by emphasising cost pressures. However, there was no public disclosure of adverse financial developments at the time. Beginning in late June the price of Liggett's shares steadily declined.

396. The factual basis of the first of the two alleged tips in issue was that on 10th July the director of corporate communications of Liggett confirmed to an analyst privately that sales of J&B Whiskey, one of the company's product lines, were slowing due to stockpiling and that a new competing dog food was affecting the sales of one of Liggett's dog food products. The analyst testified that he was told that the results would be coming out in a week and he deduced that the figures would be lower than expected. The factual basis of the second of the alleged tips was that on 17th July Liggett's chief financial officer confirmed privately to an analyst that there was a good possibility that earnings would be down. Preliminary earnings data for June became available to the board of Liggett on 17th July. The first half-year earnings for 1972 were approximately $1.46 per share, down from $1.82 in the corresponding half of the previous year. The board decided to issue a press release the following day and did so. The press release, which issued on the following afternoon, 18th July, disclosed the preliminary earnings figures and attributed the decline to shortcomings in all of Liggett's product lines.

397. In addressing the issue of materiality, the court referred to the *Bausch & Lomb* case, stating that it had there reiterated the language of the *Texas Gulf Sulphur* case that disclosed information must be "reasonably certain to have a substantial effect on the market price of the security" and that it had applied the *TSC Industries* materiality test. From the TSC Industries test it abstracted the relevant question in determining materiality in an alleged tipping of analysts context: whether the tipped information, if divulged to the public, would have been likely to affect the decisions of buyers and sellers. Applying that standard to the disclosures made on 10th July, it held that these were not material. The information about J & B and about the pet food was already common knowledge among analysts. The bare announcement that preliminary earnings would be released in a week was not material. However, in relation to the disclosure on 17th July, it was held that it was sufficiently directed to the matter of earnings to sustain the lower court's finding of materiality.

398. In computing damages for 10th July and 17th July tips, the lower court had attempted to award the difference between the amount the plaintiff class members paid for their stock and the value they had received. In fixing that value, the court looked at the actual market price at the end of "a reasonable period" (eight trading days) following the 18th July release of earnings figures as approximate of what the price would have been had the tipped information been disclosed publicly. The Appeal Court remanded the matter for reconsideration of damages. In discussing the amount of damages which should be recoverable by the uninformed trader from the tipper and tippee trader, the court rejected "the traditional out-of-pocket measure" (the difference between the price paid and the "value" of the stock when bought or when the buyer committed to buy, if earlier) for a number of reasons. One of the reasons was that it posed serious proof problems that might often be insurmountable in a tippee-trading case. Mansfield J., delivering the judgment of the Court, elaborated on this as follows at p. 170:

> "The 'value' of the stock traded during the period of non-disclosure of the tipped information (i.e. the price at which the market would have valued the stock if there had been a disclosure) is hypothetical. Expert testimony regarding that 'value' may, as the district court found in the present case, be entirely speculative. This has led some courts to conclude that the drop in price of the stock after actual disclosure and after allowing a period of time to elapse for the market to absorb the news may sometimes approximate the drop which would have occurred earlier had the tip been disclosed. … The court below adopted this approach of using post-public disclosure market price as *nunc pro tunc* evidence of the 'value' of the stock during the period of non-disclosure.

Whatever may be the reasonableness of the *nunc pro tunc* 'value' method of calculating damages in other contexts, it has serious vulnerabilities here. It rests on the fundamental assumptions (1) that the tipped information is substantially the same as that later disclosed publicly, and (2) that one can determine how the market would have reacted to the public release of the tipped information at an earlier time by its reaction to that information at a later, proximate time. This theory depends on the parity of the 'tip' and the 'disclosure'. When they differ, the basis of the damage calculation evaporates. One could not reasonably estimate how the public would have reacted to news that the Titanic was near an iceberg from how it reacted to the news that the ship had struck an iceberg and sunk. In the present case, the July 10 tip that preliminary earnings would be released in a week is not comparable to the later release of the estimated earnings figures on July 18. Nor was the July 17 tipped information that there was a good possibility that earnings would be down comparable to the next day's release of the estimated figures."

399. So, effectively, in the context of what was the proper approach to the measurement of damages, the court held that there was not parity of information. Despite that, the court upheld the finding as to the materiality of the information disclosed on 17th July.

400. Of the authorities which counsel for the plaintiff contended highlight the importance of subsequent market reaction, I propose commenting on two.

401. The earliest is the decision of the United States District Court (C.D. California) *SEC v. Lund 570 F. Supp*. 1397 (1983). That was an action under s. 10(b) of the Act of 1934 in which the SEC contended that Lund purchased shares in a publicly traded company, P&F Industries, Inc., after receiving material, non-public, corporate information concerning the corporation from his long-time friend and business associate, Horowitz, a P&F insider. The facts were that in May or June, 1979 Horowitz told Lund of a possible involvement of P&F in a project involving gambling. On Friday, 3rd August, 1979, Horowitz told Lund about negotiations with a corporation concerning a joint venture involving a gambling casino in Las Vegas in detail, that the final meeting with the corporation representatives would be held the following Monday, 6th August, at which parties were to draft a formal letter of intent which would be presented to the board of P& F the same day for approval, and if approved, would be signed immediately following the board meeting. After the conversation with Horowitz, Lund purchased shares in P&F, his first purchase of P&F stock for approximately ten years. The joint venture was approved by the board of P&F on the following Monday, August 6th, and a letter of intent was signed on that day. Opening of trading in P&F stock was delayed on that day, pending the public announcement of the joint venture. When trading opened, the trading volume and price of P&F stock rose dramatically and remained high for weeks. The court held that the information received by Lund was both material and non-public, that as a "temporary insider" Lund was subject to the duty to "disclose or abstain" and that he should be required to disgorge the profits earned from the illegal trading. Lucas D.J. applied the *TSC Industries* test as to materiality. In doing so, he observed that a reasonable investor would have considered the company's participation in the joint venture involving a gambling casino to be important. The proposed joint venture was a major undertaking which would have a significant effect on the assets of P&F and its earning potential. The passage from the judgment on which counsel for the plaintiff laid particular emphasis was the following:

"Finally, the rapid increase in the trading volume and price of P&F stock following the disclosure of the joint venture confirms the conclusion that a reasonable investor would have considered this information to be important in making an investment decision with respect to P&F stock."

402. It seems to me that, on the facts, that case meets the fundamental assumptions identified by Mansfield J. in the passage from the judgment in *Elkind v. Liggett* & Myers which I have quoted earlier: there does seem to be parity of the information given by Horovitz to Lund and the public announcement; and the post-trading reaction occurred on the next trading day. In any event, the post-disclosure reaction was merely confirmatory of a finding of materiality independently arrived at.

403. In *SEC v. Falbo* 14 F. Supp. 2d 508 [1998] the United States District Court, S.D. New York, did take cognisance of an almost 50% increase in the stock of a company, Pillsbury, after the announcement on 4th October, 1988 of a tender offer by Grand Metropolitan Plc for all the outstanding shares of the company. However, it was in the context of determining whether information Falbo possessed was non-public information, rather than on the issue of materiality which it decided by reference to *Basic Inc v. Levinson*, that it did so. The factual background was that Falbo had engaged in a number of trades in Pillsbury stock in August and September, 1988. While there had been a great deal of media speculation and rumour about a possible takeover of Pillsbury by Grand Met, the court found that Falbo possessed information, which he had obtained by eavesdropping on Grand Met executives while working as an electrician in Grand Met's premises and from his wife, who worked at Grand Met as an executive secretary, that was more specific and more private than the rumours. It held that the post-announcement market reaction was evidence that the information Falbo had "was not fully impounded into the price of the company's stock", so that the information he had was not public information when he traded.

404. The last of the authorities to which I propose referring was cited as one which gives guidance in relation to the meaning of the word "likely" in s. 108(1). That is the decision of the New Zealand Court of Appeal in *Colonial Mutual Life Assurance Society Limited v. Wilson Neill Limited* [1994] 2 N.Z.L.R. 152. The statutory definition of inside information under consideration there required that the information "would, or would be likely to, affect materially the price of securities of the public issuer if it was publicly available". In relation to that element of the definition, Cooke P. said at p. 161:

"The argot speaks of such information as 'price-sensitive' when what is really meant is price material. The opinion of Queen's Counsel was too generous to the complaining shareholders if it meant, as some passages in it seem to suggest, that a bare possibility, however remote, could come within 'likely'. A real or substantial risk is required."

405. Apart from ascribing a meaning to "likely" with which both sides in this case agree up to a point, that passage is a reminder that the use of the expression "price-sensitive information" in relation to Part V, while convenient shorthand, is not an accurate representation of what Part V is about.

Submissions/conclusions on applicable legal principles

406. In their submissions on the manner in which the hypothetical component of the price-sensitivity test should be applied to the facts of this case, the plaintiff and the defendants advocated two very different approaches, which I will outline later. There was some little common ground as to the relevant legal principles. They agreed that the hypothesis had to be applied at each of the dates of the Share Sales. They also agreed that the word "likely" in s. 108(1) imports more than a mere possibility and that the correct test is to be found in the passage from the judgment of Cooke P. which I have just quoted. However, while counsel for the plaintiff accepted that "likely" is synonymous with "probably" in the context of s. 108(1), counsel for the defendants advanced a more nuanced interpretation that the probability of a material price change must be found applying the appropriate standard of proof, proof in the balance of probabilities. I see little or no difference between the two positions.

407. A major divergence between the plaintiff and the defendants on the meaning of "generally available" was that counsel for the plaintiff rejected the contention of counsel for the defendants that the expression requires that the information must have been "internalised by the market" as being a refinement of Part V which is not required and which is apt to confuse, and, in short, is a tautology. In their written submission the defendants explained the concept of "internalised by the market" as meaning that the share price should fully reflect the fact that the information is in the market. As there was no dispute between the parties that, as regards the factual component of the materiality test, the specific information contained in the November and December Trading Reports was not generally available, it seems to me that I am only concerned with the concept of general availability in the context of the hypothetical component of the test. As regards the application of the hypothesis, I think the assumption must be that the information is accessible by investors.

408. A related point, on which the parties were agreed, is that statutory hypothesis does not envisage the information in issue finding its way into the market in any particular manner. That proposition is correct, in my view.

409. The greatest area of controversy between the parties related to the concept of materiality. The defendants criticised the plaintiff's emphasis on the materiality of the information and submitted, correctly in my view, that the issue of materiality in s. 108(1) goes to the materiality of the share price effect. There was consensus that materiality must be assessed objectively. That is unquestionably correct. However, there was no consensus as to the applicability of the "reasonable investor" test. The plaintiff's contention was that the likely reaction of the reasonable investor is not an irrelevant consideration, because how he reacts will indicate what market reaction is likely to be, but it is not determinative. What s. 108(1) requires the court to do, it was contended, is to form a view on the likely effect on the share price, which in turn is brought about by the conduct of all investors, including market makers and traders. The collective wisdom of market participants, the buyers and the sellers, at a particular time is what determines the value of the share. So the determinant, as I understand the plaintiff's argument, is whether, if the information were available, the collective wisdom would bring about a material movement in the share price. The defendants, on the other hand, embraced the "reasonable investor" test, stating that it was simply a mechanism to describe the objectivity of the price-sensitivity test. They submitted that the court must not assess whether the availability of the alleged price-sensitive information would impact on a particular sort of investor, for instance, a market maker, pointing out that, in any event, the general availability criterion would not be met if such approach were adopted.

410. Given the similarity of the legislative purpose which underlies federal security law in the United States and the legislative purpose of Part V in implementing the Directive, in my view, the jurisprudence of the United States federal courts provides helpful guidance to the courts in this jurisdiction in relation to identifying the proper approach to the application of s. 108(1). Obviously, the court's task is to construe s. 108(1) in accordance with the principles which were outlined at C and D above. That said, I consider that, with the aid of the authorities which I have reviewed, it is possible to identify certain principles by which the court may be guided to a proper determination on the hypothetical component of the statutory hypothesis. These principles are as follows:

> (i) The information must not be assessed in isolation. It must be assessed in the light of the total mix of information generally available about the company at the relevant date, the date of dealing.
>
> (ii) Once the significance of the information is assessed in that manner, the question for consideration is whether, if it had been generally available on the date of dealing, in the light of its significance the information would have had a substantial or a significant effect on the company's share price. If so, the effect would have been material. The terms "substantial" and "significant" are relative terms. The assessment of the share price effect must be made having regard to all of the factors which have a bearing on the value of the company's shares at the date of dealing.
>
> (iii) Both assessments, the assessment of the significance of the information and the assessment of the impact of the information on the share price, must be carried out objectively. The subjective views of the insider are irrelevant. What this means is that the court, in carrying out the assessments, does so from the perspective of the reasonable investor making an investment decision, that is to say, a decision to buy, sell or hold the shares in the company.
>
> (iv) The standard of materiality to be applied is prescribed in s. 108. The question to be addressed is whether it is probable that the impact of the information would have a substantial or significant effect on the share price. In view of the express inclusion in s. 108(1) of the "would be likely" criterion, it would not be appropriate to apply the "substantial likelihood" standard applied by the U.S. Supreme Court in the *TSC Industries* case.
>
> (v) However, the application of the standard may require the type of balancing exercise recognised in the Texas Gulf Sulphur case – weighing indicated probability against anticipated magnitude in the light of the totality of the company activity.

411. In applying the foregoing principles in the context of the factual matrix of these proceedings, the hypothetical test is whether on 3rd February, 2000, 8th February, 2000 and 14th February, 2000, had it been available to him, the information contained in the November and December Trading Reports, viewed by him against the "total mix" of information about Fyffes' trading and earnings available on those dates, would have impacted on the judgment of the reasonable investor in relation to an investment decision about Fyffes' shares to the extent that he would have concluded that the information probably would have a substantial effect on Fyffes' shares.

412. This leads to the profile of the reasonable investor. As a general proposition, it is not clear to me that it should be necessary to profile the reasonable investor any more than it is necessary to profile the reasonable man in applying the principles of the tort of negligence. However, on the facts and arguments in this case, a question has arisen as to whether the profile has to take account, so far as the evidence has established its relevance, of the enthusiasm for internet stocks (the phenomenon variously described in the evidence by the colloquialisms "dotcom mania", "irrational euphoria" and "irrational exuberance") which was prevalent in the period leading up to and including the dates of the Share Sales. The question is whether it must be assumed that the reasonable investor would be infected by, or immune from, the market's infatuation with internet stocks or stocks with an internet dimension. The plaintiff's position, while abjuring the reasonable investor test, was that, even if it were a correct approach to adopt, it would indicate that the behaviour of irrational forces within the market is not relevant to the resolution of the issue of price-sensitivity. A fundamental aspect of the defendants' submissions, which I did not understand the plaintiff to dispute as a general proposition, was that the statutory hypothesis assumes that the alleged price-sensitive information is introduced into the actual world of stock prices. The defendants suggested the judgment in the *Chua* case as guidance at a general level, in that it correctly shows, it was submitted, that the reasonable investor is not to be found at the extremes of the market. More specifically in relation to the facts of this case, the defendants submitted that, whether the market was behaving irrationally or not, the information mix at the relevant time in relation to Fyffes included its wof.com venture.

413. It seems to me that, if the concept of the reasonable investor is to be meaningful in assessing objectively whether the availability of the November and December Trading Reports was likely to materially affect the Fyffes share price, it must represent the type of investor who was typically found in the market at the time. If that investor, on the evidence, was one who was anxious to own internet stocks or stocks with an internet element, the likely consequences of such predilection are a relevant factor.

414. Having stated what I consider are the principles to be applied in the application of s. 108(1) and what I believe to be the fundamental test of materiality on the facts of this case, it is necessary to address propositions advanced by the parties in relation to the application of the price-sensitivity test which I have not already alluded to.

415. The defendants submitted that, in the application of the hypothesis, information alleged to be price-sensitive cannot be "contextualised" by some significance that may be attached to any other internal information that was available to the directors, including Mr. Flavin, or by knowledge they had at the relevant time. That proposition is undoubtedly correct, and it was so acknowledged by the plaintiff.

416. In relation to the total mix of information against which the information alleged to be price-sensitive is viewed in applying the hypothesis, the defendants submitted that information within that total mix which has emanated from the company is of particular significance. The plaintiff accepted this proposition but pointed to the fact that the November and December Trading Reports emanated from Fyffes and that there must be a consistency in recognising the significance of information which emanated from Fyffes.

417. As will appear later, one of the main thrusts of the defendants' answer to the allegation that the November and December Trading Reports constituted price-sensitive information was that, even if those documents had been generally available, they would not have had a material effect on Fyffes' share price because of the action and inaction of Fyffes prior to 3rd February and what the market knew about those matters. The plaintiff, while not suggesting that these matters are not wholly irrelevant, contended that they did not have the significance which the defendants ascribed to them.

418. As to whether there is a "rule of thumb" (which is not an expression which was used by either the plaintiff or the defendants) by which materiality of price effect is measurable, the defendants' position was that what is or is not material cannot, as a matter of law, be a matter of percentages applied universally to all share prices at all times. It was submitted on behalf of the defendants that the general approach is correctly set out by the Financial Services Authority (FSA) in the United Kingdom in relation to Rule 9 of the Listing Rules in a recent issue of its publication "List!" – issue No. 8, December, 2004 at p. 8. The passage which the court was referred to states:

> "We would like to remind issuers that, when assessing whether information needs to be announced, Listing Rules 9.1 or 9.2 do not set a materiality threshold. We are aware that some market practitioners operate under a '10% rule', whereby if a piece of information would move the share price or alter another key figure (such as operating profit) by more than 10%, then an announcement is made.
>
> While such an approach may result in some issuers complying with the requirement of these paragraphs, it is not appropriate for all issuers. Listing Rules 9.1 or 9.2 require an issuer (in conjunction with its advisors) to assess whether the unpublished information in question would bring about 'a substantial movement in the price of its listed securities'. The level of movement that is 'substantial' will vary from issuer to issuer. For example, we would ordinarily expect a FTSE100 company to have a lower threshold than an illiquid small cap with high price volatility."

419. The defendants submitted that the above observations are equally appropriate in relation to the statutory price-sensitivity test and that approach recommended is implicit in s. 108(1).

420. I did not understand the plaintiff to take a firm position on the utility or appropriateness or otherwise of a spectrum of percentages although it did submit that some sources support this view. The principal source referred to is the Guidelines published in 1991 by the Irish Association of Investment Managers on insider dealing. The guidelines set out the view of market participants and it is only fair to record that it is emphasised in the publication that the view was being expressed "in the absence of Irish case law". The relevant guidance is in the following terms:

> "It is considered by market participants that the price of a liquid equity security would be likely to have been materially affected if, had the information been generally available, (and in the absence of any specific announcement, general sectoral influence or market movement), the price of the security would have been less than 95% or more than 105% of the market price on the day(s) on which the dealing(s) occurred."

421. The plaintiff also submitted that, as regards Fyffes' shares, the preponderance of the evidence was that a likely share price movement of more than 10% would be material, although some witnesses supported materiality at a level between 5% and 10%. I will analyse this evidence later.

422. As a matter of construction of s. 108(1), I do not think it envisages either a "rule of thumb" of universal application or in relation to a particular share. In the test which I have concluded is the appropriate test for gauging share price effect set out above, the second of the principles does not accommodate such an approach. It requires a specific assessment as to what constitutes a substantial or significant movement in relation to the specific share on the specific day of dealing.

423. As I have stated, counsel for the defendants submitted that the two prerequisites to a post-market event being of evidential value in applying the price-sensitivity hypothesis are that:

> (a) the information alleged to be price-sensitive should be substantially the same as the information which gave rise to the share price movement which is proffered as a proxy, and
>
> (b) the market conditions on the date at which the hypothesis is being applied are identical with market conditions on the date on which the supposed proxy event occurred.

424. The decisions of the U.S. Federal Courts in the *Bausch v. Lomb* case and in the *Elkind v. Liggett & Myers* case give some support that submission. In my view, the submission is correct in principle. Using a post-market event as an evidential tool in the application of the statutory hypothesis is an exercise akin to the use of comparators for valuation purposes in litigation in a wide range of contexts. While in the present context there are additional elements, the hypothetical element and a "reverse engineering" dimension, the fundamental rule, that a comparison is only valid if one is comparing like with like, must apply. The burden of proving

the evidential value of the supposed proxy event in this case, the share price reaction on 20th March, 2000, is on the plaintiff.

425. The basis on which the defendants asserted that the provisions of the Listing Rules and of the Model Code, which I have outlined earlier, are of relevance was that what Fyffes did or did not do having regard to its obligations under the regulatory framework governing listed companies is evidentially significant. Under Rule 9.2, for instance, Fyffes was obliged to make a timely disclosure of trading information which was price-sensitive. It was submitted that the hypothesis by reference to which price-sensitivity is to be assessed for the purposes of Rule 9.2, whether, if made public, the relevant information would be likely to lead to a substantial movement in the share price, is probably no different from the price-sensitivity test contained in s. 108(1). In relation to the provisions of the Model Code, the evidence established that Fyffes in its Board Procedures dated July, 1996 had addressed the requirements of the Model Code. Paragraph 5.2 thereof contained a provision in the following terms:

> "Directors (and connected persons) must not deal in the securities of a listed company where 'unpublished price sensitive information' exists as defined by the Model Code, by section 108 of the Irish Companies Act, 1990 and by section 346 of the U.K. Companies Act, 1985."

426. The defendants did not assert that there was a breach of either the Listing Rules or the Model Code on the part of Fyffes. The point they made was that the absence of an announcement on foot of the contents of the November and December Trading Reports, which was one of the grounds on which they asserted that Fyffes' executives and board did not consider the information to be price-sensitive, is indicative that the information was not price-sensitive. The plaintiff's position was that in point of principle the defendants' argument was fallacious. Part V of the Act of 1990 and the Listing Rules are two separate regulatory regimes imposing obligations which are not co-extensive. Rule 9.2 envisages a process whereby the company has time to appraise the information and reach a judgment as to whether an announcement should or should not be made, so that the fact that an announcement has not been made does not mean that the directors do not have price-sensitive information. Part V, on the other hand, imposes an instantaneous prohibition on dealing once the director is in possession of price-sensitive information.

427. The plaintiff's proposition was that, as a matter of common sense, it does not follow that the directors of a company do not have in their possession price-sensitive information if the company has not made an announcement to the market. That may be so. However, the investment community knows that Listing Rules regulate the market and that they impose continuing obligations on companies. In applying the price-sensitivity test contained in s. 108(1), in my view, it must be assumed that the reasonable investor is aware in a general way that a company must make timely disclosure of non-public, price-sensitive information and that he knows whether, in relation to the information which is the subject of the hypothetical assessment, an announcement has been made or not. Those two matters, the existence of the regulatory requirement and the existence or absence of an announcement, are part of the total mix of information about the company. To that extent, in principle, they are relevant. In practice, the weight, if any, to be attached depends on the facts of the case. Having considered the facts, I will look more closely at the submissions as to the relevance of what the executives and board of Fyffes believed at the relevant time to the resolution of the statutory hypothesis.

428. Finally, the plaintiff and the defendants advocated very different approaches to the court's assessment of the price-sensitivity of the information contained in the November and December Trading Reports. The approach advocated by the defendants was that the information generally available in the market in relation to Fyffes' trading as of 3rd February, 2000 should be considered first by the court and it should then look at the information contained in the two documents. The plaintiff, on the other hand, advocated that the court should look at the information contained in the two documents first and assess its significance in terms of share valuation. In my view, s. 108(1) does not mandate one approach rather than the other. It should make no difference which approach is adopted if the forensic analysis which must be carried out is conducted properly and in accordance with the principles which I have outlined earlier. The result should be the same.

Approach to identifying the relevant facts/analysing the evidence

429. In identifying the facts and analysing the evidence relevant to the price-sensitivity issue, I propose adopting the following approach.

430. First, I will outline what I consider to be the relevant facts as to –

> (i) what the market knew about Fyffes, its trading and its business, at the dates of the Share Sales, and
>
> (ii) the information contained in the November and December Trading Reports, which was not in the marketplace, in other words the new information contained in those documents.

431. While this exercise is essentially a fact finding exercise, it is informed not only by the testimony of the witnesses as to fact but also by the evidence of the accountancy, academic and stock market experts who testified at the hearing.

432. Secondly and separately, I will outline and analyse the evidence of experts and others as to the significance or otherwise of the information in the November and December Trading Reports in the particular market prevailing at the relevant date in terms of probable movement in Fyffes' share price. As part of the exercise, I will review the evidence as to the status of the market reaction following the release of the March 2000 Trading Statement as a proxy for what might have happened on the relevant dates, if the information contained in the November and December Trading Reports was generally available. To give a complete picture of, and so as not to distort, the evidence of the expert witnesses, the summaries of their evidence will outline evidence on which I have already drawn in the first stage.

433. The final stage is to outline other facts which the parties contend are relevant to the determination of the price-sensitivity issue: facts which the defendants contend establish that Fyffes' executives and board, other than Mr. Flavin, did not consider the information to be price-sensitive; and facts which the plaintiff contends establish that Mr. Flavin was aware that the information was price-sensitive.

What the market knew at the dates of the Share Sales

434. On the evidence, the principal sources of information about Fyffes' trading and earnings which the market had in late 1999, apart from what Fyffes itself told the market through results and other announcements, were:

> (a) publicly disclosed information in relation to the state of the banana and fresh produce business globally through announcements made by its competitors;
>
> (b) global economic news about banana prices and exchange rate movements;

(c) reports and forecasts of stockbroker analysts; and

(d) media reports.

435. In 1999 Fyffes was one of the main players in the global fresh produce market, its main competitors being U.S. corporations, Dole Food Company Inc. (Dole), Chiquita Brands International, Inc. (Chiquita) and Fresh Del Monte Produce Inc. (Fresh Del Monte). During the last three quarters of calendar year 1999 the trading environment for fresh produce was difficult internationally and this impacted adversely on the earnings of Fyffes' competitors. This was manifested in results announcements and broker analysis. For example, when Chiquita announced its third-quarter results on 19th October, 1999, it stated that third-quarter banana pricing was lower in Europe compared to prior year. It attributed the decrease to over- allocation of European Union quota in the early part of the year, oversupply and continuing weakness in demand from Eastern Europe and Russia. The position did not improve and Chiquita issued a cautionary trading statement on 13th December, 1999, again attributing the results to lower banana pricing in Europe. Similarly, when Dole announced its third-quarter earnings on 4th November, 1999, it attributed the third-quarter net loss from ongoing operations primarily to "significantly weaker pricing in the European banana business due to higher market volumes as a result of increased industrial license allocations". Fresh Del Monte was also affected by unprofitable banana prices in Europe. It issued a profit warning on 22nd December, 1999.

436. The market was aware of the general trading difficulties in the banana market in Europe. It was also aware that Fyffes' banana division was its core business and that Fyffes' sales of bananas were focused almost entirely on the United Kingdom and European Union markets. Before Fyffes announced its preliminary results for its financial year 1999 on 14th December, 1999 in the Preliminary Announcement, the analysts who covered Fyffes' business were aware of the oversupply and the weak banana prices in Europe. In the Preliminary Announcement Fyffes told the market that, despite oversupply in the latter stages of the year, the produce business had made good progress in its key market sectors. It disclosed another factor which had the potential to impact adversely on its banana trade, the euro/dollar exchange rate. Fyffes purchased bananas in U.S. dollars and sold them in euro and sterling. In the Preliminary Announcement it was disclosed that in the banana business the impact of the weaker value of the euro on product purchases in the second half of the year had been offset by reduced shipping charges, other logistical efficiencies and tighter cost control. In the outlook portion of the Preliminary Announcement, Fyffes indicated that it was going to deal with the oversupply situation as follows:

> "For the coming year, operational focus will be directed to optimising those areas in which the Group has particular strengths. In line with the publicly stated intentions of several other companies in the industry, Fyffes will be reducing its overall banana imported volumes in Europe by 10% for calendar 2000, the benefit of which will be weighted towards the second half of the year. In conjunction with this strategy, efficiencies in the Group's cost structures will continue to be vigorously pursued."

437. Fyffes gave some further indications of the future development of its business in the outlook portion of the Preliminary Announcement. It hinted at the possibility of merger and acquisition activity in the following passage:

> "Fyffes continues to benefit from strong cash flows and the strongest balance sheet in the international fresh produce sector. These leave it well positioned to develop the business further by organic growth and by sizeable strategic acquisitions."

438. As I have outlined in the introduction, Fyffes also set out its intentions in relation to the wof.com venture and pointed to its potential.

439. On the day of, and on the day following, the Preliminary Announcement Fyffes' senior management made presentations to stockbrokers and fund managers both in Dublin and in London. There were also media presentations. It is clear on the evidence that, when it arose, Fyffes' management were candid about the adverse trading conditions, what was described at one presentation as "bloody awful" banana prices, and the adverse exchange rate.

440. Apart from the publication of the annual report for 1999, which was circulated after the dates of the Share Sales and, in any event, which contained nothing new, after 14th December, 1999 Fyffes did not give the market any trading or earnings information until it released the March 2000 Trading Statement.

441. A considerable amount of evidence of broker analysis and media coverage in relation to Fyffes, its competitors, internet companies, their businesses and share prices and suchlike was adduced by the parties. By way of general observation, I have drawn on that evidence principally in order to ascertain what the market knew about Fyffes' core business at the relevant time, how the market viewed internet stocks generally and Fyffes' wof.com venture in particular and how the share price reaction to the March 2000 Trading Statement was interpreted by the market.

442. For the purposes of illustrating what the market knew about Fyffes' and its expectations about its earnings in the period from 14th December, 1999 to 20th March, 2000, I propose looking at the broker analysis which emanated from three sources during that period. The three sources are ABN AMRO, because of the emphasis which the defendants attached to this material, and Goodbody and Davy, the two largest stockbroking businesses in Ireland.

443. On 16th December, 1999, the research department of ABN AMRO issued a note, which contained a "hold" recommendation, in which Fyffes' results were analysed. Headlined "An uncertain outlook", it stated that the trading environment merited some caution and that the analyst saw little prospect of double digit earnings growth without sundry property realisations.

444 Nonetheless, the EPS forecasts for 2000 were upgraded by 4.5% to 20.1c, but it was noted that this upgrade was driven by lower tax rate expectations and such like rather than changes at pre-tax level. The pre-tax profit forecast for 2000 was €89.6m, which was higher than Fyffes' internal budget (€84.1m). The opinion expressed that the outlook for Fyffes in financial year 2000 was more uncertain and merited more caution than previously, notwithstanding "upside opportunities", was based on an examination of the following issues:

· Little, if any, benefit was to be expected from wof.com in the short term. Indeed scepticism was expressed as to the ability of the venture to realise significant earnings benefits for Fyffes both in the medium and long term.

· The benefits to accrue to Fyffes from the Capespan joint venture would come on stream gradually, projecting an incremental profit of €2.5m from the joint venture in the year 2000.

· Property realisations were a potential goldmine.

· Share buy backs could uplift earnings.

· The outlook for the EU banana regime was uncertain, although in the period up to 2006 Fyffes was reasonably well hedged against most eventualities.

· The weakness of the euro against the U.S. dollar was a major feature which could be very damaging to Fyffes. The assumption made in this context was that, in the case of Fyffes, banana profits accounted for over 50% of Group profits.

· Upward price movements looked unlikely until the first quarter of 2000 at the earliest.

445. Prospects for consolidation in the fresh fruit sector were considered and it was commented that Fyffes appeared particularly well positioned to benefit from consolidation moves. In fact, Fyffes' net cash balances were €138.7m at the end of financial year 1999. However, a reservation was expressed that consolidation would expose Fyffes to volatile earning streams which its competitors had reported in recent years.

446. ABN AMRO's Ireland Equity Book for January, 2000 maintained the "hold" recommendation, but summarised the difficult banana trading environment in the EU as evidenced by the profit warnings from its competitors, the oversupply in the EU banana market and the weak euro.

447. On 14th January, 2000, after Fyffes' announcement of the strategic partnership with Computer Sciences Corporation, ABN AMRO issued a flash note. It did not alter its "hold" recommendation, nor did it alter its EPS or pre-tax profit forecasts for financial year 2000. It explained this as "erring on the side of caution", recognising that Fyffes' competitors were likely to retaliate with comparable launch sites and the benefits from wof.com were unlikely to accrue to shareholders until 2002 at the earliest. It was suggested that, given that the trading environment had deteriorated since Fyffes' year end in October, 1999, the internet potential was then reflected in the share price, which, according to the note was then at €2.50.

448. In its February and March editions of its Irish Equity Book, ABN AMRO maintained its caution about Fyffes' earnings in the wake of the profit warnings from its competitors. It gave its perspective on the wof.com venture in the following terms:

> "However, following the unveiling of worldoffruit.com, the market is now valuing Fyffes more as an internet proposition than a produce play and short-term trading prospects are being overlooked."

449 Notwithstanding that it remained sceptical of wof.com, and an assessment that the valuation looked stretched on fundamentals, the recommendation was that "dotcom mania makes the stock worth holding".

450. The research department of Goodbody issued a note on the preliminary results on 14th December, 1999. Its EPS forecast for the financial year 2000 was 18.2c, an increase of about 7%. Its forecast for pre-tax profits was €88.5m. It was commented that Fyffes' statement sounded "confident about prospects, e.g. potential sizeable deals, worldoffruit.com, property development". It was stated that operating profit in the financial year 1999 was helped by lower costs, which more than offset the impact of weak banana prices. However, in relation to Fyffes' statement that it would be reducing overall banana import volumes in Europe, it was commented that, if overall volumes were reduced, it would clearly have a positive impact on prices but the analyst queried whether the 10% volumes would not be distributed by the EU to other players. The note contained a "buy" recommendation.

451. On the following day, 15th December, 1999, Goodbody issued another note, maintaining the "buy" recommendation. It stated that it was leaving its forecasts for Fyffes unchanged, but anticipated reviewing them again the following spring, "with a view to a modest upgrade". Looking ahead, the analyst saw some progress on existing fundamentals, essentially banana pricing, but identified M & A activity, wof.com, property development and share buy backs as the more interesting possibilities.

452. Goodbody issued a further note on 24th January, 2000. It maintained the "buy" recommendation in the December notes. The primary focus of this note was on the then "current M&A opportunities" in the banana industry and produce sector over the coming year, stating that both Chiquita and Dole had indicated that part or all of their businesses might be for sale, and on the potentiality of wof.com. The EPS forecast for the financial year 2000 remained at 18.2c and the forecast for pre-tax profit was €88.5m. Commenting on Fyffes' existing businesses, it was pointed out that Fyffes had bucked the trend in the industry in the previous year by reducing its cost base against a background of weak banana prices. It was predicted that the existing businesses would generate 5% to 10% growth over the following few years, through a combination of improvement in pricing, the acquisition of Capespan and share buy backs. It was predicted that world banana prices would improve in the year 2000. Belief was expressed that WTO negotiations in relation to the reform of the E.U. banana regime would ultimately be resolved in a manner which would not be negative for Fyffes' earnings. The recommendation to buy was repeated, although it was noted that the share price had surged in recent weeks. It was disclosed in the note that Goodbody Corporate Finance was raising venture capital for wof.com.

453. In a further note dated 29th February, 2000, Goodbody left its forecast for financial year 2000 unchanged and commented that, despite the surge in the share price, the prospects for Fyffes remained positive and the shares were recommended.

454. In relation to the period under consideration, 14th December, 1999 to 20th March, 2000, only one analyst report from Davy was put in evidence. This was dated 4th February, 2000 and was entitled "Fyffes: More Upside Still". The focus of this note was on Fyffes' ability, because of its financial strength, to participate in industry restructuring and the potential of wof.com. The conclusion was that because of these factors the outlook for Fyffes was very positive. Furthermore, the evidence of Professor Daniel R. Fischel, one of the academic experts called on behalf of the plaintiff, established that in its Weekly Book published on 28th, January, 2000, Davy had forecasted Fyffes' FRS3 profit before tax for financial year 2000 at €91.1m.

455. As I have indicated, there was considerable reliance on the part of the expert witnesses who were called by the defendants on the analysis of Fyffes by the ABN AMRO analyst and, in particular, on its cautionary tone. The plaintiff's position was that the view of the ABN AMRO analyst was not representative of the view of the stockbroking community in the Irish market. Certainly, on the evidence of the analyst's analysis which I have just outlined, the Goodbody and Davy analysts were much more bullish on Fyffes.

456. In the introduction, I have outlined the information which Fyffes gave the market in relation to wof.com by formal announcements in the period from its launch on 1st November, 1999 to the March 2000 Trading Statement. I have also outlined the intense investor relations activity which was centred on wof.com in the latter half of January and in the first half of February, 2000.

Fyffes' promotion of wof.com undoubtedly garnered considerable media interest, some of which I have referred to in the introduction.

457. The plaintiff's emphasis understandably was on what the market did not know about Fyffes' trading and profitability. It was accepted that the market had full visibility of the exchange rates but it was argued that the market did not know how currency relativity impacted on Fyffes' earnings. The market did not know to what extent, if any, Fyffes hedged against exchange rate volatility. It did not know to what extent Fyffes purchased bananas in dollars. It did not know the extent to which Fyffes' sales were generated in sterling as opposed to euro. Similarly, in relation to banana prices, while accepting that the market was aware of weak banana prices, it did not have the information which would enable it to quantify either the impact of banana prices on Fyffes' business or the extent to which Fyffes could maintain margins by reducing costs. Even the analysts who commented on the food sector and on Fyffes did not have critical information about the nature of Fyffes' business, for example, monthly trading figures, the budget for the full year or the first quarter, the percentage of Fyffes' turnover attributable to bananas or banana sales within the United Kingdom or its profits from bananas. In fact, banana sales accounted for about 25% of total sales, whereas profits from bananas accounted for almost 75% of total profits. Therefore, the assumption made by the ABN AMRO analyst on 16th December, 1999 that it was 50% was incorrect. Indeed, before the plaintiff went into evidence in these proceedings, the experts who testified on behalf of the defendants knew as little as the analysts about the breakdown of Fyffes' profits.

458. The plaintiff also submitted that the evidence showed that, whatever knowledge the market had of fresh produce and banana trading from announcements made by its U.S. competitors, it did not affect the market's perception of Fyffes. In the years 1998 and 1999 Fyffes' competitors had made sixteen adverse trading statements, none of which impacted on Fyffes' share price. Over that period, Fyffes' share price increased by 50%, whereas its competitors' share prices declined by in excess of 60%. As regards Fyffes' core business, the inference which the plaintiff has invited the court to draw, that the market perception of Fyffes' business was different from the perception of its competitors' businesses, in my view, is correct.

459. After the November and December Trading Reports were circulated internally, Fyffes made two stock exchange announcements whereby, the defendants argued, it was implicitly telling the market that trading conditions and its expectations had not changed since the Preliminary Announcement. The first announcement was made on 27th January, 2000 and it was a notification of the grant on 25th January, 2000 of options to Mr. Halpenny, the secretary of Fyffes, in relation to 50,000 ordinary shares in Fyffes. As secretary of the company, Mr. Halpenny came within the definition of officer in Part V and, as such, was a connected person within the meaning of s. 108(1) of the Act of 1990. It was submitted by the plaintiff that the grant of options to employees under the Fyffes' share option scheme was not captured by Part V. In my view, that is not correct for the reasons which I will outline later. The second announcement was made on 28th January, 2000. It notified that on 26th January, 2000 Mr. Ellis, an executive director of Fyffes, had sold 45,000 ordinary shares in Fyffes. From an outside perspective, the defendants were correct in suggesting that the impression that announcement created was that Mr. Ellis did not have price-sensitive information on 26th January, 2000.

The new information contained in the Trading Reports

460. I have quoted the portions of the November and December Trading Reports which the plaintiff contends constitutes price-sensitive information in the introduction. The following table in columns (1) to (4) is intended to illustrate the information in relation to Fyffes' pre-tax profit which can be extrapolated from those documents.

	(1) Actual FY 1999	(2) Budget FY 2000	(3) Actual FY 2000	(4) Variance	(5) Gernon Forecast Actual
	€'m	€'m	€'m	€'m	€'m
				(a) Prior Year €'m	(b) Budget €'m
November December January	1.5 3.3 6.3	(0.3) - 5.0	(2.6) (1.3) 1.3	(4.1) (4.6) (5.0)	(2.3) (1.3) (3.7) (3.43) (2.92) 2.54
Total Q1	11.1	4.7	(2.6)	(13.7)	(7.3) (3.81)
Capespan		(2.5)	(3.0)		(2.5)
Capespan Adjustment					(9.8)

461. I make the following comments by way of explanation and elaboration:

> (1) The actual pre-tax profit figures for the months of November and December, 1998 and January, 1999 are set out in column (1). Neither the monthly breakdown nor the quarterly breakdown for financial year 1999 was generally available, although the half-yearly breakdown was derivable from the interim results in June, 1999 and the Preliminary Announcement.
>
> (2) The budget figures in column (2) for November, 1999 and January, 2000 reflect the revised spread adopted after the budget meeting, which envisaged a break-even budget for December, 1999. No information in relation to Fyffes' budget for financial year 2000 was generally available. The budget for the first quarter was significantly lower than the actual for the prior year.
>
> (3) The actual pre-tax profit figure for November, 1999 in column (3) comes from the November Trading Report. This was not generally available.
>
> (4) The corresponding actual figure for December, 1999 in column (3) comes from the December Trading Report. This was not generally available.
>
> (5) The figure for January, 2000 in column (3) is the forecast for January contained in the December Trading Report. This

estimate was not generally available. The evidence shows that the actual outturn for January was €1.1m.

(6) Column (4) sets out the variance (a) from prior year and (b) from budget. None of this information was generally available.

(7) The Capespan losses for November and December in column (3) are extrapolated from the December Trading Report. As the commentary in the December Trading Report indicates, it was hoped that it would be possible to treat the Capespan losses for these months as pre-acquisition losses. None of this information was generally available.

(8) In column 4(b) the Capespan adjustment illustrates the effect of adjusting the budget figure by adding back the budgeted losses for Capespan (€2.5m) to correlate, on a like for like basis, the budget total with the actual total for the first quarter. The adjustment is necessary because the actual figure for the first quarter in column (3) does not include actual Capespan losses for November and December, 1999 because the accounting treatment of the actual losses of €3m had not been decided on. None of this information was generally available.

(9) For convenience, I have included in this table in column (5) figures which the defendants contend are relevant to assessing whether Fyffes' management considered the information in the November and December Trading Reports to be price-sensitive, which I will address later.

462. Counsel for the plaintiff made a number of general observations about the November and December Trading Reports which, in my view, cannot be gainsaid. Being management accounts, they were authoritative. As regards quality and provenance, the information contained in them differed from the general information about trading difficulties available in the market. They were intended for internal use only and, as such, were confidential, which emphasises their sensitivity, although, in my view, not in any technical sense. They contained detailed and precise information: precise figures for actual losses in the months of November and December, 1999 and a forecast for January, which on the evidence, was made some time after the middle of January, and which would be assumed to be very accurate. From the figures given for deviation from prior year and budget, by a simple arithmetic calculation, it was possible to deduce what profits were achieved in each of the three months of the first quarter of financial year 1999 and the profits for which Fyffes had budgeted for each of the three months in the first quarter of the financial year 2000. The profit level which had to be achieved, as it was put, the hill which had to be climbed, in the last three quarters of financial year 2000 even to reach the profit achieved in the financial year 1999 was obvious: it was at least €85.5m, being the aggregate of the loss of €2.6m in the first quarter of financial year 2000, which had to be made up, together with the actual figure achieved in financial year 1999, €82.9m.

463. Indeed, it was submitted by the plaintiff that the information indicated that the situation was even worse for a number of reasons. First, the Capespan losses of €3m would also have to be made up in the last three quarters. Secondly, the market knew from the Preliminary Announcement that Fyffes' expectations for financial year 2000 exceeded what was achieved in the previous year: in the outlook statement the market had been told of Fyffes' belief that the year 2000 would be "another year of further growth" for Fyffes. Therefore, a reasonable deduction was that the hill to be climbed to meet budget in the final three quarters was higher than €85.5m. Thirdly, at the time, analysts' profit forecasts for financial year 2000 were in the range of €88m to €92m, from which a reasonable deduction could be made that the hill to be climbed to match those forecasts was very high indeed, between €90.6m and €94.6m.

464. The information contained in the November and December Trading Reports was unquestionably bad news about Fyffes' trading and earnings performance in the first quarter. Taken on their own, a reasonable inference could be drawn from the figures that there was a real risk that Fyffes' own expectations and analysts' expectations for the first half and for the full year would not be met. It is true that the market did not know what Fyffes' expectations for the first half were, although it did know what was achieved in the first half of the previous year. Nonetheless, given the size of the loss in the first quarter against the modest budget for that quarter, that there was a risk was a reasonable deduction. The absence of interpretation or a narrative explanation from management did not hinder the arithmetical exercise which enabled deductions to be made in relation to the likely adverse impact of the first quarter results on the half year or the full year and, to that extent, was immaterial. That the fresh produce business, including the banana business, was, and was known in the market to be, seasonal with the first quarter being the least profitable quarter, was also immaterial, to the extent that seasonality was factored into the prior year figures and the budget figures contained in the documents and was also built into analysts' forecasts. The plaintiff suggested that a reader of the information would discern a worsening negative trend. The figures in the above table for variances from prior year and budget bear this out, in that they were getting larger in absolute terms, but whether this should be regarded of any significance, in my view, is doubtful. In general, the narrative gave very little inkling that matters would improve, except the statement that the European market had improved quickly in January with prices at budget level going into February. Conversely, there was nothing in the narrative to indicate that matters were getting worse.

465. On the basis of the foregoing, the court was invited to conclude that intuitively the information appeared on its face to price-sensitive. The statutory test does not warrant drawing any conclusion in relation to the information contained in the trading reports standing alone. The furthest the court can go is that the information was of a type and quality that was potentially price-sensitive. Whether it was or was not, falls to be judged by applying the principles which I have adumbrated earlier.

The evidence of Fyffes' share price movement
466. The following table sets out Fyffes' closing price in euro on the Irish Stock Exchange in the critical months of December, 1999, January, 2000, February, 2000, March, 2000 and April, 2000.

December 1999	**January 2000**	**February 2000**	**March 2000**	**April 2000**
Date	Price €	Date	Price €	Date Price € Date Price € Date Price €
01	1.60	04	1.95	01 3.26 01 3.35 03 2.25
02	1.63	05	1.98	02 3.32 02 3.55 04 2.00

03	1.62	06	1.98	03 3.20 03 3.60 05 1.95
06	1.62	07	1.97	04 3.50 06 3.65 06 1.98
07	1.60	10	2.25	07 3.70 07 3.65 07 1.97
08	1.60	11	2.23	08 3.60 08 3.50 10 2.00
09	1.60	12	2.25	09 3.68 09 3.20 11 2.12
10	1.62	13	2.58	10 3.85 10 3.45 12 2.15
13	1.65	14	2.55	11 3.85 13 3.55 13 2.08
14	1.80	17	2.63	14 3.90 14 3.43 14 2.05
15	1.99	18	2.72	15 3.90 15 3.35 17 1.93
16	2.00	19	2.63	16 3.93 16 3.30 18 1.97
17	2.00	20	2.60	17 3.95 20 2.70 19 1.97
20	2.00	21	2.60	18 3.98 21 2.46 20 2.00
21	1.97	24	2.70	21 3.95 22 2.60 25 1.93
22	1.97	25	2.62	22 3.87 23 2.50 26 1.87
23	1.98	26	2.80	23 3.87 24 2.62 27 1.85
		27	2.95	24 3.80 27 2.55 28 1.85
		28	3.14	25 3.75 28 2.55
		31	3.30	28 3.55 29 2.55
				29 3.40 30 2.40
				31 2.20

467. As has been stated previously, Fyffes' shares traded on the London Stock Exchange on 17th March, 2000 and closed at the euro equivalent of £3.165 on that day.

Expert evidence generally
468. At this point the focus of the analysis of the evidence is on the expert evidence proffered by the parties as being of assistance in determining the significance of the new information contained in the November and December Trading Reports in answering the hypothetical question posited in s. 108(1), specifically, whether it was price-sensitive. The expert witnesses whose specific brief was to address this issue and whose testimony is particularly relevant, broadly speaking, fall into two categories: academic experts and experts with market experience.

469. I propose first analysing the evidence of the academic experts in the order in which they were called. Each side called two academic experts. The plaintiff called Professor Daniel R. Fischel and Professor Kenneth Lehn. The defendants called Professor Richard J. Taffler and Professor S.P. Kothari.

470. I will then analyse the evidence of the witnesses with market experience: Mr. John Brindle, Mr. Scott J. Dobbie and Mr. Padraic O'Connor, who testified on behalf of the plaintiff; and Mr. Frank O'Brien and Mr. John Lawrie, who testified on behalf of the defendant. By way of clarification, although they were proffered as expert witnesses with market experience, neither Mr. Michael Dillon, who testified on behalf of the plaintiff, nor Mr. Tom Byrne, who testified on behalf of the defendant, were briefed to address the discrete issue with which I am now concerned.

Evidence of plaintiff's academic experts

Professor Fischel

471. Professor Fischel is President of Lexecon, a consulting firm that specialises in the application of economics to a variety of legal and regulatory issues. He is also Lee and Brenna Freeman Professor of Law and Business at the University of Chicago Law School. His brief from the plaintiff's solicitors was to analyse whether the economic evidence supported the plaintiff's claim that the information contained in the November and December Trading Reports was price-sensitive. He concluded that, had the information concerning Fyffes' financial performance in the first quarter of financial year 2000 contained in the two documents been publicly disclosed, it would have materially affected Fyffes' share price. He advanced a number of reasons for that conclusion.

472. On the basis of an analysis of Fyffes' historical monthly and quarterly earnings during the financial years from 1991 to 2000, which disclosed that the largest November, December and first quarter losses of any of the financial years analysed were in the months and quarter at issue here, Professor Fischel concluded that the financial information contained in the relevant documents indicated poor performance relative to historical benchmarks. The historic data on which Professor Fischel based his analysis was not in the public domain and, consequently, his finding, however interesting, is not relevant to the determination of the price-sensitivity issue subject to one qualification. The qualification is that information in relation to profit in the relevant months and quarter in the prior financial year, 1999, is derivable from the November and December Trading Reports.

473. On the basis of an intrinsic analysis of the information contained in the November and December Trading Reports, Professor Fischel concluded that Fyffes was not on track to achieve either its own budget or analysts' published forecasts of earnings for financial year 2000 as at 3rd February, 2000. As my analysis of the documents earlier indicates, I agree that the inferences drawn by Professor Fischel can reasonably be drawn and I agree with his oral testimony that it is possible to draw such inferences without the help of management explanation or interpretation. As I understand Professor Fischel's approach, having found in the documents information of the type which causes investors to change their beliefs about the value of a company and its securities, specifically, information about earnings or profitability which represents a deviation from past performance or from what analysts and other market participants expect, he assumed that, had the information been generally available on the relevant dates, the dates of the Share Sales, it would have had that effect.

474. Professor Fischel then sought to test his hypothesis that the information he had found in the documents would have an effect on Fyffes' share price. He identified a number of factors which supported the hypothesis. The first was the decline of Fyffes' share price following the release of the March 2000 Trading Statement on the day of the release and the following day. Professor Fischel's view was that the information contained in the March 2000 Trading Statement had effectively been included in the November and December Trading Reports. The correctness of that view was hotly disputed by the defendants and their experts. I did not understand the defendants to quibble with Professor Fischel's conclusion that the decline (which he measured from the closing price on the London Stock Exchange on 17th March, 2000, resulting in a negative return of -14.7% on 20th March, 2000) was statistically significant, specifically that it was significantly negative at the 5% level or better in a one-tailed test. However, the validity of the event as a proxy for what might have happened if the alleged price-sensitive information was generally available on 3rd February, 2000 was vigorously contested.

475. Professor Fischel found a precedent for what happened on 20th March, 2000 in an event approximately three years earlier. On 14th April, 1997, Fyffes had issued a statement at its A.G.M. that interim profits would be "slightly down" on the previous year and this was ascribed to price falls and unfavourable currency trends. Fyffes' share price declined by 5.93% on that day and by a further 3.94% on the following day. What happened on 20th March, 2000 and on the following day should not have been a surprise given this precedent, Professor Fischel suggested. What the evidence shows is that by the end of financial year 1997 there had been a recovery and profits for financial year 1997 exceeded the prior year. At the hearing there was much debate as to whether, if the negative financial information contained in the November and December Trading Reports had been generally available at the beginning of February, 2000, analysts and market participants would have taken comfort from the recovery which had occurred in 1997. Professor Taffler, for instance, thought they would. In general, I do not find the evidence of what happened in 1997 persuasive one way or the other in determining the price-sensitivity issue.

476. The final factor which Professor Fischel cited in support of his hypothesis was the experience of Fyffes' principal competitors, Dole, Chiquita and Fresh Del Monte, to which I have already referred, of profit warnings being accompanied by negative, and on Professor Fischel's assessment, statistically significant declines in stock price. While the examples cited by Professor Fischel are undoubtedly factually accurate, Professor Fischel's assertion that they are strongly suggestive that negative financial information in relation to a company's performance is "price-sensitive", in my view, does not go any distance in meeting the test of materiality which must be met in order to satisfy the hypothetical test posited in s. 108(1).

477. In his report, Professor Fischel did not analyse the information contained in the November and December Trading Reports in the context of the total mix of information available to the market in relation to Fyffes at the beginning of February, 2000 or the market conditions prevailing at that time. In particular, he did not analyse the significance, or otherwise, of the wof.com venture in the context of the then prevailing enthusiasm for internet stocks or stocks with an internet element or in relation to the dramatic increase in Fyffes' share price over the period from early January, 2000 to 3rd February, 2000 in his written statement of evidence. However, he was asked to address these issues in his oral testimony. He acknowledged that the environment of the prevailing market in January and February, 2000 was not like any environment that Fyffes had seen in the market place previously, because of enthusiasm about the internet. The principal reason for the rise in Fyffes' price share at that time he ascribed to the company's "dotcom prospects". However, in his view it was not correct to infer that investors were not interested in other aspects of Fyffes' business. To the extent that there were adverse developments in the company's core business which made the company less profitable, investors, including institutional investors, were interested in the core business.

Professor Lehn

478. Professor Lehn is the Samuel A. McCullough Professor of Finance in the Joseph M. Katz School of Business in the University of Pittsburg. His brief was, not only to form an opinion as to the price-sensitivity or otherwise of the information contained in the November and December Trading Reports, but also to form an opinion as to what Fyffes' share price might have been at the dates of the Share Sales, if that information had been generally available.

479. On the basis of an intrinsic analysis of the information contain in them, Professor Lehn concluded that the November and December Trading Reports contained adverse information about Fyffes' financial performance in the first quarter of financial year 2000. He described the variances against prior year and budget as "striking". Like Professor Fischel, he sought to give an historic perspective to the information by reference to data which was not in the public domain and is not relevant in the context of the price-sensitivity issue before the court. However, leaving aside the historic perspective (apart from the comparison with the prior year, the relevant data being accessible in the November and December Trading Reports), Professor Lehn testified that the information in the two documents conveyed highly negative information. He emphasised the fact that they disclosed that the budget for the first quarter was significantly lower than the prior year performance. His view was that there was nothing to indicate that the

shortfall in the first quarter would be made up in subsequent months of the then current half-year. Although the half year was not explicitly addressed at all, this is a deduction which was open on the figures.

480. Professor Lehn then went on to outline and explain the proposition that research in finance and accounting shows that a company's stock price is directly related to expectations about its future earnings and cash flows and that these expectations are affected by contemporaneous earnings. A corollary of this is that announcements of unexpected earnings are associated with significant changes in stock prices; unexpectedly good earnings are associated with increases in stock prices and unexpectedly bad earnings are associated with decreases in stock prices. On the basis of this theory he suggested that one would expect that, had the information in relation to Fyffes' negative financial performance in the first quarter become available generally in February, 2000, it would have had a material, that is to say, a significant, effect on Fyffes' share price. The position adopted by the defendants was that the basic theory was relatively non-controversial but that it did not work with what were referred to as "dotcom stocks", which it was contended at the relevant time were not being valued in a rational manner. The conclusion of the debate on the cross-examination of Professor Lehn, as I understand it, was that, in stating the theory, Professor Lehn had referred to earnings without distinguishing between gross profit, on the one hand, and operating profits or net income, on the other hand. However, he did acknowledge that if one equates earnings with current net income, the theory is not as an appropriate metric for "dotcoms" as it would be for what he called "bricks and mortar" companies. His explanation for that situation and for the high P/E ratios which "dotcom" stocks had at the time was that they were a consequence of the required accounting treatment of the high level of investment in research, development, marketing and such like which "dotcoms" typically made, which treated such investment as expensed. However, his view was that "dotcom" stocks were being valued in a rational manner at the time, although market participants might have been overly optimistic about them. In any event, his view was that Fyffes was not a pure "dotcom" company at the relevant time; it was a hybrid, a trading company with a dotcom component.

481. On the basis of empirical analysis he conducted, Professor Lehn concluded that there was a significant relation between Fyffes' stock price and its contemporaneous earnings. For this analysis he used a model known as the "net income and book value of equity" ("NIBE") model, which depicts a company's market capitalisation as a function of two accounting variables, its current net income and the book value of its shareholders' equity. In implementing the model, Professor Lehn covered the period from the end of the financial year 1987 to the end of the first half of financial year 2004. Over that period, he inputted data in relation to the three components (net income for prior year, book value of equity and market capitalisation), generally speaking at two data points for each year based on published information (the interim results and the end year results as contained in the Annual Report). Professor Lehn concluded that the model did a good job of explaining, and of predicting, Fyffes' share price over time. He justified his conclusions by testing the result of the modelling exercise against Fyffes' actual share price over the period in question. The graphic presentation of the result of that test, predictably, showed a glaring discrepancy between the price predicted by the model and the actual share price in the early part of 2000. Professor Lehn explained that this was because he used an estimation period during which, for the most part, 1987 to 1999, Fyffes had no internet appendage, so that the model effectively analysed the value of Fyffes' core business. The wof.com value accounted for the difference between the actual price and the price predicted by the model in early 2000.

482. Professor Lehn used the NIBE model to evaluate what the likely effect on Fyffes' share price of the negative information in relation to Fyffes' performance in the first quarter of financial year 2000 would have been, had it been generally available in February, 2000. The estimated coefficient on the prior year net income which the model produced was 14.89, indicating that Fyffes' market capitalisation typically was a factor of 14.89 times its prior year net income over the sample period, after controlling the book value of its equity . The exercise which Professor Lehn did to evaluate the likely adverse effect on the share price, if the negative information had been generally available, was to multiply the shortfall in net income from prior year for the first half of financial year 2000 (which was an assumed figure) by 14.89% and divide the product by the number of issued shares. The assumed figure, which was just short of €12m, was based on the actual shortfall figure shown in Fyffes' management accounts for January, 2000 for the first quarter, the assumption he made being that the shortfall would not vary over the first half. That assumption was not accepted by the defendants as being valid. On the basis of his calculation, the negative effect on the share price was represented by a decline of €0.62. Taking the closing price on 2nd February, 2000, the day before the first of the Share Sales, Professor Lehn calculated the €0.62 decline as representing an 18.6% drop in Fyffes' share price, which he considered to be statistically significant. That evaluation was done without reference to the reaction to the March 2000 Trading Statement.

483. However, Professor Lehn went on to consider that reaction. His conclusions by reference to it were predicated on the premise that the information released on 20th March, 2000 reflected the information contained in the November and December Trading Reports. That premise was hotly disputed by the defendants. Adopting a slightly different approach to that adopted by Professor Fischel, Professor Lehn measured the decline in the Fyffes' share price, which he considered to be the consequence of the trading statement made on 20th March, 2000, from the closing price on 16th March (€3.30) to, first, the closing price on 20th March (€2.70), and, secondly, the closing price on 21st March (€2.46). The declines represented a one-day stock return of -18.2% and a two-day return of -25.5%. Professor Lehn concluded that such returns were statistically significant. As I understand the position, the defendants did not dispute the proposition that negative returns of such magnitude would be statistically significant. In fact, Professor Lehn's testimony was that the two-day stock return was the most negative two-day percentage change in Fyffes' share price since 1989.

484. Professor Lehn also conducted an "event study", which he described as a technique commonly used in academic literature to examine how stock prices react to the release of new information, to further assess whether the decline following the March 2000 Trading Statement was statistically significant. On the basis of the results of the study, he concluded that it was. The defendants did not seek to dispute the results of the event study. The controversy related to the relevance of what happened on 20th March, 2000 and events subsequent to that date to the issues which the court has to determine.

485. While the quantification of loss does not arise at this juncture, Professor Lehn testified that by reference to the reaction to the March 2000 Trading Statement he estimated that the DCC Group avoided losses in the range of €0.60 to €0.84 per share by reason of the disposals involved in the Share Sales, the estimate of €0.60 being based on the one-day return and the estimate of €0.84 being based on the two-day return. This result, the plaintiff submitted, validated his estimate based on the NIBE model.

486. An issue which I will be addressing later is the defendants' experts' contention that the revelations in relation to trading performance made on 20th March, 2000 were not the cause of the share price decline on that day. While he was unable to track intra-day price movements on the Irish Stock Exchange on 20th March, 2000, Professor Lehn was able to track intra-day movements on the London Stock Exchange on that day. What his evidence, which was not controverted, revealed was that at 12.15 p.m. Regulatory News Service reported that Fyffes had issued a profit warning (the March 2000 Trading Statement) and almost immediately there was a significant decline in Fyffes' share price of approximately 15% on the London Stock Exchange. Further information later that afternoon, first rumours of a possible merger between Fyffes and Dole, and later a statement by Fyffes playing down talk of the rumoured Dole deal, failed to generate a reaction. Therefore, Professor Lehn concluded, virtually the full decline on 20th March was closely related to the March 2000 Trading Statement. On the basis that the information released in the March 2000

Trading Statement was effectively the information alleged to be price-sensitive in these proceedings, Professor Lehn concluded that it was price-sensitive and, further, that it was not generally available before 20th March, 2000 because, if it had been, there would have been no reason for the reaction which occurred on that day, applying the type of reasoning which underlies the decision in *SEC v. Falbo*.

487. Professor Lehn did not address the significance or otherwise of wof.com relative to Fyffes' share price movements in his written statement of evidence, although he was asked to do so in his oral evidence. His view was that one must distinguish a company which is a "pure dotcom" and a company which is a "hybrid". Fyffes fell into the latter category, being a company which had been in business for a long time with a core business and an adjunct, wof.com, that would provide another growth vehicle. Professor Lehn acknowledged that investor interest and enthusiasm about wof.com was the major catalyst for the stock price increase from early January, 2000 onwards. However, his view was that the negative information contained in the November and December Trading Reports would have been relevant for the valuation of both Fyffes' core business and the wof.com component. The value of both would have been adversely affected.

488. Both of the defendants' academic experts were critical of the use Professor Lehn made of the NIBE model, which they contended was not an appropriate tool for measuring the effect on share price of an event, such as information about earnings becoming generally available on a particular day. They also were critical of the application of the model, the data points chosen and such like. I do not consider it necessary, nor do I consider myself competent, to comment on the minutiae of the criticisms, which the plaintiff submitted did not go to the root of the exercise. However, on the basis of my understanding of the model, and assuming for present purposes that, had the negative information contained in the November and December Trading Reports had been generally available on 3rd February, 2000, it would have had an adverse effect on Fyffes' share price, I am not confident that the model could properly measure that adverse effect given the wholly abnormal market for Fyffes' shares at that time. I have come to that conclusion because of the following answer given by Professor Lehn in cross-examination:

> "So the prediction that will come out of this model basically is a prediction as to the value of the information that Mr. Flavin saw in those two documents as it affected the core business of Fyffes. The worldoffruit.com value accounts for the big difference between the actual price and the predicted price in early 2000 and as I indicated earlier, the value of that venture will depend upon the value of the core business. So effectively the value of the information that Mr. Flavin had, had implications for the value of both pieces of Fyffes and this model effectively tells us the impact of that information on the value of the core business, but in my judgment, unambiguously that information had implications for the value of worldoffruit.com and I think that is validated again looking at what happened on March 20th when the profit warning was issued."

489. What that answer conveys is that the modelling exercise did not measure, and I would surmise was not capable of measuring, the impact on Fyffes' share price of the information which is alleged to be price-sensitive being generally available on 3rd February, 2000 in the actual market for Fyffes' shares prevailing on that date, which is what the statutory hypothesis requires. In effect, in the modelling exercise the factor which rendered the market for Fyffes' shares abnormal, the wof.com component, was ignored.

The evidence of the defendants' academic experts

Professor Taffler

490. Professor Taffler is the Professor of Accounting and the Director of the Centre for Financial Research at Cranfield School of Management, Cranfield University in England. His brief was to furnish an opinion as to whether the information contained in the November and December Trading Reports was price-sensitive information within the meaning of s. 108(1). He summarised his opinion by stating that his clear conclusion was that on any reasonable criteria the information contained in the documents was not price-sensitive as statutorily defined.

491. The main thrust of Professor Taffler's evidence was to outline two separate and independent approaches he adopted to reach that opinion. However, that evidence was prefaced by very technical evidence which described how Professor Taffler developed an operational definition of materiality to distinguish what he referred to as "noise" (normal levels of price volatility and trading activity in shares) from major, that is to say, material shifts in valuation parameters such as would be associated with new information releases or significant changes in investor expectations. This process involved the application of what Professor Taffler referred to as the standard model for generating expected returns in finance, the Capital Asset Pricing Model (CAPM).

492. As part of the process he conducted, Professor Taffler set out to ascertain whether at the relevant time, February, 2000, Fyffes' shares were being priced as a traditional "old economy" stock or as "dotcom" stock. He compared Fyffes' stock returns with a range of benchmarks: the ISEQ General Index, the EU Datastream Internet Index (DSII), the Dow Jones Internet Index, the Dow Jones European Technology Index, the NASDAQ Composite, the FTSE All Share Index, the FTSE TechMark (All) Index, the FTSE TechMark 100 and the ITEQ (an Irish technology index which came on stream in January, 2000). Applying the CAPM methodology he found that the ISEQ was the best fit for Fyffes' stock returns in the period from 14th December, 1998 to 13th December, 1999 and the DSII was the best fit for the period from 14th December, 1999 to 30th June, 2000. Those results, he concluded, illustrated that up to 14th December, 1999 Fyffes' share price was being valued by the market as an "old economy" stock, whereas from 14th December, 1999 to 30th June, 2000 it was being valued as an internet stock.

493. Adopting the ISEQ as the relevant benchmark for the year up to 14th December, 1999 and the DSII as the relevant benchmark for the period from 14th December, 1999 to 30th June, 2000, Professor Taffler used the CAPM methodology to develop what he described as "an operational definition of materiality using a broad-brush 5% criterion". The result he obtained was that in the period during which the Share Sales took place, from 3rd to 14th February, 2000, daily price movements in Fyffes' stock relative to the market, which he equated with the DSII, of below -9.85% or above 11.69% would be considered material.

494. I do not pretend to have any real understanding of the modelling exercise. Therefore, I express no view on to what extent the type of exercise conducted by Professor Taffler resulting in a statistical concept of materiality with a confidence level of 95% might be helpful in applying the hypothesis contained in s. 108(1). However, I can say that the exercise carried out by Professor Taffler is of no assistance in this case. Other experts had recourse to indexes to gain a general understanding of what was happening to Fyffes' share price in late 1999 and early 2000. However, Professor Taffler's use of the indexes in developing "an operational definition of materiality" calls for a close examination of his choice of benchmark. On the evidence, I am not satisfied that the DSII was an appropriate benchmark against which to measure Fyffes' share price movements in the relevant period, as the evidence suggests that at that time the DSII comprised only two stocks, both listed in the United Kingdom, one being an internet service provider and there being no evidence as to the nature of the business carried on by the other. Therefore, to the extent that Professor Taffler's opinion is based on the result of the modelling exercise, it is not a sound basis for his conclusion, in my view. Having said that, it is not clear to me that Professor Taffler deployed the result in a manner which is relevant to the court's determination on the price-sensitivity issue.

495. As I have stated, Professor Taffler adopted two approaches, which were independent of each other, to assessing the impact, if any, the information contained in the November and December Trading Reports would have had on Fyffes' share price at the time of the Share Sales if generally available: one was by reference to his thesis that at the relevant time the market was valuing Fyffes' shares "as a quasi-dotcom stock at the peak of the dotcom bubble"; and the other assumed that "normal market conditions, i.e. ignoring the input of the dotcom pricing bubble" prevailed.

496. In relation to the latter approach, Professor Taffler looked at the documents themselves, what they said and what they did not say. He considered what proxy sources of the alleged price-sensitive information contained in them were available to the market and found published data in relation to banana prices, exchange rate movements and Fyffes' competitors' profit warnings. His opinion was that it was very unlikely that the documents contained information the substance of which was not already available to the market. That opinion was one basis for his conclusion that the information in the documents, broadly speaking, would have been reflected in Fyffes' share price on 3rd February, 2000. He also pointed to –

> (a) the relative unimportance of the first months of Fyffes' financial year because of the seasonality of the banana business,
>
> (b) the lack of interpretation by the management,
>
> (c) the absence of forecast earnings revisions for the full year, and
>
> (d) management's previous excellent track record in forecasting and the precedent of 1997.

497. Another basis for his conclusion was his theory, which he testified was consistent with well-established behavioural biases found in the academic behavioural finance literature, that analysts and the market tend to underreact to bad news and overreact to good news in revising earning forecasts. As I understand the relevance of this theory to the facts of this case, it is that the market might not have readily taken on board negative trading information about Fyffes and, if it did, it would have overestimated the probability of matters working out as they had done in 1997. Leaving aside the controversy which developed as to the level of acceptance of the theory in academic circles, it seems to me that the theory is too general and too imprecise to be given any weight in the resolution of the price-sensitivity issue in this case.

498. Professor Taffler did not ascribe to the precise numbers contained in the November and December Trading Reports the significance which the plaintiff's experts had ascribed to them. His view was that one must be careful not to assign spurious accuracy to numbers – what is known in behavioural finance as functional fixation. What the market is concerned about, in his view, is not actual numbers relating to individual months but what the outcome for the year will be.

499. The plaintiff, in its submissions, commented that Professor Taffler ignored what the plaintiff submitted was the decisive test of whether the information in relation to poor trading contained in the November and December Trading Reports was generally available – the adverse share price reaction on 20th March, 2000. This is true, but in his oral testimony Professor Taffler gave a very comprehensive analysis of the March 2000 Trading Statement to illustrate that there was not parity of information in that document and in the November and December Trading Reports.

500. The assumption which underlies the other approach adopted by Professor Taffler is that, at the time of the Share Sales, Fyffes' stock was being principally valued as a "dotcom" stock "under the influence of rampant dotcom mania". While he was not asserting that the internet venture was the only driver of the share price, he considered it to be the main driver. The price changes were being driven by expectations about future rewards associated with wof.com. Analysts were not valuing the underlying business; it was a "given" and was not the focus of their attention. Professor Taffler characterised the relevant period as "the late stage of the internet bubble" and his conclusion was that, given "the irrational euphoric behaviour of the market" at the time, any company specific information relating to short-term trading issues in bananas would be highly unlikely to have any impact whatsoever on Fyffes' share price. The following is a summary of the opinions and arguments relied on by Professor Taffler in support of that conclusion in the order in which they are set out in his written statement of evidence, although he confirmed that the order was not hierarchical:

> (i) A review of contemporaneous broker analyst reports and financial media comment supported his conclusion.
>
>> There is no doubt that Professor Taffler adduced convincing evidence that the potential of wof.com was the main driver of the share price increase, a proposition with which the plaintiff's experts were, in any event, in agreement. The area of disagreement is whether Professor Taffler's assertion that the underlying fundamentals of Fyffes' business were being almost totally ignored by the market is correct.
>
> (ii) The co-movement of Fyffes' share price with the DSII, not the ISEQ, at the relevant time confirmed his assumption that from 14th December, 1999 onwards Fyffes' stock was being priced as a "dotcom" stock.
>
>> It follows from my comments on the use of the DSII as a benchmark, that I do not find the result of the exercise as of any probative value in this case.
>
> (iii) Analyses of trading volumes and price volatility supported his conclusion.
>
>> As regards the weekly trading volumes, it is unquestionably the case that the pattern in the first half of calendar year 2000 differed from the pattern in the second half of calendar year 1999. Moreover, the pattern of price volatility unquestionably differed in those two periods. As regards price volatility, insofar as Professor Taffler based his conclusion on Fyffes' price volatility post 14th December, 1999 being more similar to that of the DSII rather than the ISEQ, I do not consider that a sound basis for the conclusion, because I am not satisfied that the DSII was an appropriate benchmark.
>
> (iv) Estimates of the market value of wof.com supported his conclusion.
>
>> The approach adopted by Professor Taffler to split the market value of Fyffes' shares in February, 2000 between the core business, on the one hand, and the wof.com component, on the other hand, for which he used an equally weighted index of the stock of Fyffes' main competitors (Dole, Chiquita and Fresh Del Monte) was described as Professor Lehn as being completely inappropriate. Indeed, Professor Taffler acknowledged that the competitors were not perfect proxies for Fyffes' core business and that the exercise he had carried out was only "very broadly

indicative".

(v) An analysis of the information events that impacted materially on Fyffes' share price supported his conclusions.

Professor Taffler chronologically tracked the major news events in relation to wof.com against the movement in the share price. In relation to the period from the end of 1999 until the share price peaked on 18th February, 2000, a convincing picture emerged of a causative link between the share price and wof.com. However, the only evidence which Professor Taffler cited to support his contention that the mainly downward trajectory in the share price from 18th February to 30th June, 2000 resembled "the characteristics of a typical "dotcom" stock post-crash" were the comparisons with the DSII and a general statement that the Dow Jones Internet Index peaked on 9th March, 2000 and, after wobbling, the market went into freefall.

Both Professor Fischel and Professor Lehn disagreed with Professor Taffler's opinion as to the cause of Fyffes' stock price decline.

Professor Fischel's view was that, both as a matter of logic as well as a matter of evidence in this case, it was simply inconsistent with what happened in the real world, the real world, as I understand his evidence, being what happened on and after 20th March, 2000 as interpreted by analysts at the time. Indeed, Professor Fischel's view was that the share price reaction on 20th March, 2000 would have been more adverse but for the positive offsetting factor, the contemporaneous disclosures in relation to Fyffes' internet venture. However, in relation to the market generally, Professor Fischel testified that in late February and early March, 2000 there was less optimism about the internet sector. There was a beginning of a realisation that the expected demand for the internet was exaggerated, there was tremendous overcapacity, and inflated beliefs about profitability began to turn more negative.

Professor Lehn described the proposition that the fall in Fyffes' share price on 20th and 21st March, 2000 was the result of the bursting of a speculative bubble as preposterous. He suggested that there was some revisionist history at play; contemporary evidence indicates that people were still reasonably optimistic about the internet and the opportunities for internet businesses as of 20th March, 2000.

In his analysis, Professor Taffler went further than merely identifying a causative link between enthusiasm for the wof.com component of Fyffes' business and the share price movement. He opined on whether a particular movement was material or otherwise. Having regard to the view I have taken that the DSII was not an appropriate benchmark for Fyffes' share movement at the relevant time, it follows that I do not accept as being correct Professor Taffler's characterisation of any actual movement between the end of 1999 and 30th June, 2000 as material or not material, as the case may be, by reference to his operational definition of materiality. In any event, what the court is concerned with is whether there would have been a material share price movement in the hypothetical situation posited in s. 108(1) – that the information contained in the November and December Trading Reports had become generally available. The court is not concerned with the materiality or otherwise of actual share price movements.

(vi) A consideration of market psychology and behaviour pertaining at the relevant time supported his conclusion.

In invoking behavioural economics in this context Professor Taffler asserted that, through operation of "the representativeness heuristic cognitive bias", Fyffes was transformed by brokers, investors and financial journalists from a fruit importer and distributor into a "dotcom" stock play. Professor Taffler's conclusion that in February, 2000 investors were not interested in the profitability of Fyffes' core business was underpinned by his opinion that, because of the state of market psychosis pertaining at the time, the underlying business realities in relation to Fyffes were viewed as irrelevant. Whether this was so is one of the fundamental areas of disagreement between the plaintiff's experts and the defendants' experts. The application of discipline of behavioural economics, in my view, in this case is too vague and imprecise to justify weight being attached to it in the resolution of the price-sensitivity issue.

501. Finally, returning to the modelling exercise which Professor Taffler conducted to develop an operational definition of materiality, in the course of his re-examination, he introduced the results of an application of the CAPM using as a benchmark for Fyffes' share price movements an unweighted index he had constructed of share price movements of all internet sector stocks listed on the London Stock Exchange and on the Alternative Investment Market between 14th December, 1999 and 30th June, 2000. I am not satisfied that the index so constructed is any more suitable as a benchmark against which to measure Fyffes' share price movements in the relevant period than the DSSI. I have not had regard to the results of this modelling exercise.

Professor Kothari

502. Professor Kothari is the Gordon Y. Billard Professor of Management at the Sloane School of Management of Massachusetts Institute of Technology and head of MIT's Department of Economics, Finance and Accounting at the Sloane School of Management. His brief was the same as Professor Taffler's.

503. The theoretical premise from which Professor Kothari started was that non-public information about a company can only be price-sensitive when either of the two following conditions is met:

(a) if released, it would cause investors to revise their expectations of the company's future cash flows; or

(b) if released, it would cause investors to revise their beliefs about the degree to which the company is exposed to market risk.

504. He found no information in the November and December Trading Reports to indicate that Fyffes' exposure to market risk had changed. In relation to the first condition, he formed the view that investors had already factored in, and the stock prices had reflected, the poor performance for the first quarter of financial year 2000 by the time of the Share Sales.

505. Professor Kothari was in agreement with the other academic experts in identifying the cause for the increase in Fyffes' share price in January and February, 2000. Investor interest and enthusiasm in relation to Fyffes' internet venture was the major catalyst for the share price increase. However, unlike Professor Taffler, but in common with the plaintiff's experts, Professor Kothari located the watershed at 5th January, 2000, rather than 14th December, 2000. He ascribed the price increase immediately after 14th December, 2000 to investor satisfaction with the results for financial year 1999, which were announced on that day. Professor Kothari

based his conclusion on the correlation between Fyffes' share price performance from 5th January, 2000 to 20th March, 2000 on a number of indexes and he found a greater correlation with a European internet stock index (compiled by Credit Suisse First Boston) than to a European food and beverage stock index (compiled by Dow Jones).

506. The rationale underlying Professor Kothari's conclusion that Fyffes' negative financial performance in the first quarter was already impounded in the share price involved a number of elements.

507. First, he was of the view that there was sufficient information about Fyffes' trading in the public domain to enable investors and analysts to infer the losses incurred in the first quarter. To illustrate this point, Professor Kothari constructed an earnings model for Fyffes using only public information. There was considerable criticism from the plaintiff and its experts of the assumptions underlying the model and the data inputted. Professor Kothari reworked the model to accommodate some of the criticisms. However, in the final analysis, Professor Kothari acknowledged, properly in my view, that he would have limited confidence in the capability of the model to accurately predict Fyffes' results for the first quarter. In my view, it is clear on the evidence adduced at the hearing that there was not information in the public domain which would have enabled an informed outsider to quantify the effect of weak banana prices and the adverse dollar/euro exchange rate on Fyffes' earnings.

508. Secondly, on the basis of his belief that analysts did not significantly adjust their earnings forecasts in response to the March 2000 Trading Statement, Professor Kothari concluded that they had already anticipated the negative financial information contained in the November and December Trading Reports.

509. It is convenient at this juncture to consider, as a matter of fact, how analysts reacted after 20th March, 2000. On the following morning, 21st March, 2000, two brokers, ABN AMRO and NCB Equity Research, revised their forecasts. ABN AMRO downgraded its pre-tax profit estimate for financial year 2000 by €6.6m to €83m and its EPS forecast to 16.7c and the revision was expressly related to the profits warning. It maintained its "hold" recommendation. NCB adjusted its forecasts in the light of the trading statement and reduced its EPS forecast for financial year 2000 to 18.4c, which, on the evidence, would appear to have been a slight reduction. On 21st March, 2000 Goodbody stated that it was effectively adopting what might be termed a "wait and see" policy, stating that it was not revising its forecasts but would review them after the interim results in June. It continued its buy recommendation. In the event, just over a month later, on 28th April, 2000, Goodbody downgraded its pre-tax profit estimate for financial year 2000 from €88.5m to €44.2m and its EPS forecast from 18.2c to 13.8c. In doing so it commented as follows:

> "The comments at Fyffes' AGM about difficult trading conditions in one sense came as no surprise. However, the tone of the statement indicated a position worse than we expected and has prompted us to review our forecasts."

510. Davy did not revise its earnings forecast on 21st March, 2000, although, in a note headlined "Produce trading overshadows Fyffes' e-commerce developments", it recorded the revelation at the AGM of "how weaker Euro hit opening quarter profits the effect of which has failed to be offset by firmer market prices since" and the sharp fall in the share price on the previous day. On 20th April, 2000, Davy formally changed its forecasts, reducing the pre-tax profit estimate for financial year 2000 from €91.1m to €67.7m and its EPS estimate from 20.6c to 14.3c, pointing to the fact that neither currencies nor market prices had changed direction in the weeks since the AGM, with both continuing to impact results negatively, especially in Fyffes' key banana division. To complete the picture, on 2nd May, 2000, ABN AMRO further revised its forecasts. It announced that it had downgraded its forecasts following the profit warning on 20th March, 2000 and on the close of the first half of financial year 2000 at the end of April significantly. For financial year 2000 it reduced its profit before tax estimate by 27% to €60.9m, and its EPS estimate to 12.0c.

511. I do not think that the evidence bears out Professor Kothari's proposition that analyst response to the March 20th Trading Statement indicates that Fyffes' negative financial performance for the first quarter was already factored into the share price on 3rd February, 2000. Aside from the fact that the proposition is something of a *non-sequitur* because of the sudden share price reaction on 20th March, 2000, what the evidence shows is that, in the wake of 20th March, 2000, analysts did drastically revise their earnings forecast, although, for whatever reason, both Goodbody and Davy did not make the revision for a month.

512. One aspect of Professor Kothari's evidence on which the plaintiff laid particular emphasis and which it was contended is of critical importance merits comment. The submission was that Professor Kothari had accepted that, if the information contained in the November and December Trading Reports was not generally available to the market on the dates of the Share Sales, it would have been likely to materially affect the share price if it had been available. In building up to his theory that analysts did not vary their earnings forecast following the March 2000 Trading Statement, Professor Kothari pointed out that that announcement did not quantify the extent to which financial performance in the first three months of fiscal 2000 was poorer than that of previous years and below management expectations, although it did stress that under-performance was very significant. In his written statement of evidence, Professor Kothari continued as follows:

> "Therefore, if investors had not already anticipated a level of under-performance close to that indicated in the [November and December Trading Reports], and such under-performance was material, revision of EPS forecasts in response to the release would have been significant."

513. This led on to the third element of the rationale underlying his conclusion, which, as outlined below, basically recognised the adverse share price reaction on and after 20th March, 2000 but attributed it to factors other than the under-performance in the first quarter. I do not think it is correct to construe Professor Kothari's evidence, which I have quoted, as implicit acceptance that the information at issue here was material in terms of share price, because he did not directly address the issue at all, but addressed it indirectly on the basis of the erroneous premise that analysts did not alter their forecasts on and after 20th March, 2000. However, when in cross-examination it was put to Professor Kothari that, if the information had not been anticipated by the market, it is likely that it would have a material effect on the price of the shares, his response was that it was not anticipated, but he thought that "it would have or at least it raises a possibility that it would have". That answer, in my view, does not have the import which the plaintiff sought to attach to it.

514. Thirdly, Professor Kothari identified in the totality of the information released by Fyffes on 20th March, 2000, information, other than the disclosure of the negative trading performance during the first quarter, which he considered relevant to the market reaction which followed. He pointed to aspects of the earnings information released on that day from which he inferred that to attribute any portion of the price decline to the disclosure of poor performance during the first quarter would be highly tenuous: his interpretation that it disclosed that the poor financial performance continued well past January and that management was uncertain whether performance for the second half of financial year 2000 would compensate for poor performance in the first half. Those points go to the issue whether the court can treat what happened on 20th March, 2000 as a valid proxy for what would likely have happened if the hypothetical situation posited in s. 108(1) played out. However, Professor Kothari went further and he expressed the opinion that the information released on 20th March, 2000 in relation to Fyffes' plans for wof.com and its interest in other e-commerce ventures

was plausibly perceived as negative by the market because sentiment for internet stocks had soured earlier in the month. In my view, the evidence does not support this opinion. On the totality of the evidence, it is quite clear that it was the bad news in relation to earnings which caused the share price decline on 20th and 21st March, 2000.

Evidence of expert witnesses with market experience called by the plaintiff

Mr. Brindle
515. The first of the expert witness with market experience to be called by the plaintiff was Mr. Brindle, who is a Fellow of the Faculty of Actuaries and had spent his working life, until his retirement, with Standard Life Assurance Company, being responsible for its investment operations in Ireland, including portfolio management of retail and pension funds, through the 1980s and thereafter being responsible for retail unitised funds in the United Kingdom, Luxembourg and Hong Kong. His brief was to consider some of the issues in this case from the standpoint of an institutional investor.

516. One of the issues he was asked to assess from that standpoint, which is the kernel of the price-sensitivity issue, was what the effect there would have been on Fyffes' share price on 3rd February, 2000, if the information contained in the November and December Trading Reports had been in the public domain. He pointed to the 1997 precedent, when a cautionary statement from Fyffes had provoked an adverse price reaction, and the positive price reaction following the Preliminary Announcement on 14th December, 1999, which he characterised as the market having been pleasantly surprised by a modest out-performance of expectations and the announcement of new activities in the coming year, as instances which indicated that Fyffes' share price was sensitive to trading data. I think that is the height of the relevance of those precedents.

517. Mr. Brindle went on to attempt to calculate the share price effect in the hypothetical situation arithmetically. As I understand it from his oral evidence, as his view was that the share price would have reduced in line with the reduction in earnings, that is to say, the expected earnings for financial year 2000, his objective was to calculate the percentage reduction in such earnings disclosed by the information. In other words, he envisaged a straight line reduction in the share price in line with the reduction in earnings forecast which was derivable from the information in the two documents. In doing the calculation he took the figure for expected earnings before the bad news would have become generally available at €88.5m, which he stated was the Davy forecast of profits but was actually the Goodbody forecast. He calculated the reduced earnings by adjusting the total budget figure of €84m to €76.5m to adjust for the variance against budget for the first quarter disclosed in the documents. That figure was of the order of 14% below market expectations and, on that basis, Mr. Brindle was of a view that the share price on 3rd February, 2000 would have been of the order of €2.75 rather than €3.20. The actual calculation Mr. Brindle did is not permissible in resolving the statutory hypothesis because the budget figure for the full year was not generally available and it was not derivable from the two documents. Even if one assumed that a reduced earnings forecast was derivable from the information in the two documents by reference to the actual earnings in financial year 1999 and the variance from prior year for the first quarter in financial year 2000 disclosed, the question which Mr. Brindle's evidence raises is whether his general approach to the evaluation of the price effect could, having regard to the prevailing market conditions on 3rd February, 2000, satisfactorily resolve the hypothetical test. In my view it could not.

518. Mr. Brindle recognised that "dotcom" considerations were the major factor in driving the share price upwards prior to 3rd February, 2000, although his view, like that of Professor Lehn, was that it was a hybrid situation, in which trading information and the fundamentals in terms of financial stability, cash-flow and such like were extremely important to investors. In relation to the evaluation of the price effect, he acknowledged that the situation was complicated because a significant portion of the share price was due to "dotcom" factors. However, he avoided the complication on the basis of his belief that, even allowing for the "dotcom" factor, the share price would have been lower by not less than the reduction in profit expectations. In my view, that solution is much too simplistic.

519. Mr. Brindle ascribed the decline in Fyffes' share price after 18th February, 2000 to profit taking on the part of the purchasers of the DCC Group holding in Fyffes. He noted the share price reaction after the March 2000 Trading Statement. He suggested that the fall was possibly compounded by weakness in "dotcom" stocks at the time.

Mr. Dobbie
520. The second market expert called by the plaintiff was Mr. Dobbie, whose expertise is derived from a long career as a practitioner in stockbroking and investment banking in the United Kingdom and more recently as an active non-executive director of public companies in the United Kingdom. He is also a member of the Regulatory Decisions Committee of the FSA in the United Kingdom and a member of the Jersey Financial Services Commission. In his written statement of evidence he described his brief as to "review and comment on the circumstances and events surrounding" these proceedings.

521. In the context of the price-sensitivity issue raised in these proceedings, the parameters of which are defined by s. 108(1), some of the matters which Mr. Dobbie addressed are not relevant. For instance, he commented that Mr. Flavin was in an enhanced position, because of his knowledge of Fyffes, to understand the consequences of the information contained in the November and December Trading Reports. In particular, he alluded to the fact that Mr. Flavin, as a member of the Audit Committee of Fyffes, was aware of the accountancy treatment in the accounts for the financial year 1999 of provisions made in the previous accounting period which had been utilised or released in the year under consideration, which arose primarily out of the consequences of Hurricane Mitch in 1998 and the possibility of non-recovery of loans advanced by Fyffes to growers. That Mr. Flavin had that information is irrelevant because the significance of the inside information to the insider is not an ingredient of the statutory test.

522. In analysing the factors which drove Fyffes' share price from the end of 1999 into the year 2000, Mr. Dobbie concluded, from comparing Fyffes' share price performance with the NASDAQ, that the rise in Fyffes' share price was fuelled by lively expectation of future earnings from the internet venture, although it was his view that investors took comfort from the core business and built the euphoria on top of the core business, so that "damaging either part would damage the whole by more than the part". He also concluded that underlying short-term trading performance outlook was largely overlooked by market commentators and, presumably, by investors also. He explained that what he meant by "overlooked" was "taken for granted", in other words, that people assumed it was fine. He further concluded that what caused the sharp downward price reaction on 20th March, 2000 and thereafter was the release of the trading information specific to Fyffes on 20th March, 2000, rather than general loss of support for "dotcom" securities in general, which he interpreted as having occurred after 20th March, 2000. In relation to the retreat of Fyffes' share price after it had peaked on 18th February, 2000, Mr. Dobbie was of the view that it had less to do with the start of the waning of the "dotcom" euphoria than the fact that the sale of the DCC Group stake had, as he put it, "mopped up all the loose buyers around".

523. In assessing the impact which the information contained in the November and December Trading Reports would have had, if it had become generally available on 3rd February, 2000, Mr. Dobbie laid particular emphasis on the disclosure that profit for the first quarter of financial year 2000 was €13.7m behind prior year. Paraphrasing Mr. Dobbie's evidence, it was that the market would look at that disclosure in the context that the earning estimates in the market were for growth of €5m or €6m and would see that Fyffes

would have to make €20m more in the next three quarters than they made in the prior year to make the estimates. Fyffes' shares were being offered as a way into the "dotcom" boom but there was a plethora of other vehicles in which an investor could ride the "dotcom" boom. A prospective investor looking at the degree of the shortfall disclosed by the documents would not choose Fyffes' shares. The impact of such reaction would be that the share price would fall by 5% at least, or more. Mr. Dobbie's view was that, if the information had become generally available on the morning of 3rd February, 2000, by lunchtime on that day the book which Goodbody and Davy were building would have evaporated. Mr. Dobbie characterised the "mainly new, mainly institutional" investors who, on the evidence, purchased the first tranche of the DCC Group holding on 3rd February as "sophisticated investors" who would have done their homework, done a due diligence on the earnings and the record of Fyffes, before becoming investors. His view was that they would not have purchased if they had not been "fairly clear about the earnings".

524. In his written statement of evidence Mr. Dobbie stated that, on the basis of his experience, he would have expected an adverse price movement of at least 10%, if the information contained in the November and December Trading Reports was generally available at the end of January, 2000. I do not read that as being inconsistent with his oral testimony because, as I understand his oral testimony, it was that he would have anticipated an immediate 5% drop at least in the share price on the day the information became available. Dealing with the issue of the materiality of a share price movement, in his written statement of evidence Mr. Dobbie stated that "material" in an accounting context is normally taken to mean 5%. However, in relation to his expectation of an adverse movement of at least 10%, if the information in issue became generally available, he expressed the view that, in the context of a share with the capitalisation of that of Fyffes, that level of movement would certainly meet the "material" criterion. He considered that the price movement on and after 20th March, 2000, a decline of about 25% over two days, backed up his conclusion as to what would have happened at the end of January, if the information had become generally available. He stated that on any basis that movement would be defined as "material".

525. Mr. Dobbie stressed the importance of recognising that a given set of data can give rise to quite different responsibilities in respect of the release of a profit warning by a company and the inhibition of dealing by a director. He suggested that the criterion of materiality or the importance of the information is for a director very low. If in any doubt, he must not deal. In the case of a profit warning, this must be judged in the context of the original forecast. Specifically in relation to what Fyffes stated in the outlook section of the Preliminary Announcement, he described it as being "of a fairly bland nature" and not "terribly precise". His view was that Fyffes acted appropriately in making the announcement on the day it did, 20th March, 2000, bearing in mind the uncertainty of the recovery in the banana market and that the AGM is a time when the market expects a statement on the future. In cross-examination it was put to Mr. Dobbie that he was not suggesting that the price-sensitivity test contained in Part V and the price-sensitivity criterion contained in Rule 9 of the Listing Rules are different. He confirmed he was not, but elaborated on that answer as follows:

> "… but what I'm saying to you is we are talking about something which is not a legal document, it is a commercial document. If you are a company, the practical fact of life is that you have to be reasonably sure before you go to the marketplace and stick your head above the parapet and say 'my expectations have changed'. If you are a director, whatever the impact on price is, if you believe you have information which if put to the market could alter the price materially, I think you have to stop and think very carefully before your trade."

Mr. O'Connor
526. The plaintiff's final witness with market experience was Mr. O'Connor, who had been Managing Director of the NCB Group, which has extensive stockbroking and corporate finance businesses. During his tenure as managing director of that group he served on the board of the Irish Stock Exchange. Latterly he has served in a non-executive capacity on the boards of both public and private companies. Mr. O'Connor's understanding of his brief was that it was to review the circumstances surrounding the Share Sales.

527. Mr. O'Connor analysed the information contained in the November and December Trading Reports and he concluded that the information in them was not generally available. He described as specious the proposition that even a broad outline of the negative financial position disclosed in the documents could have been divined by analysts. It was his opinion that a director in possession of detailed information from inside the company should instinctively feel disbarred from dealing. An examination by the director of the question of whether dealing was permissible, what Mr. O'Connor called going through a process, should confirm the instinct.

528. Mr. O'Connor distinguished the position of a director contemplating dealing from the position of a company in relation to issuing a cautionary statement or a profit warning. He made the same distinction between the Listing Rules and the statutory prohibition on insider dealing which Mr. Dobbie made, characterising the former as "a commercial rule book", which companies are encouraged to interpret flexibly. If and when to make a trading statement is a matter of judgment, and he inferred from the decision of the FSA in the matter of *Marconi Plc*, to which I will return later, that it is a judgment that takes place over time. Mr. O'Connor was rigorously cross-examined on what Fyffes had done, and what it should have done, having regard to the information it had in relation to trading and earnings at the end of January, 2000 and in the subsequent period up to the March 2000 Trading Statement. He addressed the question whether it would have been appropriate to issue a trading statement two months earlier than it was issued and his conclusion was it would probably not have been. In reaching this conclusion he stressed the importance of there being some certainty as to what was being said.

529. Mr. O'Connor endeavoured to estimate what the impact of the negative information contained in the November and December Trading Reports would have been had it been generally available on 3rd February, 2000. His approach was to analyse share price reaction to the Preliminary Announcement on 14th and 15th December, 1999 and share price reaction to the March 2000 Trading Statement on 20th and 21st March, 2000. He ascribed the increase in December to the importance the market attached to what was perceived as the good performance of the company in a difficult environment. He ascribed the decline in March, which he described as immediate and severe, to the March 2000 Trading Statement. Although he considered that the fact that the NASDAQ had weakened in the second half of March was not a helpful backdrop, his opinion was that there was still substantial momentum in the wofcom "story". He considered that the March 2000 Trading Statement painted a substantially similar picture to the November and December Trading Reports, while acknowledging the differences and that the former did not have the same level of certainty of a bad first-half outcome. His view was that the starkness of the message was to be seen in the former and that no commentary was necessary. He shared Mr. Dobbie's view that a big factor in the decline of the share price after 18th February, 2000 was that demand for Fyffes' stock had been satiated by the sale of the DCC Group holding.

530. In his estimation exercise, Mr. O'Connor recognised that there were two components in the Fyffes' share price at the beginning of February, 2000, one reflecting the market's perception of the value of the core business and the other its perception of the wof.com potential. He estimated that €2.20 and €1 represented the core business component and the wof.com component respectively of the share price of €3.20 on 3rd February. The general availability of the negative information in relation to trading would have resulted in the core business component falling back to the level it was at on 14th December, 1999, before the preliminary

announcement (€1.65). Therefore, in the unlikely event that the bad news did not also impact on the wof.com component, the share price would have been at €2.65, or 17% lower than the price at which the first of the Share Sales was executed. However, Mr. O'Connor believed that the wof.com component would also have been affected. On that basis, he put the share price on 3rd February, 2000, had the negative financial information been generally available, at €2.20, which would have been 31% lower than the price at which the first of the Share Sales was executed. The figure of €2.20, he suggested, was the level the share price reached following the March 2000 Trading Statement, at a stage when the wof.com story "was still upbeat". It was on 31st March, 2000 that the share price first fell back to the level of €2.20. Aside from the crucial question, which is whether the share price reaction on and after 20th March, 2000 is a valid proxy for what would have happened in the hypothetical situation posited in s. 108(1), having regard to the evidence, I can see no logical basis for basing the estimation on the level which the share price actually reached on 31st March, 2000.

Evidence of expert witnesses with market experience called by the defendants

Mr. O'Brien
531. Mr. O'Brien, the first of the witnesses with market experience to be called by the defendants, has had forty years' experience of investment markets as an investment analyst, fund manager and chief investment officer. In the period from 1992 until 1998 he was the investment director and Head of Fund Management of Irish Life Investment Managers. Since 1998 he has worked as an independent investment advisor. His brief, as he described it in his written statement of evidence, was to prepare an expert report on the circumstances pertaining to the plaintiff's claim in these proceedings. There were three broad strands in Mr. O'Brien's evidence.

532. First, he examined the international produce sector during the years 1999 and 2000. He was undoubtedly correct in his conclusion that the trading background for banana and fruit producers in those years was difficult and that, as regards Fyffes' U.S. competitors, trading conditions impacted on their earnings. He was also correct in concluding that the investment community was aware of those difficulties.

533. The second strand was to analyse the matters he considered relevant to Fyffes in 1999 and early 2000 to assess the extent to which the implications of the trading difficulties in the banana and fresh produce sector internationally for Fyffes' earnings were generally known. He looked at the share price in the calendar year 1999, Fyffes' profitability in financial year 1999, including comparison of operating profit with the prior year, and analyst reaction to the Preliminary Announcement. In reality, his focus was entirely on reports issued by ABN AMRO because, as he explained, the commentary in those reports was unusually blunt and specific, the analyst was located in London, which he supposed had given rise to more independence in viewing the overall picture, and ABN AMRO focused more on the core trading activity than local analysts. On the basis of his examination, he concluded that information was generally available that the global difficulties in banana trading had adverse implications for Fyffes' profitability. Apart from the commentary from ABN AMRO, he based his conclusion on a number of factors. In his opinion, the under-performance of Fyffes' shares against the ISEQ from the beginning of 1999 to the beginning of December in that year manifested a general awareness of the impact of these difficulties on Fyffes' trading. He concluded that Fyffes' eventual good performance in financial year 1999 was bolstered by cost reductions which might not be replicated. He interpreted the 10% reduction in overall banana import volumes into Europe for calendar year 2000 announced in the Preliminary Announcement as having negative implications for Fyffes' short-term profitability.

534. The third strand was an examination of stock market conditions in early 2000.

535. His opinion was that at that time Fyffes was drawn into the "technology mania", where economic realities and earnings fundamentals had little influence on the development of the share price. His opinion was that it was unlikely in such market environment that indications of short-term trading difficulties, of which there was ample evidence, would have materially affected the share price.

536. In relation to the concept of materiality in this context, Mr. O'Brien explained that materiality varies from company to company and from market to market. He contrasted the big liquid international markets, Wall Street or London, where quite modest increments to a price may be material, to the Irish market where stocks are smaller, they trade less frequently and they are held by fewer holders. Having regard to the size of Fyffes, in terms of market capitalisation, his opinion was that a share price movement was material if it was in the range of 8% to 12% or 7% to 10%.

537. Mr. O'Brien ascribed the adverse share price reaction on and following 20th March, 2000 to four factors. The first, in order of importance, was the question mark which the March 2000 Trading Statement raised over the full year's outcome. The second and third related to the announcements made about wof.com on 20th March, 2000. The planned expenditure of €20m during the year on wof.com, he surmised, might have caused some people to have second thoughts. The prospect that Fyffes might spend a further €100m on internet ventures might have begun to alarm the market, he surmised. As I have indicated, Professor Kothari expressed a similar opinion about possible negative market reaction to Fyffes' intentions in relation to wof.com and internet ventures. In my view, this is pure conjecture and there is no evidence to support the opinion. The fourth factor was that any vague hope the market had that the first half of financial year 2000 might turn out all right was dashed.

538. Mr. O'Brien was the only expert witness who had actually turned his mind in the first quarter of calendar year 2000 to Fyffes' share price and committed himself in writing about it. He was the author of a two-page article in the 6th April, 2000 edition of Business & Finance about Fyffes in a series entitled "PLC Analysis". As the article disclosed, he had met Mr. Halpenny to discuss the then recent developments in relation to Fyffes' share price. That meeting took place on 27th March, 2000. The article dealt with the position when the share price was at €2.20, that is to say, the position as of 31st March, 2000. Mr. O'Brien, quite rightly, emphasised the limitations of the article, which was not a professional institutional investment article but was intended for "the man in the street", which I understand to mean the average businessman. In the article, Mr. O'Brien's assessment of what happened on and after 20th March, 2000 was that the "profits warning" had jolted investors out of their infatuation with the new economy potential of wof.com. The weakness of the euro and over-supplied produce markets had eroded first half profitability. However, he stated that it was too early to predict whether the shortfall could be recovered in the seasonally stronger second half. In recommending the stock, he stated that the profits warning, together with the cooling of market enthusiasm for high-tech stocks, had resulted in a sharp pullback in the Fyffes' share price from a distinctly overheated €4 to €2.20. On the basis of a price/earnings ratio of 12, which he believed was merited, he valued the core business component of the share price at €2 and the wof.com component at 20c. Mr. O'Brien set out his view on the potential of wof.com as follows:

> "It is still too early to say whether worldoffruit.com will carve out a meaningful share of Internet-based trading. As an early mover it has established a competitive advantage and the potential is huge."

539. He referred to plans for future investment in wof.com and the likelihood of an IPO.

Mr. Lawrie

540. The only other witness with market experience called by the defendants in relation to the price-sensitivity hypothesis was Mr. Lawrie. For thirty years Mr. Lawrie was employed by Scottish Provident, first as an investment analyst and later as an investment manager. Between 1991 and 1997 he was Chief Investment Manager for Scottish Provident in Ireland. In 1997 he became Executive Chairman of Aberdeen Asset Management Ireland Ltd., when that company took over the investment division of Scottish Provident. In that capacity he had ultimate responsibility in 1999 and 2000 for the Scottish Provident holding in Fyffes. Mr. Lawrie's brief was to give an opinion as to whether the November and December Trading Reports contained price-sensitive information at the time of the Share Sales.

541. Mr. Lawrie analysed the information contained in the November and December Trading Reports individually. His opinion was that an insider would have been under a duty to consider the possible impact on the market of the figures contained in the December Trading Report, although he took a contrary view of the November Trading Report. He identified a number of points which would have been germane to the insider's consideration. The first was that the causes of the poor figures, which were price and currency related, were not specific to Fyffes but were well known to the market. The second was that the December Trading Report disclosed that what he described as "indifferent trading" extended over three months which, had the information been generally available, might in certain circumstances have affected the share price. Whether it was likely to affect the share price was a different question. The third was that the rise in Fyffes' share price during the relevant period was attributable to perceived long-term benefits of wof.com and, in those market conditions, an adverse quarter's trading would probably have been ignored by the institutions that were buying the shares. He gave two reasons for this conclusion: that the adverse trading might be an entirely temporary phenomenon; and, more importantly, that the potential long-term benefit which was being perceived from wof.com was such as to dwarf any short-term setback, especially if the short-term setback was due to currency movements, which can be very volatile. The fourth was that, if Fyffes' trading was sufficiently bad that publication of the figures would be likely to materially affect the share price, then the board would have the duty to issue a profit warning. An individual director might reasonably draw the inference that the view of all of his colleagues was that the information was not likely to materially affect the share price, if the board did not do so and did not contemplate it at the relevant time.

542. Mr. Lawrie's conclusion was that the information contained in the December Trading Report did not constitute information which would, in February, 2000, have been likely to materially affect Fyffes' share price, had it become generally available. He explained what he meant by both "likely" and "materially". For an outcome to be "likely" there had to be more than a 50% chance of it happening. He expressed a reluctance to put a precise percentage on the word "materially" in every context, because what might be material in one set of circumstances might not in another. He considered that in most cases anything above 10% movement would be regarded as material, unless very exceptional circumstances prevailed. Less than 10% might be material with a large share trading very liquidly, in which case 5% might well be regarded as material.

543. Of the expert witnesses, Mr. Lawrie was in the unique position that in the spring of 2000, while not having day to day responsibility for the management of the Scottish Provident holding in Fyffes, he had overall responsibility. The evidence from Fyffes' share register disclosed that, between 19th January, 2000 and 14th March, 2000, Scottish Provident's holding of ordinary shares in Fyffes decreased from 12.7 million to 10 million shares. Obviously, the relevant sale transactions were executed approximately seven days before the date of registration. Mr. Lawrie's evidence was that, in the context of those sales, his view at the time was that the rise in Fyffes' share price was wholly attributable to the perceived benefit of wof.com, although he was not suggesting that the existing business was irrelevant or that it did not have a significant value. It was a consequence of the prevailing enthusiasm for "dotcom" shares, which he did not believe to be sustainable. He was further of the view that the company's then current trading was not a factor which was influencing the share price. Even if that view is correct, it is predicated on what the market actually knew at the time: the price-sensitivity issue is concerned with, what, if any, influence the information which was not known to the market, which was contained in the November and December Trading Reports, would have had on the market, if it had been generally available.

Overview of expert evidence: areas of controversy

544. From the foregoing outline of the evidence of the expert witnesses, it will be clear that there was an enormous divergence of opinion between the plaintiff's experts and the defendants' experts. Before attempting to identify the areas of disagreement which I consider it necessary to address, I propose taking an overview of the approach adopted by the expert witnesses on each side.

545. The evidence of the two academic experts who testified on behalf of the plaintiff overlapped in some of the essential elements. Each looked at the November and December Trading Reports in isolation and identified what intrinsic information was contained in the documents in relation to Fyffes' trading and profitability in the first quarter of financial year 2000. The analysis only drew on extrinsic information to a very limited extent to illustrate how far off track Fyffes was at the end of the first quarter in relation to its own expectations, as seen in the budget, and analysts' expectations for the full year. In essence, each concluded that the information contained in the documents showed that Fyffes' earnings for the first quarter were so far off track that the information was price-sensitive. Each then sought to validate this conclusion by reference to the share price reaction on and after 20th March, 2000 on the assumption that same information became generally available through the March 2000 Trading Statement as was contained in the November and December Trading Reports. Of course Professor Lehn additionally conducted the empirical studies to which I have referred and he quantified the impact of the general availability of the information in issue on Fyffes' share price. Neither expert focused on actual market conditions on the dates of the Share Sales. In particular, a matter which puzzles me is that neither explicitly addressed what all of the experts accept was the main driver of the unprecedented increase in Fyffes' share price in January and February, 2000, the wof.com venture. In fact they did not evaluate the information in issue against the total mix of information available on the dates of the Share Sales, which, as I have held, the price-sensitivity test contained in s. 108(1) requires.

546. The evidence of the two academic experts called on behalf of the defendants overlapped in an essential respect, each being of the opinion that there was sufficient information generally available in relation to Fyffes's trading and profitability during the first quarter of financial year 2000 to obviate any share price effect, in the event of the information contained in the November and December Trading Reports being generally available. Each arrived at that conclusion by a different route. Professor Kothari's scientific approach was not convincing. In relation to Professor Taffler's approach, analysing the information in issue to determine whether it would have had a material impact on Fyffes's share price in normal market conditions, that is not an exercise which is comprehended by s. 108(1), although that is not to say that the exercise is of no benefit in achieving an understanding of the market in Fyffes' shares at the time. The hypothetical test is predicated on the information in issue being generally available in the market conditions prevailing at the date of dealing. As regards Fyffes' shares, one of the rare areas of consensus among all the expert witnesses was that on the dates of the Share Sales the wof.com venture was the principal driver of Fyffes' share price and the cause of the unprecedented share value. As I have outlined earlier, Professor Taffler also considered independently what the impact of the information would have been in the market conditions prevailing at the date of the Share Sales, as he perceived them. His opinion was that the prevailing market was a market in which Fyffes' shares were being valued "as a quasi-dotcom stock at the peak of the dotcom bubble". It was a market in which, in his opinion, any company specific information relating to short-term trading in bananas

would have been unlikely to have any impact on Fyffes' share price.

547. Both of the market experts who testified on behalf of the defendants supported Professor Taffler's conclusion that, in the prevailing market, it was unlikely that short-term trading difficulties would have affected Fyffes' share price. All of the experts who testified on behalf of the plaintiff took a contrary view. That is one area of major controversy between the plaintiff's experts and the defendants' experts.

548. The other area of major controversy is the relevance of the investor reaction on and after 20th March, 2000 in resolving the statutory hypothesis. In my view, there is coercive evidence that it was the March 2000 Trading Statement, and not the contemporaneous announcements in relation to the wof.com venture or the vagaries of rumours in relation to a possible merger, that provoked the adverse reaction. I have rejected Professor Kothari's assertion that analysts did not change their forecast after 20th March, 2000, as being both incorrect and irrelevant. Therefore, the parameters of this area of controversy, which essentially raises the question whether what happened on and after 20th March, 2000, is a valid proxy for what would have happened on the date of the Share Sales, if the alleged price-sensitive information had been generally available, are –

(a) a comparison of the information contained in the November and December Trading Reports and the information contained in the March 2000 Trading Statement, and

(b) a comparison of the market conditions on 3rd, 8th and 14th February, 2000 and market conditions on 20th March, 2000.

549. While the court is not concerned at this juncture with quantifying the amount to which the plaintiff is entitled under s. 109(1)(b), if it has established civil liability, I think it is important not to lose sight of the ultimate objective of the plaintiff in these proceedings, which is to procure an account of profits under that provision. Therefore, I think it is a relevant consideration at this juncture whether the evidence to date suggests that, assuming for the purposes of the argument that there would have been an adverse share price effect if the information contained in the November and December Trading Reports was generally available at the dates of the Share Sales, that share price effect is measurable in such a manner that one would have confidence in the fairness of the outcome.

550. As the outline of the expert evidence indicates, some of the expert witnesses carried out exercises to apportion Fyffes' share price in the first half of February, 2000, to identify how much of the share price was attributable to Fyffes' core business and how much to the wof.com component. While I consider that the evidence shows that such exercises could produce an apportionment in which one could have reasonable confidence, such exercises are only marginally, if at all, germane to the quantification exercise which s. 109 calls for. As outlined earlier, issues in relation to the application of s. 109 remain to be resolved at a later stage in these proceedings, if the issue of liability is decided in favour of the plaintiff. Without trespassing on those issues, I think it is useful to consider what the evidence already adduced indicates in relation to the prospect of quantifying the share price effect, if the information alleged to be price-sensitive had been generally available at the date of the Share Sales.

551. The evidence of the plaintiff's witnesses as to their estimation of what the share price effect would have been as of 3rd February, 2000, if the information in issue was generally available, may be summarised as follows:

· Professor Lehn estimated a fall of €0.62, on the basis of one methodology, which I have already concluded would not properly measure the hypothetical share price decline, and a fall of between €0.60 to €0.84, on the basis of another methodology, which is dependent on the adverse share price reaction on 20th March, 2000 being relevant in the resolution of the statutory hypothesis.

· Mr. Brindle estimated a fall of at least €0.45, from €3.20 to €2.75.

· Mr. Dobbie estimated a fall of €0.32, a fall of 10% on €3.20.

· Mr. O'Connor estimated a fall of €0.55, from €3.20 to €2.65, if only the value of the core business was affected, and a fall of €1, a fall to €2.20, if the value of wof.com was affected.

552. Aside from the criticisms which, in my view, can be properly made of the methodology deployed, that summary reveals a significant divergence of opinion on a crucial issue in this case among the plaintiff's witnesses.

553. Before considering the areas of controversy which the expert evidence has thrown up in greater detail, I propose outlining other evidence which the parties contended is relevant to the price-sensitivity issue.

Evidence as to Fyffes' appreciation of/reaction to the information contained in the November and December Trading Reports.

554. The defendants contended that there has not been a single objective fact established which indicates that Fyffes thought in February, 2000 that the information which it is alleged in these proceedings was price-sensitive was, in fact, price-sensitive. The objective of following analysis of the evidence is to ascertain whether that contention is correct and, if so, to consider its relevance to the price-sensitivity issue.

555. Having already held that s. 108(1) imports an objective criterion in determining price-sensitivity, it follows that I accept the argument advanced on behalf of the plaintiff that Fyffes' appreciation of the significance of, or reaction to, the information is not the litmus test with regard to whether or not information is price-sensitive. However, counsel for the plaintiff acknowledged that the court does not have to exclude the evidence of Fyffes' reactions and actions in the relevant period but contended that counsel for the defendants laid too much emphasis on these matters. It seems to me that counsel for the plaintiff had to make that concession, given that one of the main planks in the plaintiff's case that the information contained in the November and December Trading Reports was price-sensitive was that intuitively the information on its face appears to be price-sensitive. If that was so, it should have been obvious to Fyffes' executives and they should have reacted appropriately to it.

556. The first board meeting of Fyffes after the close of the financial year 1999 was held on 9th December, 1999. Only one of the directors, Mr. Ellis, was not in attendance. A meeting of the Audit Committee had been held earlier in the day. The board approved the appointment of a sub-committee comprising Mr. David McCann and Mr. Carl McCann to approve the final accounts for the financial year ended 31st October, 1999, to declare the final dividend for 1999 and to authorise the release of the preliminary statement to the stock exchange and the shareholders on the following Tuesday, 14th December, 1999. The minute of the meeting discloses that Mr. David McCann drew attention to the forecast shortfall for November against budget and last year and the expectation that the

situation would be further behind budget and last year by the end of December. Mr. Halpenny's contemporaneous manuscript notes reveal that at the meeting that Mr. David McCann reported that the position was then currently €3.5m behind budget and €0.5m "more behind" than last year. It is obvious that this was a reference to performance in November. Mr. David McCann is also recorded as reporting that December would also be behind on budget and last year. Mr. Gernon is recorded as reporting that the cumulative to 31st December, 1999 could be €6.5m behind budget and €9m behind last year. The contemporaneous notes also record that Mr. Flavin queried what the board would say at the results announcement.

557. Mr. Gernon's evidence was that he had at the meeting a manuscript note which contained three columns of figures headed as follows: B, meaning budget; A, meaning actual; and LY, meaning last year. The figures in column (5), headed "Gernon Forecast", in the table set out above, in which the effect of the information contained in the November and December Trading Reports is tabulated, are taken from the "actual" column in Mr. Gernon's note. I am satisfied on the evidence that all of the figures in that note were expressed in Irish pounds. For the purposes of column (5), I have converted the figures to euro. I deduce that the budget figures set out in that note were derived from the original budget presentation, and did not show the revised spread. The note is not fully replicated in the table, because the note also contained a cumulative figure for November and December, which forecast cumulative losses of €6.35m for the two months. Mr. Gernon's evidence was that his note was not circulated at the meeting; he had it as a speaking note or an *aide-mémoire*. However, his evidence was that Mr. David McCann gave a figure for November and spoke in a general way that December was also behind. Mr. Gernon then gave the cumulative variances to the end of December. While it appears from Mr. Halpenny's contemporaneous note that he did so, there is an inconsistency between Mr. Halpenny's note and Mr. Gernon's *aide-mémoire*; the cumulative variances by reference to Mr. Gernon's *aide*-mémoire were much higher than recorded by Mr. Halpenny, being IR£6.5m (€8.25m) against budget and IR£9m (€11.43m) against prior year. It was Mr. Gernon's belief that he told the meeting of the shortfalls against budget and prior year which he had forecast for January, but I am satisfied on the evidence that this information was not taken on board by those at the meeting. Mr. Gernon described his estimate for December and January as a "back of the envelope guesstimate". His evidence, which I accept, was that, being only six weeks into financial year 2000, it was too early to have a view on the trend for the year or for Fyffes to change its view of the year.

558. What Fyffes told the market about its view of the likely outcome of financial year 2000 some five days later in the Preliminary Announcement was that it would be "another year of further growth for Fyffes". That statement was approved by all members of the board before it was released to the market. I believe that, notwithstanding the information in relation to current trading which the board had been given on 9th December, 1999, including the estimated cumulative shortfalls for November and December, the considered judgment of the members of the board was that the statement was a proper statement to make. A theme which ran through the defendants' defence was that the information contained in the November and December Trading Reports was, in reality, no different from the information put before the board on 9th December, 1999, and, if anything, the latter presented a gloomier picture of Fyffes' trading and financial performance. In my view, the information available on 25th January, 2000, the actual figures for November and December and a firm (and it transpired almost precise) estimate for January was qualitatively different from the information available on 9th December, 2000.

559. I have already referred to the stock exchange announcements made by Fyffes after 25th January, 2000 in relation to the grant of options to Mr. Halpenny and the sale by Mr. Ellis of shares and what those announcements were implicitly telling the market – that each was free to deal and, therefore, could not have had price-sensitive information at the time of dealing. Apart from the perception which the announcements would have created in the market, it was submitted by the defendants that the involvement of Fyffes executives at the most senior level in the underlying transactions was indicative of the fact that the information contained in the November and December Trading Reports was not regarded by the executives of Fyffes at the highest level at that time as being price-sensitive.

560. In relation to the grant of options, at the time, the "Fyffes Plc 1997 Share Option Scheme" was in force. It governed the grant of options to employees and directors of the company. The organ of the company which was competent to grant an option was the Remuneration Committee, which was also called the Compensation Committee. The grant of options was limited to two periods: the 42-day period immediately following publication of the annual results and the 42-day period immediately following the publication of the half-yearly results. In the case of the grant of an option, other than to a non-executive director, the scheme provided that the grant should have immediate effect upon the Remuneration Committee deciding to grant the same. The evidence shows that, as one would expect, prospective beneficiaries of options were identified by the management. In fact, a list was prepared by the Group Personnel Director and approved either by the Chief Executive, Mr. David McCann, or the Deputy Chairman, Mr. Carl McCann. What happened in the instance under consideration was that a list was drawn up by the Group Personnel Director on 21st December, 1999, and submitted to Mr. Carl McCann for approval. Because of other pressures, the list was not approved of until 22nd January, 2000. At that stage, the 42-day period following the Preliminary Announcement was running out; it would have expired on 26th January, 2000. The Group Personnel Director sent the approved list of employees, which included Mr. Halpenny, to Mr. Flavin, as Chairman of the Compensation Committee, by fax on 24th January, 2000. Mr. Flavin convened a meeting of the Compensation Committee, the other available member being Mr. Scanlan, on the morning of 25th January, 2000. The Compensation Committee approved the grant of options in accordance with the list at the previous day's closing price, thus effectively granting the options. The plaintiff's contention that the grant of the options related back to a decision in principle made on 9th December, 1999 by the Compensation Committee to grant options is not correct. When communicating the decision of Compensation Committee, Mr. Flavin pointed out that the grant to Mr. Halpenny required a stock exchange announcement. The stock exchange announcement which, as I have already stated, was issued on 27th January, 2000, announced the grant of the options to Mr. Halpenny.

561. As I have already indicated, I reject the contention of the plaintiff that the grant of options such as the options granted on 25th January, 2000, is not captured by Part V of the Act of 1990. The definition of "securities" in s. 107 encompasses any option in respect of any such shares as are referred to in para. (a) of the definition, which I have quoted earlier. It seems to me that the grant of an option to take shares in a listed company must constitute dealing in securities for the purposes of Part V, whether or not it constitutes a dealing for the purposes of the Model Code. I do not consider it necessary to address whether the options granted to employees other than Mr. Halpenny were outside the definition of "dealing" in the Model Code by virtue of para. 20(h). The debate about the grant of options got mired in irrelevancies, for instance, identifying when Mr. Halpenny and Mr. Scanlan obtained the November and December Trading Reports. As a general proposition, if on 25th January, 2000 Mr. Flavin was precluded from dealing in Fyffes' shares because he was in possession of the information contained in the November and December Trading Reports, in my view, the company, acting by the organ to which it had delegated competence to grant options, the Compensation Committee, would not have been free to grant the options because the exceptions contained in sub-ss. (7) and (8) of s. 108 would not have applied. On 25th January, 2000, Mr. Carl McCann wrote to each person on the list approved of by the Compensation Committee inviting him or her to apply for an option. On my reading of the scheme, the options had already been granted and this is consistent with the announcements to the Stock Exchange in relation to Mr. Halpenny's options. The validity of the options granted is not, of course, at issue here. What is at issue is whether the evidence is indicative of executive directors of Fyffes being conscious, on and after 25th January, 2000, that the information contained in the November and December Trading Reports was price-sensitive. In relation to the grant of options to Mr. Halpenny, in my view, it is not.

562. In relation to the Ellis share sale, Mr. Ellis, as he was required by the Model Code to do, sought the permission of the Chairman of Fyffes to sell shares by letter dated 19th January, 2000. Clearance was given by the Chairman through Mr. Carl McCann. It would appear that this occurred on 20th January, 2000. Subsequently, Mr. Ellis sold the shares and, as stated previously, the Stock Exchange was notified by Fyffes on 28th January, 2000. This would suggest that, when the permission was given, neither the Chairman nor the Deputy Chairman of Fyffes was concerned that the company had information in relation to its performance in the first quarter of financial year 2000, which could be regarded as being price-sensitive. Because of the case the plaintiff is making against Mr. Flavin in these proceedings, Mr. Carl McCann felt constrained to acknowledge that giving clearance to Mr. Ellis had been a mistake.

563. It was submitted on behalf of the defendants that what occurred at the time of, and immediately following, the first of the Share Sales on 3rd February, 2000 does not suggest that at the time the executive directors and senior management of Fyffes considered that the transaction which had been just effected by the DCC Group was in breach of s.108 of the Act of 1990. As the evidence I have outlined in relation to the dealing issue indicates, there had been contact by telephone between Mr. Flavin and Mr. Neil McCann on 3rd February, 2000, prior to the first sale being effected. After the sale was effected, Mr. McCann and Mr. Flavin agreed to meet at a mutually convenient rendezvous, which happened to be the Great Southern Hotel at Dublin Airport. The meeting took place at between 6 p.m. and 7 p.m. Mr. David McCann accompanied Mr. Neil McCann. Much of what happened at that meeting which is of relevance was reflected in subsequent correspondence between Mr. Flavin and Mr. McCann. When Mr. Flavin arrived, he was congratulated by the McCanns who had bought a bottle of champagne. That seems to me to have been a generous and gracious gesture, and I attach no weight to it. On the following day, Mr. Flavin wrote to Mr. McCann repeating what he had stated the previous evening, that he thought it appropriate that he should resign from the board of Fyffes, and stating that his resignation should be implemented in a sensible time from Fyffes' perspective. He indicated that he wished to resign from the chairmanship of the Compensation Committee with immediate effect. That letter crossed a letter of the same date from Mr. Neil McCann to Mr. Flavin. On the question of Mr. Flavin's resignation, Mr. McCann indicated that it should take effect from the end of the following week, but that he would advise Mr. Flavin when precisely, after he had consulted with Fyffes' personnel. The defendants laid particular emphasis on the opening paragraph of that letter in which Mr. McCann stated as follows:

> "Further to our meeting last evening it is encouraging to note this morning that the share price has stood up but I think, in all our interests, it would be helpful if the remainder of the shares are disposed of, so that they will not be overhanging the market. It is quite an achievement to have disposed of such a volume and get such a good reaction. Hopefully it augers well for the balance."

564. The defendants characterised the attitude portrayed in that paragraph as encouragement by Mr. McCann of the second and third sales, which the plaintiff is now contending were unlawful by virtue of Part V.

565. When announcing Mr. Flavin's resignation on 9th February, 2000, Mr. Neil McCann paid tribute to the role Mr. Flavin had played in the successful expansion of Fyffes over the previous twenty years. This treatment of Mr. Flavin, it was suggested, is inconsistent with a belief that Mr. Flavin was in possession of trading and financial information in relation to Fyffes on 3rd February, 2000 which was manifestly price-sensitive.

566. The defendants also relied on a file note prepared by Mr. Gernon on 4th February, 2000, to which I have alluded in the context of the dealing issue, recording activity within Fyffes on the previous day, after Mr. Flavin had telephoned Mr. Neil McCann and advised him that it was likely that all or part of the DCC Group holding in Fyffes would be sold, as revealing conduct which is at variance with the approach being adopted in these proceedings. My understanding of the evidence is that the focus of the research carried out by Mr. Gernon and of his discussions with Mr. Halpenny and with Fyffes' solicitors, Arthur Cox, on 3rd February referred to in the note was on whether, under the provisions of the Model Code, clearance for the sale of the DCC Group holding from the Chairman of Fyffes was necessary. Mr. Gernon recorded that the conclusion of Mr. Halpenny and himself was that, if the Chairman's permission was not requested, the onus was on Mr. Flavin to decide whether a dealing by DCC would be within a "closed period". In the note, having alluded to the clearance which had been given to Mr. Ellis, a distinction was drawn between Mr. Ellis and Mr. Flavin by reference to "ongoing issues", which were identified, which Mr. Flavin would have discussed with Mr. Carl McCann and Mr. David McCann, of which Mr. Ellis would have been unaware. Those issues did not relate to Fyffes' trading or financial performance in the first quarter of the then current financial year. The inference the court was invited to draw was that the contents of the note are inconsistent with there being any concern on the part of Fyffes' executive directors that Mr. Flavin had price-sensitive information. It is undoubtedly the case that the note itself does not evidence any concern on the part of Mr. Gernon that possession by Mr. Flavin of the information contained in the November and December Trading Reports precluded the sale of the DCC Group stake.

567. After 9th December, 1999, there was no board meeting of Fyffes until 16th February, 2000. That meeting was a specially scheduled meeting to deal with the wof.com venture and the agenda for the AGM scheduled for 20th March, 2000. The next meeting was held on 28th February, 2000. In advance of that meeting there was circulated to the members of the board a trading report for the three months to January, 2000. The following table partly replicates a table contained in the report, summarising profits to the end of January and expectations for February, March and April, 2000 and showing the cumulative expectation for the first half of financial year 2000.

	Budget 2000 €'000	**Actual 2000 €'000**	**Last Year 1999 €'000**
Worldoffruit.com	(635)	(1,326)	-
Fruit business	5,349	(2,559)	11,333
Total to end of January	**4,714**	**(3,885)**	**11,133**
February	8,450	5,700	5,376
March	14,401	15,000	12,263
April	10,317	14,185	3,867
Cumulative - Half year	**37,882**	**31,000**	**32,639**

568. In relation to the forecasts for March and April which appear in the "actual" column, it was noted in the report that those figures represented the profits required to produce a result in line with 1999 pre-exceptional items half year results, excluding wof.com. Mr. Gernon in his evidence confirmed that those figures were not based on any detailed forecast; rather they were based on an assumption that any deficit would be made up from the outcome of pending court cases to which I will refer later. The Capespan losses for November and December continued to be excluded from the actual figures for the first quarter on the basis that they could

be treated as pre-acquisition costs. The commentary disclosed that the losses for November and December would be €2m. I cannot reconcile this with the statement in the December Trading Report putting the losses at €3m, but nothing turns on this. The commentary in the report explained that the figure in relation to wof.com included overheads of €515,000 and a write-off of research costs of €810,000. It recorded that banana trading had continued to improve in February.

569. In the minutes of the meeting of 28th February, 2000, in relation to the agenda item "Trading Report", it was recorded that Mr. David McCann took the board through the key figures. Much of the subsequent discussion focused on the banana trading situation. Some improvement was evident with retailers in the United Kingdom, but the market remained sluggish on the continent. The Capespan figures to date were below expectations. Mr. David McCann stated that the ambition at the time was to achieve the prior year's half year result. Mr. Scanlan stated that careful consideration would need to be given to what should be said on current trading at the annual general meeting which was scheduled for 20th March, 2000. The minute reflects Mr. Halpenny's contemporaneous manuscript note, which was put in evidence.

570. The fact that it was Mr. Scanlan, a non-executive director, rather than any of the executives of Fyffes, who raised the issue of whether Fyffes' expectations were altered is a significant factor in determining whether Fyffes' executives considered the information contained in the November and December Trading Reports to be price-sensitive, the defendants submitted. Mr. Scanlan's recollection of the meeting was that figures were presented to the board which did not help him to appreciate that it was realistic to have the expectation that the previous year's half year result would be achieved in the then current year. His evidence was that Mr. David McCann explained that he had to review the figures further and, in addition, he was optimistic about the outcome of legal cases which had been carried over from the previous year or years. This was the first occasion on which Mr. Scanlan had heard of legal cases being relevant to the outcome of the budget, which I understand to mean Fyffes' ability to achieve budget.

571. Fyffes did in fact tell the market that their expectations had changed in the March 2000 Trading Statement. After that event, Mr. Gernon prepared a document, which is dated 23rd March, 2000, which contained an outline of the history of trading forecasts from the budget onwards. Mr. Gernon's evidence was that there had been adverse comment in the press and in the market following 20th March, 2000, and it had been suggested to him, by Mr. Carl McCann he believed, that he should prepare a statement as to the timetable of events leading to the profit warning, just in case any inquiry should follow. Mr. Gernon's recollection was that the document was prepared on 21st or 22nd March, 2000. In a paragraph of the document which was headed "Revised Outlook", having referred to the court cases, Mr. Gernon commented on trading as follows:

> "While trading had improved during February, the uplift was not continued into March and the forecast produced on 14th March showed a profit of €8.5m compared to a budget of €14.4m. There were two main reasons for this – low banana prices and continuing low volumes of Capespan produce which was affecting both our share of Capespan and throughput in our produce division. This was due to abnormal rains in South Africa and Mozambique.
>
> The further outlook for April was poorer than anticipated with a shortfall on budget of circa €4m.
>
> At this point it became clear that we would be considerably short of last year's profit figure excluding worldoffruit costs and therefore a decision was made to make the profit statement at the AGM."

572. Mr. Gernon explained that "at this point" meant on 15th or 16th March. Mr. Gernon testified that by then Fyffes had been advised by their auditors that they would have to account for the Capespan losses in the financial year 2000.

573. As I have stated in the introduction, the timetable of events which led to the announcement on 20th March, 2000, furnished by Fyffes in response to the investigation initiated by the London Stock Exchange on 7th April, 2000, commenced on the evening 10th March, 2000. The first event described was the receipt by Mr. Gernon at 6.45 p.m. on that Friday evening of the forecast for March/April for the banana division, which had been "downgraded". The timetable disclosed that on the following Monday morning the other divisional executives of Fyffes were asked to complete their March/April forecasts as soon as possible. By the afternoon of Wednesday, 15th March, Mr. Gernon and Carl McCann had reviewed all the relevant information and, following a telephone call with David McCann who was abroad on holidays, concluded that the performance for the then current first half year would be below the same period in the prior year. On 24th July, 2000, Fyffes furnished the same timetable of events to the Irish Stock Exchange in connection with its investigation.

574. An assertion robustly advanced by the defendants was that the reliance of the plaintiff's witnesses on recent developments in relation to certain court cases to rationalise the apparent inconsistency between asserting that the information contained in the November and December Trading Reports was price-sensitive, on the one hand, and Fyffes' failure to announce altered expectations to the market until 20th March, 2000, or, at any rate, to initiate a process to that end until 10th March, 2000, on the other hand, was *ex post facto* rationalisation. Fyffes was involved in three legal actions at the time, the relevance of which to the issues in this case, on the evidence, is as follows:

> (1) As I understand it, Fyffes was a defendant in what has been referred to as the AVM case, which arose out of an intended acquisition in Belgium some years previously and which was being prosecuted in Belgium. Fyffes had lodged the sum of €5m in court to meet the outcome of the case. Provision had been made for this in Fyffes' accounts for financial year 1999 and was the subject of consideration at the Audit Committee meeting of 9th December, 1999. At that stage it was believed that the case was close to settlement and that there could be a surplus of €2.5m to be refunded to Fyffes. According to Mr. Gernon's note of 23rd March, the position in February, 2000 was that it was expected that the €2.5m refund would be available as a contribution to profits for April. Fyffes' auditors had confirmed that it could be "taken to profit". The position as at the beginning of March, as recorded in Mr. Gernon's note, was that a refund of only £1m (or €1.3m) was then on offer. The implication from that note and from a contemporaneous note from Mr. Carl McCann to Mr. Gernon, also dated 23rd March, 2000, was that the refund would not be forthcoming before April, if then. The evidence suggests that the outcome of the AVM case was less significant than the outcome of the other pending cases. Mr. David McCann testified that he had not put "as much store" behind it as the other two cases, which, in his mind, were going to "produce value".
>
> (2) The Geest case arose out of the acquisition in 1996 by a joint venture established by Fyffes and Winward Islands Banana and Development Exporting Company Limited (WIBDECO) of the banana business of Geest Plc. There was provision for the legal costs of these proceedings in Fyffes' accounts for financial year 1999 and that provision was also the subject of consideration at the Audit Committee meeting on 9th December, 1999. In any event, the case came on for hearing in London on Monday, 28th February, 2000, and it ran until 7th March, 2000, when it settled. A joint stock exchange announcement was made by Fyffes, WIBDECO and Geest Plc announcing the settlement on 8th March, 2000. Although it was not explicitly stated in the announcement, as I understand it, it was settled on the basis of "back to

back" as to costs. Mr. Gernon, in his note of 23rd March, 2000, recorded that during the week commencing 6th March the Geest case was terminated with gross costs for Fyffes' account of Stg£2.5m. The contemporaneous note of Mr. Carl McCann stated that Fyffes had a reasonable expectation of an outcome of Stg£5m from this litigation, which had disappeared. Mr. Gernon's note recorded that Fyffes' auditors had advised that the proceeds of this litigation would have to be processed through the profit and loss account, although perhaps disclosed as an exceptional.

(3) The hearing of the case by Fyffes against Seatrade, referred to as the Seatrade case, commenced in London on 12th January, 2000, and ran for four weeks, the hearing finishing on 9th February, 2000. As might have been expected, judgment was reserved. Mr. Gernon recorded in his note of 23rd March, 2000 that the result of the Seatrade case was not expected until just before Easter, although Mr. Carl McCann's contemporaneous note stated that the decision had been delayed until after Easter. In any event, judgment was given towards the end of May, 2000, and Fyffes was awarded US$7m net of insurance repayment and costs. In fact, the judgment is reported as *Fyffes Group v. Templeman* [2000] 2 Lloyd's Report 643.

575. Finally, in this analysis, it is necessary to refer to the defendants' submission that the response given by Fyffes less than two months after the March 2000 Trading Statement to what was, in effect, a complaint from a shareholder, gives a truer picture of the beliefs of the executives and management of Fyffes as to the significance of the information contained in the November and December Trading Reports than was conveyed by the witnesses of fact in these proceedings. The shareholder, whom the court was told was a retired stockbroker, wrote to the chairman of Fyffes on 21st March, 2000, the day following the March 2000 Trading Statement, raising issues about the timing of that statement. The response from the chairman to that letter, and to an intervening letter, was dated 11th May, 2000. In it the chairman stated as follows:

> "The trading performance during the financial year, which commences on 1 November, is subject to significant seasonal variations. November and December are typically among the least profitable months. Indeed, generally, only a small proportion of our budgeted annual profit is achieved in the first quarter. Analysis of first quarter trends and their potential significance for the full year result is made difficult by the fact that the company normally experiences a seasonal improvement in trading in late January/early February when rising consumer demand and seasonal shortages of available fruit lead to increased market prices. It has been our experience over many years that performance in the months of November and December has not proved to be a particularly accurate indicator of likely trading patterns for the remainder of the financial year and a poor performance in those months in the past has not in itself resulted in a shortfall for the first half.
>
> What happened this year was that the seasonal trading improvement in late January/early February was not on the same scale as normally expected, especially in the light of the decline of the Euro against the U.S. dollar.
>
> Our analysis of the relevant data for the period from the beginning of the financial year coupled with the circumstances prevailing at the date of the AGM prompted us to issue the announcement on 20 March, 2000. We are satisfied that the company would not have been in a position to have made a properly informed assessment as to the necessity of such an announcement at an earlier date. In particular, we are satisfied that an earlier announcement would not have been merited based solely on the performance in November and December."

576. There is a glaring contradiction between the last sentence quoted above and the kernel of the plaintiff's case against the defendants. On the one hand, the plaintiff told a disgruntled shareholder just three months after the Share Sales that the considered opinion of its executives was that the availability of trading and earnings information for the months of November and December, 1999 did not trigger a duty to make disclosure under the Listing Rules, while, on the other hand, just short of two years after the Share Sales, these proceedings, which stand or fall on the core premise that the very same information was price-sensitive, were initiated.

577. It was urged on behalf of the defendants that in assessing the evidence adduced by the plaintiff as to the state of mind of Fyffes' executives at the beginning of February, 2000, it is necessary to filter out hindsight. In line with the observations I have made in the introduction about the impact of hindsight and retrospection on the perceptions of the witnesses of fact, I have no doubt that an objective analysis of what was done and written contemporaneously with the events gives a truer picture of the state of mind of the principal players than their subjective beliefs, honest beliefs I have no doubt, five years on.

578. On an objective analysis, in my view, the evidence of what was said, done and written at the time does not reveal any awareness on the part of Fyffes' executives and senior management as of 3rd February, 2000 that, if the information contained in the November and December Trading Reports was generally available, it would have a substantial adverse impact on Fyffes' share price. During the month after it came into existence that information does not appear to have raised any concern among Fyffes' executives that it may have triggered Fyffes' obligations under the Listing Rules. The board was certainly not apprised of any such concern. By the time the concern about informing the market of changed expectations was raised at board level by Mr. Scanlan, albeit obliquely, on 28th February, 2000, the trading and earnings information available to the board gave a much clearer picture of the likely outturn of the first half of 2000 than the information contained in the November and December Trading Reports. Yet the board did not question whether the ambition to match the outturn for the first half of the prior year required immediate review, having regard to Fyffes' obligation under the Listing Rules. I do not doubt that it was hoped that the outcome of the court cases would improve Fyffes' financial position. However, it is difficult to conclude that it could have been realistically anticipated that the outcome would be in place by the end of April, 2000.

579. What the evidence shows is that, from the perspective of Mr. Gernon, who was Chief Financial Officer and the executive centrally involved at the time, it was the consideration of the March and April forecasts for the banana business on 13th March, 2000 which set in train the process which led to the recognition on 15th March, 2000 that Fyffes' expectations as to its performance in the first half of financial year 2000 had changed. By then the information in Fyffes' possession in relation to trading and earnings in the then current year was quantitatively and qualitatively different from the information contained in the November and December Trading Reports and even from the information which was before the board on 28th February, 2000. Instead of yielding €15m and €14.1m respectively, as the table put before the board on 28th February, 2000, assumed, March and April, on the basis of the review carried out in the week commencing 13th March, 2000, were estimated to yield only €8.5m and €6.3 respectively.

580. The evidence undoubtedly shows that the executives of Fyffes, led by the Chairman, were concerned on 3rd February, 2000 about the prospect of the DCC Group holding in Fyffes being sold. The concern related to the effect of the sale on the market in Fyffes' shares, because of the size of the holding relative to Fyffes' share capital and the prospect that part only of the holding would be sold, leaving an overhang in the market. There is no objective evidence that any director or executive of Fyffes had any concern that, by reason of being in possession of the information contained in the November and December Trading Reports, Mr. Flavin was or might have been in possession of price-sensitive information. The evidence strongly suggests that such a possibility was not

entertained at all.

581. It is not in issue in these proceedings that Fyffes should have issued a trading statement on foot of the information contained in the November and December Trading Reports earlier than 20th March, 2000. On the contrary, one of the premises on which the defendants ground their defence is that the March 2000 Trading Statement was properly timed and that there was no contravention of the Listing Rules. Despite some equivocation by Mr. David McCann, admittedly conditioned by hindsight, as to the timing of the March 2000 Trading Statement, in my view, in this case there is an inherent incongruity in reason and common sense between the plaintiff's assertion that, on receipt of the November and December Trading Reports on 25th January, 2000, Mr. Flavin had in his possession information which, if generally available, would be likely to materially affect Fyffes' share price, on the one hand, and the fact that at no time did Fyffes determine that, or even consider whether, if made public, the very same information would be likely to lead to a substantial movement in Fyffes' share price, thus triggering its duty of disclosure under the Listing Rules. In order to justify that proposition I do not consider it necessary to determine that the hypothetical tests posited in s. 108(1) and Rule 9.2 of the Listing Rules are precisely the same. In my view, they are essentially the same.

582. In their defence, the defendants pleaded that by reason of certain matters, including the absence of an announcement, the plaintiff is estopped from seeking to contend that all or any part of the alleged price-sensitive information was price-sensitive and from seeking the relief claimed in the proceedings. In answer to that, the plaintiff asserted that its entitlement to the statutory remedy conferred by s. 109 is not made conditional upon, nor is it affected by, the actions of the plaintiff in any way. It was pointed out that it would have been open to the legislature to condition the availability of the relief for contravention of s. 108(1) by reference to the conduct of the plaintiff, but it did not do so. That is undoubtedly correct and the court must give effect to the intention of the legislature as manifested in the words of the statute. In any event, my understanding is that the defendants did not pursue an estoppel argument in their final submissions; their argument was that the conduct on the part of Fyffes which they highlighted was evidentially significant in the determination as to whether the information contained in the November and December Trading Reports was price-sensitive.

583. Both sides referred the court to the statement published by the FSA on 11th April, 2000 in relation to Marconi Plc, in which it was held that Marconi contravened Rule 9.2(c) of the Listing Rules in force in the period in issue in that investigation, which was in precisely the same terms as Rule 9.2(c) by which Fyffes was bound in February, 2000, and which is quoted in the introduction. I do not find the actual decision on the facts in the Marconi investigation of any assistance in determining the price-sensitivity issue in this case, although I should perhaps record that I do not consider the plaintiff's interpretation of them to be correct. However, I do find the concluding remarks of the FSA helpful. The FSA stated that it regards the continuing obligation requirements of Chapter 9 of the Listing Rules as a fundamental protection for shareholders and that observance of the obligations is essential to the maintenance of an orderly market in securities and of confidence in the financial system. This mirrors the legislative intent of both the Directive and Part V of the Act of 1990. The FSA then stated as follows:

> "The Board of a listed company, on the advice of its executive officers, must carefully and continuously consider whether changes in its financial condition, in the performance of its business or in its expectation as to its performance may be price-sensitive such that, if made public, they would be likely to lead to a substantial movement in the price of its listed securities, and so require disclosure under the Listing Rules. When such changes are under consideration, a listed company should also consult its financial advisers at the earliest possible time."

584. The FSA stated that the period of time which it is reasonable for a listed company to take, in making an announcement under the Listing Rules regarding a change in its expectations, will depend upon all the circumstances relevant to the particular situation in which the change occurs. It added that, save in exceptional circumstances, a listed company must prioritise its disclosure obligations under the Listing Rules.

585. The picture which emerges from the evidence in this case is not one of Fyffes' executives identifying the information in relation to the company's trading and financial performance in the first quarter, which was available from around 25th January, 2000, as indicating a change which might require to be announced to the market under Rule 9.2 and then allowing time to appraise the information with a view to making a prudent judgment as to whether an announcement was required, and then, after a reasonable time, making the announcement on 20th March, 2000. A different picture emerges. It is a picture of the executives of Fyffes having information available on 10th March, 2000, which only became available on that date, and then embarking on the process to determine whether an announcement was required. The information on the basis of which the announcement was made on 20th March, 2000, was not the information which is alleged to be price-sensitive in these proceedings. What I believe is a fundamental incongruity in the plaintiff's stance remains.

586. The evidence of Mr. Flavin's appreciation of the significance of the information contained in the November and December Trading Reports

587. It is necessary to preface the following analysis of the evidence by referring to the manner in which it was used by the plaintiff in the context of the price-sensitivity issue.

588. While arguing that knowledge on the part of the insider of the price-sensitivity of the information in issue is not a necessary ingredient of civil liability under s. 109 arising from a dealing which is unlawful by virtue of s. 108(1), the plaintiff nonetheless contended, and relied on, *inter alia*, the evidence to which I will refer later, to support the contention, that Mr. Flavin knew that the information contained in the November and December Trading Reports was price-sensitive. Having held that knowledge is not a necessary ingredient of civil liability, a finding does not have to be made as to whether Mr. Flavin knew that the information was price-sensitive, if it was. Moreover, it seems to me that to address the question of his knowledge with a view to determining whether the information was price-sensitive is to beg the question.

589. However, in their submissions on the proper application of s. 108(1), counsel for the plaintiff argued that, if a person proposing to deal entertains doubts as to whether the information of which he is possessed is inside information, that in and of itself, suggests that he is, quoting the following passage from the judgment of Foenander S.D.J. in *Public Prosecutor v. Allan Ng Poh Meng* [1990] 1 M.L.J. v, at page x:

> "If an insider has any doubt about the legitimacy of dealing while in possession of information gained by reason … of being a connected person … ,then he should not deal. He should not deal because his doubts are in effect telling him that the information may well have a price impact."

590. As a general proposition, it seems to me that what may be inferred from the evidence as to the appraisal by an insider of the significance of the information may be of some probative value in determining whether information would have been likely to materially

affect the share price, if it were generally available, in the circumstances of a particular case. That said, the test posited in s. 108(1) is an objective test and the subjective opinion or suspicion of the insider is not determinative.

591. In addressing the dealing issue, I have already alluded to the fact that, on 31st January, 2000, Mr. Flavin contacted DCC's legal advisers, William Fry, for advice in the context of a potential sale of the shares. The solicitor in William Fry who was consulted by Mr. Flavin, Alvin Price, recorded what transpired between them in a file note which he dictated on that day. Mr. Price did not name Fyffes in his note but, as he recorded it, in substance, the advice Mr. Flavin sought was whether DCC was free to sell its holding in Fyffes at that time. While the note did not refer to the relevant statutory provisions, the provisions of Part V, in reality what the note deals with is whether those provisions precluded a sale.

592. The note recorded that Mr. Flavin said that "he had examined his conscience with regard to any price-sensitive information", which may not be the terminology he used, and that he felt that he did not have any. The information Mr. Price noted as having been given to him by Mr. Flavin was that Fyffes' share price had risen strongly in the recent past, largely on the back of the publicity in regard to the wof.com venture. Fyffes had recently briefed analysts and done a road show and, accordingly, the market had up to date information in regard to Fyffes. Fyffes' year had ended on 31st October. To Mr. Flavin's knowledge the first two months' trading of the current year "had not been all that wonderful". However, Mr. Flavin indicated that Fyffes' track record was to have an uneven pattern of results and two relatively poor months would not have been unusual in the past.

593. The note recorded that, having discussed the matter with Mr. Flavin, Mr. Price confirmed that he shared his view "that there did not appear to be any legal obstacle to their proceeding with a full disposal of the shareholding". The note also recorded that Mr. Flavin and Mr. Price then went on to discuss Fyffes' attitude to the sale and Mr. Price noted that Mr. Flavin was unclear as to whether Fyffes would find the sale a positive or a negative development.

594. It was the evidence of Mr. Price, with which Mr. Flavin agreed, that the primary issue which arose in the course of his telephone conversation with Mr. Flavin was whether, under stock exchange regulations, DCC was required to get the prior consent of the chairman of Fyffes before accepting an offer for the shares. Mr. Price explained that he had not recorded that aspect of the conversation in his note because, in advising that it was not, he was confirming advice that he had given in writing in 1998 that such consent was not necessary. The evidence established that Mr. Price gave Mr. Flavin written advice on 12th May, 1998 that, under the Model Code, DCC was not a connected person of Mr. Flavin.

595. On 21st March, 2000, the day after the March 2000 Trading Statement, Mr. Price sent a copy of the file note to Mr. Flavin, probably at Mr. Flavin's request. Mr. Flavin's evidence was that he could not recall why he sought the file note. The only reasonable inference which can be drawn is that he was concerned that issues might arise as to whether the Share Sales were in compliance with the law and the regulatory code.

596. I have also alluded to the fact, in the context of the dealing issue, that, on 1st February, 2000, Mr. Flavin consulted Mr. Scholefield on compliance issues. In a note for the compliance file, Mr. Scholefield recorded the following facts:

> (1) Mr. Flavin was aware that the profits of Fyffes for the last two months to 31st December were behind last year. There is a rider to this in terms that both Mr. Flavin and Mr. Scholefield noted that, although Fyffes had produced good overall profit growth over the last number of years, there had been little evidence during those years of smoothness in terms of the profitability for any one or two month period over the previous year.
>
> (2) Mr. Flavin only had information on the first two months of the year. This information was the same information as was available to him at the time the board of Fyffes approved the preliminary results announcement in December.
>
> (3) The major influence on profitability in Fyffes was banana prices, which were closely followed by industry analysts. This knowledge and trading commentaries from other companies in the sector meant that a reduction in the profitability in the first two months of Fyffes' then current financial year would not be unexpected by the analysts.
>
> (4) Fyffes' share price had more or less doubled since it announced the launch of its online trading entity, wof.com. There was a rider that both Mr. Flavin and Mr. Scholefield surmised that the launch had been a major factor in the share price performance.
>
> (5) Mr. Flavin informed Mr. Scholefield that Fyffes had been active in making presentations since the results and therefore the market was likely to be as well informed as he was.
>
> (6) Both Mr. Flavin and Mr. Scholefield noted that any decision in relation to Fyffes' shareholding was in any event a matter for the board of Lotus Green. The note recorded that Mr. Scholefield confirmed to Mr. Flavin, on the basis of the above facts, that he could see no reason why the board of Lotus Green would not be free to deal in Fyffes' shares if they so wished. The note also recorded that Mr. Flavin informed Mr. Scholefield that he had discussed the matter with Mr. Price and that Mr. Price's view was similar to Mr. Scholefield's. It was also noted that Mr. Price had confirmed that, under the Model Code, DCC was not a connected party.

597. The first board meeting of DCC after the Share Sales was held on 27th March, 2000. It post-dated the March 2000 Trading Statement. The minutes merely recorded that Mr. Flavin advised the board that Lotus Green had completed the Share Sales, realising proceeds for the Group of €106.7m, a profit on cost of €85m and a profit on book value of €76m. It was also noted that Lotus Green continued to hold 4.6m convertible preference shares in Fyffes. Finally, Mr. Flavin advised the board that he had resigned as a director of Fyffes on 9th February, 2000. The contemporaneous manuscript notes which Mr. Scholefield took at the meeting, insofar as they are relative to the price-sensitivity issue, recorded that Mr. Flavin referred to the "unfortunate profit warning", that he discussed matters with Mr. Scholefield and Mr. Price, that he had no information beyond December, and that November and December were "small months in the business".

598. The principal bases on which the plaintiff contended that the three episodes which I have just outlined suggest that Mr. Flavin was aware of the significance of the information contained in the November and December Trading Reports are that the information he gave Mr. Price and Mr. Scholefield in relation to Fyffes' November and December trading and financial performance was wholly inadequate to convey the true import of the information contained in the November and December Trading Reports and, further, that by omitting any reference to the January forecast, on each of the three occasions, he was seriously misrepresenting the nature and significance of the information he had. When pressed for an explanation as to why he had not disclosed to either Mr. Price or Mr. Scholefield that he had information in relation to January, Mr. Flavin's response was that, in relation to Mr. Scholefield, he had maintained confidentiality on the numbers, and that his conversation with Mr. Price on the issue was very brief and, he believed,

unplanned. The plaintiff contended that this explanation was not plausible. Although it was not stated in these terms, the clear sub-text of the plaintiff's contention was that the compliance procedure was a sham. This is effectively what the plaintiff contended in submitting that there was clear and convincing evidence that Mr. Flavin knew that the information which he had was price-sensitive and that he made a deliberate decision, when seeking clearance to deal, not to disclose the full or true extent of that information.

599. Mr. Flavin's consideration of the November and December Trading Reports is readily perceivable as being superficial and his instructions to Mr. Price and Mr. Scholefield as to their import as being inadequate when viewed against the extent to which these documents have been parsed and analysed over the past five years and the body of evidence adduced in these proceedings as to the significance of the information contained in them. However, I am not satisfied that it would be a proper inference to draw that Mr. Flavin deliberately misrepresented the import of the documents when seeking advice from Mr. Price and Mr. Scholefield. Leaving aside the perception created by the events of the past five years, in my view, the circumstances warranted a more rigorous compliance process, given the magnitude of the transaction being contemplated and what was happening to Fyffes' share price at the time. Confidentiality would not have prevented that.

600 However, for present purposes, the question which arises is whether the process engaged in bolsters either the defendants' case that the information was not price-sensitive or the plaintiff's case that it was. In my view, it does neither. It is a neutral factor.

Share price movement on and after 20th March, 2000 as a valid proxy?
601 As I have indicated previously, I am satisfied, on the evidence, that it was the March 2000 Trading Statement, which was released by Fyffes on 20th March, 2000, the date of Fyffes' AGM, that precipitated the adverse share price movement on that day and the following day and that the information released contemporaneously in relation to wof.com had no bearing on the share price movement.

602. Earlier in this judgment, in considering the legal principles applicable to the price-sensitivity issue, I accepted as correct in principle the submission made by the defendants' counsel that a post-market event is only of evidential value for the purpose of resolving the statutory hypothesis if two factors are present: that there is parity of information between the alleged price-sensitive information and the information which precipitated the putative proxy share price effect; and that the market conditions were the same on the date the hypothesis is being applied and the date of the putative proxy event.

603. The defendants culled from the evidence of the plaintiff's witnesses no less than twenty-one instances in which, or so the defendants contended, the plaintiff's witnesses acknowledged differences between the information in issue here (the information contained in the November and December Trading Reports) and what the market was told on 20th March, 2000, and between the market conditions in issue here, that is to say, market conditions on 3rd, 8th and 14th February, 2000 and market conditions on 20th March, 2000. Some of the instances cited were not matters which were known to the market and are irrelevant for present purposes, for example, the significance Fyffes' management attached to the outcome of the *Seatrade* case and the *Geest* case. In the case of another instance, while Professor Fischel did acknowledge that market conditions were somewhat different on the two dates, in that time had passed, he resolutely disagreed with the proposition that March 20th was not a correct proxy for giving an opinion on the price-sensitivity issue in these proceedings. The final position of the plaintiff was that, while more definite information was available on 20th March, 2000 in relation to the plaintiff's trading and earnings performance, the two sources of information conveyed the same message. Further, the plaintiff suggested, the market could set off against the negative information in relation to trading disclosed on 20th March, the countervailing positive information in relation to wof.com and this was a factor which should be factored in when doing a comparison. In any event, the plaintiff asserted, there was not a bear market on 20th March, as the defendants suggested.

604. In analysing the evidence to ascertain whether the relevant factors which legitimise the use of a post-market event as a proxy are present in this case, I propose looking at the two factors separately and from an objective standpoint.

605. In determining whether the share price reaction on 20th March, 2000 and on the following day can be regarded as a valid proxy in applying the statutory hypothesis, the first question is whether there is parity of information between the contents of the November and December Trading Reports and the March 2000 Trading Statement.

606. On 20th March, 2000, Fyffes gave information to the market about four periods.

607. First, in relation to November and December, 1999, it was stated that market conditions "were significantly below expectations". That information is to be found in the November and December Trading Reports in stark detail.

608. Secondly, it was stated that the usual recovery in January and February, 2000 was slower than anticipated and this was primarily ascribed to the continuing weakness of the euro against the dollar. Such minimal information as there was about February, 2000 in the December Trading Report, while vaguely positive insofar as it was stated that the European market had improved quickly in January with prices at budget levels going into February, was tempered by negative comment about competition in the U.K. multiple market. Negative information in relation to January, 2000 is to be found in the forecast for that month contained in the December Trading Report, again in stark detail.

609. The third period addressed in the March 2000 Trading Statement was the first half of financial year 2000 and, by implication, the months of February, March and April, 2000 which were, and were known to be, significant in terms of profitability for Fyffes. In relation to this period, Fyffes stated that they expected performance, on a like for like basis, to be below what was achieved in the first half of the prior year. It is in relation to this period that the major difference, and, in my view, the material difference, between the two sources of information emerges. There is no information in relation to the first half in the November and December Trading Reports and there is no explicit statement that Fyffes considered that expectations for the first half would not be met. By 20th March, 2000, as the market would have known, Fyffes was nearing the end of the fifth month of the half year and it would have had firm figures for the first four months. In the March 2000 Trading Statement, it pointed to a trend over a four month period and it stated that it was changing its expectations for the first half. That, in my view, was the significant piece of information which Fyffes gave the market on 20th March.

610. Also significant was the information, or perhaps more correctly the absence of information, in relation to the fourth period, the full financial year. In the November and December Trading Reports, there was no information in relation to the full year and there was no explicit statement that Fyffes considered that it might not meet expectations for the full year. On 20th March, 2000, Fyffes stated that it was too early to predict whether the shortfall in the first half could be recovered in the second half, thus stating that it was uncertain whether its expectations for the full year would be met.

611. In considering the information contained in the November and December Trading Reports earlier in this judgment, I have accepted that a simple arithmetical exercise on the figures disclosed in it would lead to a reasonable deduction that there was a risk

that Fyffes would not make either its own or analysts' expectations in the first half of financial year 2000, or for the full year. However, looking at the information in isolation for the purpose of ascertaining whether there is parity between it and the information contained in the March 2000 Trading Statement is no more legitimate than looking at it in isolation for the purposes of applying the hypothesis contained in s. 108(1). To properly assess whether there is parity, what is relevant is what the impact of the information would have been in the market on the date of the Share Sales. That impact would have been conditioned by what the market already knew about Fyffes. The market knew that banana trading was difficult for Fyffes, because of pricing and exchange rate factors. It also knew from the preliminary announcement that Fyffes was reducing its overall banana import volumes in Europe by 10% for calendar year 2000, but that the benefit of this would be weighted towards the second half of the year. From the same source it knew that Fyffes was committed to vigorously pursuing efficiencies in the Group's cost structures. Viewed in the context of the other information available to him, the reasonable investor might well have deduced at the beginning of February, 2000 that Fyffes' management had not formed the view that its own expectations for the first half or for the full year would not be met. In that respect, the information contained in the March 2000 Trading Statement was fundamentally different because, by that information, Fyffes was formally telling the market that it had revised downwards its expectations in relation to the first half and was uncertain whether it would meet its target for the full year.

612. The second question to be considered in determining whether the price reaction on and after 20th March, 2000 is valid proxy for what would have happened, if the information contained in the November and December Trading Reports was generally available on the dates of the Share Sales, is whether market conditions were the same on 20th March, 2000 as they were on those dates. On the basis of the evidence, in my view, they were not.

613. On 3rd February, 2000, Fyffes' share price was rising and it had been for approximately six weeks. It continued to rise up to and beyond 14th February. However, by 20th March the share price had come off its peak on 18th February and was in decline. This is obvious from the table of share prices set out earlier. Whatever the cause of the decline, whether it was attributable to or reflected –

(a) profit taking, as Mr. Brindle suggested, or

(b) demand for Fyffes' shares having been satiated by the sale of the DCC Group holding, as Mr. Dobbie suggested, or

(c) an incipient disenchantment with internet stocks or stocks with an internet component, even if temporary (as suggested in an opinion feature entitled "Caution advised for investors in e-commerce" published in the Irish Times on 20th March, 2000, which anticipated that Fyffes' shareholders would have "perplexed faces" at the AGM later that day because, "after seeing their shares in the doldrums for many years", they saw them doubling to €4, but, "in line with the temporary slide against IT shares", they had fallen back to €3.30),

614. by 20th March, 2000 market conditions were different from what they had been between in excess of six weeks (3rd February) and four weeks (14th February) earlier.

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

"Dotcom" bubble/burst
616. The focus here is on the scenario painted by the defendants' expert witnesses, notably Professor Taffler, that the stock market was in the throes of "dotcom mania" on 3rd February, 8th February and 14th February, 2000, but that the bubble had burst by 20th March, 2000.

617. The overall conclusion I have reached is that it is incontrovertible that there was very considerable enthusiasm for dotcom stocks or stocks with a dotcom component in January and February, 2000, but whether that enthusiasm merits a diagnosis of mania is not something on which I need express a view. It is incontrovertible that that enthusiasm affected Fyffes' share price, in that it is incontrovertible that it was the wof.com venture which was the main driver of Fyffes' share price at the time. However, in my opinion, the evidence does not establish that the enthusiasm for the internet component of Fyffes' business at the time was of an order that investors regarded the underlying fundamentals of the core business to be wholly irrelevant. But the issue in this case is whether the information in relation to trading and earnings performance in November and December, 1999 contained in the November and December Trading Reports would have dented that enthusiasm to the extent that it would have materially affected the share price.

618. Professor Taffler invoked the "bubble burst" theory to explain the decline in Fyffes' share price from 18th February onwards, including the marked decline on 20th and 21st March, 2000. There is no evidence to support that theory. While enthusiasm for Fyffes' shares waned after 18th February, the probability is that that was due to a combination of the factors to which I have referred in concluding that market conditions on 20th March were different from market conditions on 3rd February. There is no doubt, however, about what caused the adverse share price reaction on 20th March, 2000. The evidence is coercive that it was caused by the negative trading information contained in the March 2000 Trading Statement.

Application of legal principles to facts
619. As the analysis of the testimony of the expert witnesses illustrates, answering the hypothetical question posed in s. 108(1) is not a question of simply choosing between the testimony of the plaintiff's witnesses that the information contained in the November and December Trading Accounts was price-sensitive and that of the defendants' witnesses that it was not. It is a matter of assessing the facts and the proper inferences to be drawn from the facts in the light of the opinions of the experts and then applying the legal principles which I have outlined earlier. The task is peculiarly difficult because of the unusual market conditions in which Fyffes' shares were trading at the relevant time.

620. In applying the statutory hypothesis, having regard to the expert opinion, the basic premise is that share price movements reflect changes in investors' expectations in relation to a company's future earnings and cash flows. So the kernel of the price-sensitivity issue here is whether, had it been available on the dates of the Share Sales, the information contained in the November and December Trading Reports would have altered investors' expectations about Fyffes' future earnings and cash flows. Although there was some controversy on this point, on the evidence, I consider that investors would have been concerned about the outcome, not only for Fyffes' full financial year, but also the outcome for the first half.

621. In summary, the information contained in the November and December Trading Reports pertinent to Fyffes' future earnings and cash flow was that, leaving Capespan out of the picture, Fyffes had incurred losses of €2.6m in the first quarter of financial year 2000, leaving it €13.7m behind its actual performance in the corresponding period in the previous financial year and €7.5m behind its own budget. As stated previously, a simple deduction from the figures is that Fyffes' earnings for the remaining three quarters would have to be up €2.6m on its earnings for the whole of the previous year and simple arithmetic quantified that at €85.5m. The reasons

given for the poor performance were weak banana prices in the U.K. market and competition in the multiple sector of that market, weak banana prices and oversupply in European markets, and the weakness of the euro against the dollar. The only information in relation to Fyffes' expectations beyond the first quarter was that the European market was improving, whereas the weakness in the U.K. market was continuing.

622. That information has to be viewed objectively, that is to say, from the perspective of the reasonable investor, against the total mix of information generally available in relation to Fyffes' future prospects to assess its importance. The relevant items of information which were generally available, all of which have been alluded to previously, are the following:

(i) The fact that the market had been told by Fyffes, in the Preliminary Announcement, that going forward it would be focusing on optimising the returns from its core business, that it would be pursuing cost-cutting and addressing the oversupply in the banana market. Of particular relevance is the information that the benefits of its strategy in relation to oversupply would not be felt in the first quarter.

(ii) The fact that, in the Preliminary Announcement, Fyffes had pointed to the possibility of major acquisitions and the fact that its balance sheet indicated that it had the wherewithal to realise such an ambition.

(iii) The fact that Fyffes was announcing progress in the development of the wof.com venture and its potential.

(iv) The fact that analysts recognised, and the media reported on, what was seen as positive prospects for Fyffes: the opportunity to acquire, or merge with, one of its major competitors and the prospect of reaping the rewards of being the first mover in the development of a B2B on-line fresh produce market.

(v) The fact that investor enthusiasm for shares within an internet component was nearing its highpoint and that, by general consensus, this is what was fuelling the rise in Fyffes' share price.

623. The key question is whether, as a matter of probability, on 3rd February, 2000, the reasonable investor, having assessed the negative news about Fyffes' performance in the first quarter in the context of the total mix of information available about Fyffes' prospects, would have concluded that the information indicated a lowering of expectations about Fyffes' earnings in the first half of financial year 2000 and in the full year of an order of magnitude that would probably impact on Fyffes' share price to a substantial or significant degree. I think the answer to that question is that he would not. I think he would conclude that it was too early in the financial year to make a judgment about the outcome for Fyffes' existing business in the first half. That conclusion is consistent with what Fyffes told the disgruntled shareholder in the letter of 11th May, 2000, which I have quoted earlier. But more importantly, I think he would have concluded that prospects for a merger or a major acquisition, and the potential of the wof.com venture, which were the main focus of the interest of the market at the time, would offset the impact of the current trading problems. In particular, the strength of the sentiment for Fyffes' wof.com venture at the time, as evidenced by what was happening to the share price, was such that he would have concluded that an adverse share price reaction was not likely. Moreover, he had no reason to suppose that Fyffes' own expectations about future earnings had changed. On the contrary, the announcements in relation to the sale of Mr. Ellis's shares and the grant of options to Mr. Halpenny suggested they had not, as did the fact that no announcement had been made under the Listing Rules.

624. Accordingly, I hold that the plaintiff has not discharged the onus of proving that, at the dates of the Share Sales, Mr. Flavin, by reason of his connection with Fyffes, was in possession of information which, if generally available, would have been likely to materially affect the share price.

625. That outcome on the price-sensitivity issue obviates the necessity to confront the fundamental incongruity in the plaintiff's position, which I have highlighted earlier. However, it is difficult to see how a statute outlawing, and providing a remedy for, insider dealing could accommodate such a fundamental incongruity. That it could, would seem to be at variance with fairness and justice.

V. Conclusion on the statutory claim

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

III. THE NON-STATUTORY CLAIM

The basis of the claim for an account in equity

627. The basis on which the plaintiff's non-statutory claim for an account in equity was pleaded was that, by reason of having been a director of Fyffes, Mr. Flavin owed certain fiduciary duties to Fyffes: a duty to avoid a conflict between the interests of Fyffes, on the one hand, and his own interests or those of any other company or person, on the other hand; a duty not to make any profit from opportunities or information accruing to him or acquired by him in his capacity as a director or by virtue of his position as such; a duty not to enable or facilitate any third party in the making of a profit from such opportunities or information; and a duty of confidentiality in respect of information relating to the affairs and business of Fyffes. It was alleged that Mr. Flavin acted in breach of those fiduciary duties to Fyffes and, as a consequence, all of the defendants benefited thereby in circumstances where DCC , S&L and Lotus Green knew or ought to have known of the breach and/or the facts giving rise to the breach. Several alleged breaches of Mr. Flavin's fiduciary duty were particularised in the pleadings, but as I understand it, the only allegation actually pursued was that Mr. Flavin used and that he caused or permitted DCC, S&L and Lotus Green to improperly use and/or derive a profit from confidential information which was the property of Fyffes. It was further alleged that the corporate defendants received that information when they knew or ought to have known that it was confidential, price-sensitive information and that it was "transmitted" to them by Mr. Flavin in breach of his fiduciary duties, so that they were precluded in law from utilising and/or deriving profit from it. The account which the plaintiff claimed was an "account in equity of all profit accruing" to the defendants or each or either of them from the three Share Sales.

The legal principles applicable to the non-statutory claim generally

628. Section 109(1) provides that civil liability thereunder is "without prejudice to any other cause of action which may lie" against the person sought to be charged with statutory liability under that provision. That an insider who owes a fiduciary duty to a company and who, with the benefit of confidential information of the company, makes a profit from dealing in securities of the company may be compelled by an Irish court to account to the company for that profit has be recognised in theory. (cf. Keane on **Company Law, paras. 34.16 and 27.102**; and Cahill on **Corporate Finance Law**, para. 4-06). In practice, the parties have not pointed to any case in which an Irish court had to consider a claim for such an account. The rarity of authorities in other common law jurisdictions, for

example, the United Kingdom and Australia, as well as the absence of any authority in this jurisdiction, addressing the circumstances in which directors as fiduciaries would be required to account for profits made from insider dealing was ascribed by the plaintiff to a combination of factors: statutory regulation; the reluctance of corporations to bring actions against their own directors; and the restrictive conditions surrounding the derivative action in those jurisdictions. The point is made in Cahill at para. 4-06, that even if a shareholder's derivative action is mounted and is "successful", it may be difficult to demonstrate any measurable loss to the company itself and, even if such loss could be proved, the award would be in favour of the company, rather than the shareholder. All of this means that there is a certain novelty involved in the plaintiff's claim.

629. That said, the legal principles upon which the plaintiff founded the claim are well established in Irish law. The plaintiff followed a well-trodden path through the law of trusts and, in particular, the doctrine of constructive trust citing the dictum of Chatterton V.C. in *Gabbett v. Lawder* (1883) 11 L.R. Ir. 295, at p. 299, to the following effect:

> "The fundamental principle upon which the doctrine of constructive trusts proceeds is, that no person in a fiduciary capacity shall be allowed to retain any advantage gained by him in his character as trustee".

630. The plaintiff invoked authorities in which that general principle has been applied to specific problems arising from the use of information or opportunity obtained by company directors: the decision of the House of Lords in *Regal (Hastings) Limited v. Gulliver* [1942] 1 All E.R. 378; and the decision of the Court of Appeal in Industrial *Development Consultants v. Cooley* [1972] 2 All E.R. 162. The plaintiff also invoked the decision of the House of Lords in *Phipps v. Boardman* [1967] 2 A.C. 46, although that case was not concerned with the position of a company director. The plaintiff submitted that the authorities suggest various theoretical bases for non-statutory liability for insider trading: that the information in the possession of the director is a form of property, the appropriation of which for the benefit of the director personally represents a breach of duty; or that the deriving by a fiduciary of a benefit consequent on his position as such in and of itself gives rise to an obligation to account; or that the breach may be said to lie in taking for himself an advantage which the company has authorised him only to pursue for the benefit of the company itself. Whichever analysis is favoured, the plaintiff submitted that the authorities are clear on a number of points. First, the liability to disgorge a profit made from acting in breach of a fiduciary duty arises irrespective of whether the company itself has suffered a loss. Secondly, liability arises irrespective of whether the company itself could have made a profit. Thirdly, the liability is triggered irrespective of considerations of fraud or bad faith. I am satisfied that those propositions are amply supported by authority and, in particular, by the judgments in the *Regal (Hastings)Limited case.*

631. While the legal principles which govern the identification of the circumstances in which a constructive trust will be found to exist and an equitable account will be directed, and, indeed, the extra judicial and academic controversies which surround the principles, are readily ascertainable, I found the arguments which were advanced by the parties in relation to the relevance of those principles to the facts of this case somewhat confusing. While that may be a result of my own misunderstanding of the arguments, I think that, to some extent, the parties were at cross purposes.

632. Counsel for the plaintiff identified two issues which require to be addressed in considering whether the plaintiff is entitled to an account in equity. The first is a hypothetical question and was articulated as follows: if Mr. Flavin had been the owner of Fyffes shares, had traded in them and had made a profit, would he have been in breach of his fiduciary duty to Fyffes and liable to account in equity? On my understanding of the plaintiff's argument, there is implicit in that question the assumption that the profit would have been generated from the misuse of confidential price-sensitive information which it is alleged Mr. Flavin acquired as a director of Fyffes. The second, which depends on an affirmative answer to the first, is whether if, as the plaintiff alleges was the case, Mr. Flavin was central to the dealing on behalf of DCC, S&L and Lotus Green with which he was associated, those corporate defendants are liable to account consequent upon his breach.

The first issue

633. The authority on which the plaintiff primarily relied on the first issue was a decision of the New York Court of Appeals, applying State law, in *Diamond v. Oreamuno* (1969) 248 N.E. 2d 910. The issue on that appeal was whether a motion to dismiss an action taken by way of derivative claim by a shareholder in a corporation against two officers of the corporation should be granted or denied. It was alleged that the officers had learned that the net earnings of the corporation had significantly declined. Before the information was publicly announced, they had sold their shares at a price of US$28 per share. Following the release of the information publicly, the price of the shares dropped to US$11 per share. In his judgment, Fuld C.J. began his analysis of the issue by stating (at p. 912) the following general principle, which the plaintiff contended is equally applicable in this jurisdiction:

> "It is well established, as a general proposition, that a person who acquires special knowledge or information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge or information for his own personal benefit but must account to his principal for any profits derived therefrom … This, in turn, is merely a corollary of the broader principle, inherent in the nature of the fiduciary relationship, that prohibits a trustee or agent from extracting secret profits from his position of trust."

634. Having stated that proof of damage had never been considered to be an essential requirement for a cause of action founded on breach of fiduciary duty, Fuld C.J. explained the rationale for that as follows:

> "This is because the function of such an action, unlike an ordinary tort or contract case, is not merely to compensate the plaintiff for wrongs committed by the defendant but, as this court declared many years ago … '
>
>> to *prevent* them, by removing from agents and trustees all inducement to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency or trust relates.'"

635. Fuld C.J. then applied the general proposition to the corporate context in the following passage:

> "Just as a trustee has no right to retain for himself the profits yielded by property placed in his possession but must account to his beneficiaries, a corporate fiduciary, who is entrusted with potentially valuable information, may not appropriate that asset for his own use even though, in so doing, he causes no injury to the corporation. The primary concern, in a case such as this, is not to determine whether the corporation has been damaged but to decide, as between the corporation and the defendants, who has a higher claim to the proceeds derived from the exploitation of the information. In our opinion, there can be no justification for permitting officers and directors, such as the defendants, to retain for themselves profits which, it is alleged, they derived solely from exploiting information gained by virtue of their inside position as corporate officials."

636. The plaintiff also relied on the fact that the judgment of Fuld C.J. has received a level of acceptability in the United Kingdom. In

Walsh v. Deloitte & Touche [2001] U.K.P.C. 58, Judicial Committee of the Privy Council on an appeal from the Bahamas approved the principles set out in the judgment of Fuld C.J. in the passages which I have quoted above, but did so in the context of the "arguability" test in an interlocutory application to discharge a *Mareva* injunction. At para. 14 of his opinion Lord Hoffman stated as follows:

> "This is of course a statement of the law of New York, but entitled to great respect as expounding doctrines of equity which are common to the legal systems of New York and The Bahamas as well as of England. It has been cited in support of the existence of a similar equitable cause of action in English law by Professor Davies in his 6th Edition of Gower and Davies' *Principles of Modern Company Law* (1997) at p. 445 and by Mr. Ben Pettet in his recent *Company Law* (2001) at p. 393. Their Lordships therefore agree with the courts of The Bahamas that such a cause of action is arguable."

637. As the plaintiff pointed out, in the latest edition, the seventh edition, of Gower and Davies (Sweet & Maxwell, 2003) at p. 755 the decision in *Diamond v. Oreamuno* is cited as authority for the following proposition, noting, however, that the precise situation had not arisen in an English court:

> "… if directors make use of information acquired as director for their personal advantage they will breach their fiduciary duties to the company and be liable to account to it for any profits they have made. A great advantage of the civil suit brought by the company for breach of fiduciary duty is that it does not have to show that it has suffered loss as a result of the insider dealing, simply that the insider fiduciaries have made an undisclosed profit."

638. It may be of some significance that, as the editor of **Gower and Davies** emphasises, the specific insider dealing legislation in the United Kingdom relies wholly on criminal sanctions.

639. The defendants' primary stance in relation to the first issue was that, while acknowledging that Mr. Flavin, as a director of Fyffes, unquestionably owed fiduciary duties to that company, as a matter of fact, he was not in breach of his fiduciary duties to the plaintiff and has not been shown to be. He did not, as the plaintiff alleged, trade or use inside confidential information.

640. As to the legal principles on which the plaintiff grounded the first issue, in their written legal submissions, the defendants conducted an interesting analysis of the rationale of the doctrine of constructive trust. They adverted to the differences of opinion in the speeches of the Law Lords in *Phibbs v. Boardman* as to whether information is property, on the significance of the existence of a conflict of interest to a finding of constructive trusteeship and such like. However, in the final oral submissions on behalf of the defendants, counsel for the defendants acknowledged that there is no doubt that there is a rule that a person who receives information in confidence must not profit from it and the rule may arise from a common-law duty, a contractual duty or a fiduciary duty. It was confirmed that the defendants were not suggesting that it is not a breach of duty for a director to further his self-interest from use of corporate information. However, they contended that the true analysis of a fiduciary's liability to account is property based.

641. Whatever is the correct theoretic basis for making a director who trades on using inside information to his own advantage liable to account for the profit he makes, the existence of the equitable remedy cannot be doubted. In short, in my view, the first sentence of the passage from the 7th Edition of **Gower and Davies**, which I have quoted above, represents the law in this jurisdiction, as has been recognised in the texts to which I have referred earlier. I am satisfied that the plaintiff has demonstrated that the reasoning which underpinned the decision of the New York Court of Appeals in *Diamond v. Oreamuno* is consistent with principles of law which have been applied, and authorities which have been followed, in this jurisdiction for many years.

The second issue

642. In relation to the second issue identified by the plaintiff, the question of law which arises is in what circumstances will liability for breach of duty by the fiduciary extend to a third party so as to render the third party liable to account. The defendant submitted that the answer to that question is to be found in the judgment of Lord Selborne L.C. in Barnes v. Addy (1874) 9 Ch. App. 244 at p. 251 where the Lord Chancellor stated:

> "That responsibility [of a trustee] may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*. But, on the other hand, strangers are not to be made constructive trustees merely because they act as agents of trustees in transactions within their legal powers, transactions, perhaps, of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees."

643. That passage has been regarded in this and other jurisdictions as the source of two distinct heads of liability in respect of which a third party is obliged to account in equity. The first, usually referred to as "knowing receipt", deals with the circumstances in which a third party who has received trust property is obliged to account. The second, usually referred to as "knowing assistance", deals with the circumstances in which a third party, who may not have received any of the trust fund which has been misapplied, will be treated as accountable as a constructive trustee, if he has knowingly participated in a dishonest design on the part of the trustees to misapply the fund.

644. The argument advanced by the plaintiff on the second issue effectively bypassed the *Barnes v. Addy* categorisation. The position of the plaintiff was that whether, as regards DCC, S&L and Lotus Green, one classifies this as a case of knowing receipt of trust information or of knowing assistance in a breach of trust, the corporate defendants are liable to account in equity because either:

> (a) what Mr. Flavin knew, must be imputed or attributed to the corporate defendants; or
>
> (b) because the facts and circumstances were such as to put them on notice of a potential breach of trust in such a manner as to render them liable as constructive trustees.

645. It is convenient to consider the second point first. Counsel for the plaintiff submitted that, on the question of the requisite degree of knowledge, this court should be guided by the decision of the Court of Appeal in *BCCI Ltd. v. Akindele* [2000] 4 All E.R. 221. The facts of that case are succinctly outlined in the headnote. The defendant, A, entered into an agreement with I Ltd., a company controlled by the BCCI Group, ostensibly for the purchase of shares in the group's holding company. That agreement, which guaranteed A a return of 15% per annum compounded annually, on an investment of $10m, enabled officers of the group to conceal a series of "dummy" loans which had been fraudulently used by the holding company to buy parcels of its own shares. The liquidators of I Ltd. contended that A was liable to account, as constructive trustee, for sums paid to him under the agreement. At first instance, it

was held that A had not been aware of the underlying fraud and that he had not been dishonest. Accordingly, the liquidator's claim, which had been brought under both the knowing receipt and the knowing assistance heads of constructive trust, was dismissed. On the appeal, two legal issues arose: what state of knowledge was required in a claim for knowing receipt and whether dishonesty was an essential ingredient of such a claim. It was held that dishonesty was not an essential ingredient of a claim for knowing receipt and that the test for knowledge in such a claim was simply whether the defendant's knowledge made it unconscionable for him to retain the benefit of the receipt.

646. As I understand the plaintiff's argument, it is that the judgment of Nourse L.J. is authority for the proposition that actual knowledge or a lesser degree of knowledge, but not necessarily what is generally referred to as constructive notice, is necessary to render a third party a constructive trustee in the context of knowing receipt. The passage from the judgment of Nourse L.J. on which the plaintiff specifically relied is the following passage at p. 235:

> "For these reasons I have come to the view that, just as there is now a single test of dishonesty for knowing assistance, so ought there be a single test of knowledge for knowing receipt. The recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt. A test in that form, though it cannot, any more than any other, avoid difficulties of application, ought to avoid those of definition and allocation to which previous categorisations have led."

647. The test of knowledge which should be applied in this case, it was submitted by the plaintiff, is whether it would be unconscionable for the corporate defendants to retain the profit from the Share Sales.

648. In relation to the plaintiff's contention that the confidential information or knowledge, which they allege Mr. Flavin had, is to be imputed or attributed to the corporate defendants, counsel for the plaintiff cited as authority the decision of the Court of Appeal in *Belmont Finance v. Williams Furniture* (No. 2) [1980] 1 All E.R. 393, to which I have alluded earlier in the context of the statutory claim. That was a case in which the facts were of considerable complexity. They were outlined in the judgment of Nourse L.J. in the BCCI Ltd. case at p. 229. The plaintiff (Belmont) was the wholly-owned subsidiary of the second defendant (City), which in turn was the wholly-owned subsidiary of the first defendant (Williams). The chairman of all three companies, and the sole effective force in the management of their affairs, was Mr. James. The shareholders of a fourth company (Maximum), Mr. Grosscurth and his associates, had agreed to sell its shares to Belmont for £500,000 and to buy the share capital of Belmont from City for £489,000, a transaction which, as carried out, it was held by the Court of Appeal, constituted a contravention of a statutory provision on the lines of s. 60 of the Act of 1963 which prohibited provision of financial assistance by a company for the purchase of its own shares. It was also held that the transaction thus involved a misapplication of Belmont's funds. Belmont had subsequently become insolvent. Its receiver had obtained an independent valuation of the shares in Maximum as at the date of the transaction which suggested that, instead of being worth £500,000, they were only worth £60,000. The receiver brought an action in Belmont's name, principally against Williams, City and the shareholders of Maximum, claiming they were liable to Belmont, first, for damages for conspiracy and, secondly, as constructive trustees on the grounds of both knowing assistance and knowing receipt. Counsel for the plaintiff relied on the following passage from the judgment of Buckley L.J. (at p. 404), in which he was addressing the question whether the tort of conspiracy had been established in respect of Williams, City and Mr. Grosscurth, as outlining the principle on which knowledge of wrongdoing will be imputed to a company:

> "The unlawful purpose in this case was the provision of financial assistance in contravention of section 54 of the 1948 Act. That the purpose of the sale of Maximum to Belmont was to enable Mr. Grosscurth to pay £489,000 to City for the share capital of Belmont was known to all concerned … Williams and City were parties to the agreement and so, in my opinion, are fixed with the character of parties to the conspiracy. Moreover, Mr. James knew perfectly well what the objects of the agreement were. He was a director of both Williams and City. Mr. Harries and Mr. Foley, who also knew the objects of the agreement, were a director and the secretary respectively of City. Mr. Foley was also the secretary of Williams. Their knowledge must, in my opinion, be imputed to the companies of which they were directors and secretary, for an officer of a company must surely be under a duty, if he is aware that a transaction into which his company or a wholly-owned subsidiary is about to enter is illegal or tainted with illegality, to inform the board of that company of the fact. Where an officer is under a duty to make such a disclosure to his company, his knowledge is imputed to the company … ."

649. As a subsequent passage from the judgment of Buckley L.J., which I will quote later, indicates, he adopted a different test to that adopted by the Court of Appeal in the *BCCI* case as to the type of knowledge which is a prerequisite to imposing liability on a third party under the head of knowing receipt. He considered that knowledge, actual or constructive, was sufficient.

650. The defendants' primary response on the second issue was that the plaintiff was trying to construct third party liability on the premise that Mr. Flavin was in breach of his fiduciary duties – on the basis of a premise that did not exist. They also disputed the legal bases advanced by the plaintiff for extending liability to account in equity to a third party.

651. First, they rejected the argument that the corporate defendants could be implicated in a breach of duty by application of either the doctrine of attribution or the doctrine of imputation. In relation to the concept of attribution as applied in the *Meridian* case, it was submitted that the legal rule at issue on this aspect of the case, the rule that Mr. Flavin as a director owed a fiduciary duty of the nature pleaded to Fyffes, was not capable of being attributable to a company with which Mr. Flavin was associated because it was of its nature personal to the office of director. As I understand the plaintiff's arguments on this aspect of its claim, the *Meridian* principle of attribution was only inferentially relied on by the plaintiff, and it may be that the defendants answered a point which was not made by the plaintiff. In relation to the concept of imputation as applied in the *Belmont Finance* case, it was submitted by the defendants that, under the Belmont principle it is not a question of merely imputing knowledge, which I understand to mean information, it is a question of imputing knowledge that a transaction about to be entered into is illegal, unlawful or tainted. The *Belmont Finance* principle, it was argued, on the facts of that case, put the companies involved into an unlawful design to breach the Companies Acts and that is what would be required in this case. I think that submission is correct. What would have to be imputed to the corporate defendants in this case would be knowledge that the dealing would be in breach of Mr. Flavin's fiduciary duty to Fyffes. However, I assume that that is the case which the plaintiff was making in reliance on the Belmont Finance principle.

652. Secondly, as to what constitutes knowledge when applying either the doctrine of knowing receipt or the doctrine of knowing assistance, the defendants did not accept the proposition, which I think they read as being inherent in the plaintiff's interpretation and application of the "unconscionability test" propounded in the *BCCI Ltd. case* – that it does not require knowledge or that it is an easier hurdle to overcome than constructive knowledge. I did not understand the defendants' argument to go so far as to suggest that, in Irish law, constructive knowledge would not be sufficient to give rise to liability for knowing receipt of trust property. My understanding of their submission is that they accepted, on the basis of the decision of the Supreme Court in In *Re Frederick Inns Limited* [1994] 1 I.L.R.M. 387, that constructive knowledge of the breach of trust is sufficient to render the recipient of trust funds a

constructive trustee. However, the defendants contended that, as a matter of fact, even if, contrary to their assertion, there was a breach of fiduciary duty on the part of Mr. Flavin, the other defendants did not have actual or constructive knowledge of such breach.

653. Finally, the defendants rounded off their response to the plaintiff's submissions on the second issue by pointing to the difficulty of identifying within which head of liability in *Barnes v. Addy* a claim against the corporate defendants could fall: they did not receive trust property in the sense in which the first head is normally applied; if the plaintiff was relying on the second head – that they had knowingly assisted Mr. Flavin in a dishonest or fraudulent design – the plaintiff would have to prove dishonesty and had not done so.

654. On that last point, I did not understand the plaintiff to assert dishonesty on the part of any of the defendants. In any event, I find that dishonesty was not established on the evidence. Therefore, of the categories of claim identified in *Barnes v. Addy*, only knowing receipt could be applicable. The formulation of the essential requirements of knowing receipt advocated by counsel for the defendants, and that adopted by Nourse L.J. in the *BCCI Ltd*. case, was the following statement made by Hoffman L.J. in *El Ajou v. Dollarland Holdings Plc*. [1994] 2 All E.R. 685 at p. 700.

> "For this purpose the plaintiff must show, first, a disposal of his assets in breach of fiduciary duty: secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty."

655. The Belmont Finance case fell squarely within the first head of constructive trust identified in Barnes v. Addy – knowing receipt. Buckley L.J. found that City was accountable to Belmont as a constructive trustee for £489,000 under the first of Lord Selbourne's two heads. On the facts, the payment of £500,000 by Belmont to Mr. Grosscurth, being in contravention of s. 54, was a misapplication of Belmont's money and was in breach of the duties of the directors of Belmont. £489,000 of the £500,000 so misapplied had found its way into the hands of City, with City's knowledge of the whole circumstances of the transaction. His reasoning is set out in the following passage of his judgment at p. 405, which was approved of by Blayney J. in *In Re Frederick Inns Ltd.*:

> "A limited company is of course not a trustee of its own funds:
>
>> it is their beneficial owner; but in consequence of the fiduciary character of their duties the directors of a limited company are treated as if they were trustees of those funds of the company which are in their hands or under their control, and if they misapply them they commit a breach of trust … . So, if the directors of a company in breach of their fiduciary duties misapply the funds of their company so that they come into the hands of some stranger to the trust who receives them with knowledge (actual or constructive) of the breach, he cannot conscientiously retain those funds against the company unless he has some better equity. He becomes a constructive trustee for the company of the misapplied funds. This is stated very clearly by Jessel M.R. in *Russell v. Wakefield Waterworks Company*, where he said:
>
> 'In this court the money of the company is a trust fund, because it is applicable only to the special purposes of the company in the hands of the agents of the company, and it is in that sense a trust fund applicable by them to those special purposes; and a person taking it from them with notice that it is being applied to other purposes cannot in this court say that he is not a constructive trustee.'"

656. Digressing somewhat, on the basis of the application of the foregoing principle, in *In Re Frederick Inns Ltd.*, it was held that *ultra vires* payments made to the Revenue Commissioners on the authority of the directors of four companies at a time when they were insolvent constituted a misapplication by the directors of the companies' funds. The misapplication was a breach by the directors of their fiduciary duties and the monies were received by the Revenue Commissioners with constructive knowledge of the breach since, if they had read the memoranda of association of the four companies, as they could have done since they were documents of public record, they would have seen that the company had no power to make the payments. Therefore the Revenue Commissioners were constructive trustees of the sums which were the subject of the *ultra vires* payment. The purpose of the digression is to emphasise that, as the law stands in this jurisdiction, constructive knowledge of a breach of trust is sufficient to render the recipient of trust funds a constructive trustee.

657. The analysis of the authorities engaged in by Nourse L.J. in the *BCCI Ltd*. case was with a view to establishing whether a recipient must have actual knowledge (or the equivalent) that the assets received are traceable to a breach of trust or whether constructive knowledge is enough. It is quite clear from reading his judgment, that Nourse L.J. was sympathetic to the distinction drawn by Megarry V-C. in *Re Montagu's Settlement Trusts, Duke of Manchester v. National Westminster Bank Limited* [1987] Ch. 264, between the equitable doctrine of tracing and the imposition of a constructive trust by reason of the knowing receipt of trust property; tracing is primarily a means of determining the rights of property, whereas the imposition of a constructive trust is a means of creating personal obligations going beyond mere property rights. He was also sympathetic to the ratio of the decision of Megarry V-C. that, in order to establish liability in knowing receipt, the recipient must have actual knowledge (or the equivalent) that the assets received are traceable to a breach of trust and that constructive notice is not enough. As I read his judgment, in positing the unconscionability test, Nourse L.J. was positing a stricter, not a laxer, test than constructive notice. In adopting the unconscionability test, Nourse L.J. referred to the words of Buckley L.J. in the second quotation from the *Belmont Finance* case which I have quoted above, to the effect that the court is concerned to determine whether the recipient can "conscientiously retain [the] funds against the company", having noted earlier in his judgment that actual knowledge was found on the facts in that case. However, the Supreme Court in In Re Frederick Inns Ltd., a decision by which this Court is bound, applied the "knowledge (actual or constructive)" test enunciated by Buckley L.J. in the same passage.

658. I find it is not possible to arrive at any definitive answer to the second issue from the submissions made, and the principles established by the authorities cited, by the parties.

659. However, I would summarise the general propositions which emerged from the submissions and the authorities on both issues as follows:

> (1) Mr. A, a director of X Ltd., who makes use of confidential information acquired in his capacity as a director for his personal advantage, would be in breach of his fiduciary duties to X Ltd. and would be liable to account to it for any profits he derives from exploiting that information. That hypothetical scenario reflects the first sentence in the passage from the 7th Edition of **Gower and Davies**, which I have quoted earlier. In my view, it represents the law in this jurisdiction.

(2) If, instead of using it for his own benefit, he uses such information so acquired for the advantage of a company, Y Ltd., of which he is a director, so as to enable Y Ltd. to generate a profit, the rules of equity extend to requiring Y Ltd. to account to X Ltd. for the profit, if it knows or ought to know that Mr. A is acting in breach of his fiduciary duty. In that hypothetical scenario, on the basis of the *Belmont Finance* principle, there would be a duty on the director to disclose to the board of Y Ltd. that he is acting in breach of his fiduciary duty to X Ltd., which is a civil wrong, in enabling Y Ltd. to use the information to its advantage, so that it is the director's knowledge of the civil wrong, not knowledge of the confidential information, which is imputed to Y Ltd. It seems to me that, in point of principle, that proposition must be correct.

(3) In the hypothetical scenario referred to at (2), an alternative, but problematic, basis for Y Ltd. being required in equity to disgorge a profit is that it comes within the "knowing receipt" head of liability under Barnes v. Addy. However, a difficulty arises in identifying a disposal on the part of Mr. A or receipt by Y Ltd. in that scenario. The question which arises is what asset of X Ltd. is disposed of or misapplied and received by Y Ltd. Is it the confidential information or is it the profit? A further difficulty arises in identifying the requisite degree of knowledge on the part of the board of Y Ltd. to ground a finding that knowing receipt is established, whether it is on the basis of either –

(a) the BCCI unconscionability test, or

(b) the Belmont Finance and Frederick Inns actual or constructive knowledge test.

660. It is not necessary to resolve those difficulties, and I express no view on them, because, on the facts, those principles do not come into play.

661. On the plaintiff's own case, its entitlement to an account in equity is dependent on there being an affirmative answer to the first proposition. That is dependent on there being proof that Mr. Flavin misused the information which is alleged to be price-sensitive. If the answer is in the affirmative, to fix the corporate defendants with a liability to account, on the basis of the *Belmont Finance* imputation principle, there must be proof that Mr. Flavin knew, or ought to have known, that he was acting in breach of duty.

The facts
662. It is worth reiterating that the basis on which the liability to account in equity may be imposed for insider dealing is that the insider director, in breach of his fiduciary duty, has made use of information acquired by him in that capacity for his personal advantage. To establish liability to account in equity against an insider, a corporate plaintiff bears a much heavier burden than it bears in establishing liability to account under s. 109(1), in that it must establish that the profit it seeks to attach was the result of the exploitation by the insider of the confidential price-sensitive information in issue for his own benefit.

663. In my view, in this case, the evidence is not open to the interpretation that Mr. Flavin used the information contained in the November and December Trading Reports which is alleged to have been confidential and price-sensitive, the negative information in relation to Fyffes' trading and earnings performance in the first quarter of financial year 2000, so as to enable the DCC Group to exit from Fyffes in manner which would avoid any share price impact which would ensue from the disclosure of that information. In my view, on the evidence, it is clear that what motivated Mr. Flavin in his involvement in the Share Sales and what motivated the almost total exit of the DCC Group from Fyffes in February, 2000 was the opportunity to make a substantial profit because of the increase of the share price on the back of wof.com. The plaintiff has not established any evidential nexus between the profit which the Share Sales generated for the DCC Group and the use by Mr. Flavin, or the use by any of the boards of the corporate defendants, of the confidential information contained in the November and December Trading Reports. On any view of the evidence, that information simply had no bearing on the Share Sales.

664. When dealing with the price-sensitivity issue in the context of the statutory claim, the plaintiff, in its submissions, comprehensively analysed the evidence which it was contended supported their case that Mr. Flavin knew, or ought to have known, that the information contained in the November and December Trading Reports was price-sensitive. The analysis covered Mr. Flavin's professional qualifications and his vast experience in business, his intimate knowledge of Fyffes and its business as a director and as a member of the Audit Committee and as Chairman of the Compensation Committee, the obvious significance of the information itself, the views of the expert witnesses called on behalf of the plaintiff as to its obvious price-sensitivity, some of which I have recorded, and Mr. Flavin's engagement with Mr. Price on 31st January, 2000 and with Mr. Scholefield on 1st February, 2000. Of course, when dealing with the statutory claim, it was unnecessary to express any view on whether, as urged by the plaintiff, that evidence disclosed knowledge on the part of Mr. Flavin, because I determined that knowledge is not a necessary ingredient of civil liability under Part V of the Act of 1990, so that the question did not arise.

665. Similarly, the question of knowledge does not arise in the context of the non-statutory claim for an account in equity, there being no evidence that the profit resulted from the wrongful use by Mr. Flavin of confidential information. I have already commented, in the context of the price-sensitivity issue, that the transactions which Mr. Flavin was embarking on warranted a more rigorous compliance process than he went through with Mr. Price and Mr. Scholefield. However, taking on board the allusion by counsel for the defendents to Occam's razor, I believe it would not be prudent to attempt, and, in any event, I believe it is not possible, on the back of a hypothesis which has not been proved, to express any meaningful view on whether the failure to engage in a more rigorous compliance process would support a case of constructive knowledge.

666. While the principle of liability to account for knowing receipt of trust property does not come into play on the facts, I consider it appropriate to record that there is no evidence whatsoever that Mr. Flavin transmitted the confidential information to the corporate defendants.

Conclusion
667. Accordingly, in my view, the plaintiff has not established either the hypothetical premise on which the first step in its argument is based or any other factual basis for fixing the corporate defendants with liability to account in equity.

668. In dealing with the statutory claim, in particular, the meaning of "profit" in s. 109 earlier, I have referred to the defendants' argument, drawn primarily from their contention that equitable principles govern the taking of an account under s. 109(1), that the concept of profit in the application of the equitable principle does not include a negative profit, in other words, the avoidance of a loss. I have also referred to the plaintiff's reliance on the decision in *Diamond v. Oreamuno* as an indicator that liability to account in equity does attach to a negative profit. As the plaintiff has not established any basis for liability to account, it is not necessary to determine whether the defendants' contention is correct. It is clearly at variance with the decision in *Diamond v. Oreamuno*.

669. The fact that I have had to consider the application of Part V before considering the non-statutory claim advanced by the plaintiff, has afforded a peculiar insight into the ramifications of the enforcement of the equitable remedy to account for profit from insider trading, particularly when it exists side by side with the statutory obligation to compensate counterparties and to account contained in Part V. Apart from the myriad of difficult issues which were raised by the parties in their submissions on the non-statutory claim, which I have addressed, an obvious question which arises is how the rights of counterparties would be protected in a situation where the court, exercising its equitable jurisdiction, were to find that the insider has a liability to account to the company. I think it would require more than a modicum of judicial ingenuity to ensure that the equitable remedy sat comfortably with the statutory remedies.

IV. SUMMARY OF CONCLUSIONS ON CLAIMS

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

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

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

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

671. I have answered the three questions as follows:

(1)

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

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

(c) Lotus Green dealt as principal.

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

(3) Therefore, the dealing was not unlawful under s. 108 and no civil liability to account arises under s. 109. However, I have concluded that, if the dealing was unlawful so as to give rise to a liability to account under s. 109, it would have been proper to treat the three corporate defendants, DCC, S&L and Lotus Green, as a single entity for the purposes of accounting for the profit accruing from dealing under s. 109. That conclusion is redundant because I have found that the dealing was not unlawful.

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