## CHAPTER 8. THE DOCUMENTARY EVIDENCE:

The following is a synopsis of the key documents in relation to the 1995 and 2000 transactions. I used these documents, discovered by the companies and their advisers, as the source material for the detailed interviews that I conducted with the officers, directors and advisers. The interviews are reported on and summarised in Chapter 9.

The documents are significant and important in that they provide a contemporaneous historical written record of what occurred in both 1995 and 2000. The documents are reproduced in full in Appendix A and B to the Report.

As will become apparent most, but not all, of the documents are "DCC" documents or are documents created by the advisers to DCC, S&L and Lotus Green. I did not seek, nor did I need to seek, discovery from other parties. Although Fyffes were the Plaintiff in the litigation reported on in Chapter 6, it was no part of my function to investigate Fyffes, nor did I need to seek assistance from any of the Fyffes personnel in carrying out my investigation. To the extent that there are (i) conflicting views disclosed in the documents or (ii) expressions of opinion by DCC personnel during the course of the interviews contrary to the written views expressed by Fyffes personnel, or indeed any other party, it was not necessary or relevant for me to seek to resolve such conflicts. As per Mr. Justice Kelly's Order my task was to investigate and report on the affairs of the companies in relation to the two sets of transactions in 1995 and 2000.

### 8.1 1995 TRANSACTIONS DOCUMENTS

Background:

8.1.1 It was a universally held view within DCC from the early 1990s, and certainly following the public listing of DCC in mid-1994, that its shareholding in Fyffes plc was an 'anomaly' compared with its other business interests and having regard to the move from venture capital investor in many companies to industrial holding group.

8.1.2 It was equally clear that if DCC were to decide to sell its shareholding in Fyffes which represented approximately 15% of the then value of DCC in early 1995, significant tax consequences would arise. Accordingly, sometime in early 1995 at the request of the Group's Chief Financial Officer, Fergal O' Dwyer, DCC's tax advisers, Messrs. Cooper and Lybrand, based in Dublin, were asked to advise DCC as to how it might minimise its tax liabilities following any disposal of the Fyffes stake.

8.1.3 By mid-March, 1995, Messrs. Coopers and Lybrand were in a position to write to the late Tommy McCann, Senior Counsel seeking his Opinion on a proposal, the outline of which was set out in a paper sent to him.

8.1.4 It is clear from this paper that there was a strong desire on the part of the company and its tax advisers to keep the identity of DCC confidential, and therefore code names were used for both DCC and Fyffes. In my experience this is quite standard practice with proposed transactions of this kind and nothing turns on it.

8.1.5 DCC was referred to as the "Drake Group" and Fyffes was referred to as "France plc". The structure of the proposal was set out in an eight page memorandum from CooperS&Lybrand as follows:

***"France***

***1. <u>Introduction</u>***

***1.1*** *At present, the Drake Group holds a significant investment in France plc, the disposal of which will give rise to a chargeable gain of approximately IR£17.5M (tax IR£7M). The asset has been held since 1980 and is not "trading stock". Drake has not traded in the shares of France and is treated as an investment holding company for tax purposes. Although Drake has no definite intention to dispose of its investment in France, the group wishes to take steps to*

*minimise the potential tax payable in the event of a future disposal of the investment.*

*For the purposes of this report we have treated the investment in France as being held by Drake. We understand that part of the investment is in fact held through a Drake subsidiary but this does not materially affect the tax analysis.*

## 2. ***Proposal***

### ***2.1 Step 1***

*Drake Plc and Drake BV (tax resident in the Netherlands) incorporate a new Irish company called Newco.*

*The share capital of Newco would be as follows:*
*Drake Plc 76 "A" ordinary shares*
*Drake BV 24 "B" ordinary shares (or a class of preference shares).*

*Both classes of shares would rank "pari passu" in all respects including voting rights except that the "A" shares will only be entitled to repayment "at par" on a winding up. The "B" shares would be entitled to all other assets of Newco on a winding up. The Memorandum and Articles of Association would need to be carefully drafted to ensure the desired result.*

#### ***2.1.1 Tax Analysis***

*CGT*

*Newco will be a member of the Drake CGT group, provided it is tax resident in Ireland. Under Section 129, Corporation Tax Act 1976 a CGT group consists of a principle company and all its 75% subsidiaries. Under Section 156, CTA 1976 a company is deemed to be a 75% subsidiary of another company if not less than 75% of its "ordinary share capital" is owned directly or indirectly by that company. Ordinary share capital is in turn defined by Section 155 of the same Act as meaning: "all the issued share capital of the company, other than capital the holders whereof have a right to dividends at a fixed rate, but have no other right to share in the profits of the company."*

### *2.1.2 Capital Duty*

*Capital duty of 1% will be payable in the issue of shares in Newco, assuming that the company is a limited liability company. As the share capital of Newco will be low, capital duty will not be a material cost.*

## *2.2 Step 2*

*Newco incorporates a wholly owned subsidiary company, Subco.*

### *2.2.1 Tax Analysis*

*Provided that Subco is tax resident in Ireland, it will form part of the Drake/Newco CGT group.*

***2.2.2***

*Capital duty payable on incorporation of Subco will be minimal, as the share capital will be minimal.*

***2.3 Step 3***

*Drake BV lends funds to Subco to enable to purchase France from Drake on arm's length terms. The question of how Drake BV is put in funds to finance Subco needs to be considered. There are a number of alternatives which can be considered.*

***Tax Analysis***

***2.3.1 CGT***

*As Subco is within the Drake CGT group no tax will arise on the transfer of France under Section 130, CTA 1976. Subco will be deemed to have acquired the shares in France at the same time and cost as Drake Plc.*

***2.3.2 Stamp Duty***

*In principal, under the measures announced in the 1995 Budget, no stamp duty will be payable on the transfer as Subco is a 90% associate of Drake. However, a claw back of the relief claimed at this stage could arise at Step 4 (see paragraph 2.4). Therefore, the transfer could be left at contract stage rather than executing a formal stock transfer between Drake and Subco. The duty at issue would amount to about £300,000. It is critical, however, for CGT purposes that beneficial ownership of France passes to Subco.*

### *2.4 Step 4*

*Newco is liquidated. Drake plc receives its original capital back in cash while the shares in Subco are distributed in specie by the liquidator to Drake BV.*

***Tax Analysis***

#### *2.4.1 CGT*

*On the liquidation of Newco, Subco leaves the Drake GCT group as it will now be held by a non resident company i.e. Drake B.V. Generally, under Section 135, CTA 1976, any gain which would have arisen on an intra-group transfer, but for the provisions of Section 130, CTA 1976, will crystallise in the transferee company on the 75% group relationship being broken within ten years of the transfer. Section 135, however, contains a provision which provides that no gain is crystallised where a company ceases to be a member of a group by being wound up or dissolved or as a consequence of another member of the group being wound up or dissolved. As the event resulting in Subco leaving the Drake CGT group is a liquidation in Newco, no charge to tax under Section 135 should arise. For tax purposes, Subco will continue to hold France at its original base cost to Drake Plc.*

*Newco would be regarded as disposing of its shares in Subco but as these would have no value no Capital Gains Tax would arise.*

*Both Drake and Drake BV would be regarded as disposing of their shareholdings in Newco at market value but as this is negligible no material Capital Gains Tax would arise.*

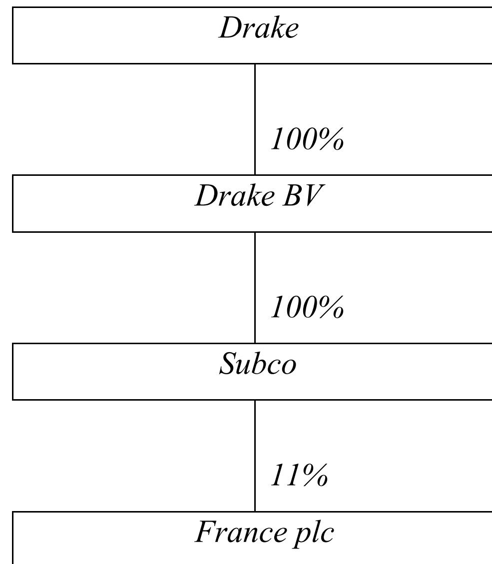
### *2.4.2 Stamp Duty*

*No stamp duty will arise on the transfer of France's shares to BV as the transfer is a distribution in specie by the liquidator of Newco.*

*As mentioned in paragraph 2.3.2, the liquidation may result in a claw back of any relief claimed on the transfer of the France shares from Drake to Subco. Relief is lost if Drake and Subco cease to be associated within 2 years of the transfer. As a company in liquidation is no longer the beneficial owner of its assets, the liquidation of Newco would appear, on a strict technical interpretation of the legislation, to break the required association relationship between Drake and Subco. This is an issue which requires further consideration and we will need to consult with your legal advisors on the matter. It may be advisable to claim the relief even if there is a risk of claw back. No claw back would arise if, as suggested in paragraph 2.3.2, the transfer is left at contract stage, but this might weaken the agreement that the transfer was not part of the pre-ordained series of steps.*

## 3. ***Sale to Third Party***

*Following implementation of steps 1-4 the structure would be as follows:*




*A disposal of the shares by Subco, would, in view of its low base cost, give rise to significant Capital Gains Tax liability in Ireland. There are two options which may be used to avoid the liability.*

### ***3.1 Option 1***

*BV disposes of Subco to the purchaser. Subject to confirmation from our Dutch colleagues, this should not give rise to any tax costs for Drake BV.*

*The difficulty with this proposal is that the purchaser is, in effect, acquiring a low based cost in the France shares for Irish CGT purposes. It is quite likely that a purchaser will require this to be reflected in the purchase price. If the purchaser is not resident in*

*Ireland, this issue may be of less relevance, as it would be relatively easy for such a person to change the tax residence of Subco from Ireland and then liquidate Subco. As Subco would not be tax resident at the time the France shares are transferred in the course of liquidation, no Irish CGT would arise.*

*The option of selling Subco rather than France is only appropriate, of course, if there is a single purchaser. If the shares in France are to be sold to a number of different purchasers, selling Subco would not be an option. Similarly, it is unlikely to be appropriate where the sale is in response to a general offer to acquire France.*

### *3.2 Option 2*

*Subco changes tax residence prior to its disposal of France shares.*

*If Subco changes tax residence, the gain deferred at the time of the transfer of the France shares from Drake plc would not crystallise under Section 135. Subco has already ceased to be a member of the Drake group (on the liquidation of Newco). As a non resident company, Subco would not be liable to Irish tax on the subsequent disposal of France shares. Depending on the jurisdiction which Subco is resident at the time of the disposal, any gains arising could be tax exempt in that jurisdiction or, at least, Subco would be entitled to a significantly higher base cost (c.£30M) than it would have been under Irish rules. In view of the fact that its parent is Drake BV the most logical jurisdiction is the Netherlands. Subject to confirmation from our Dutch colleagues no Capital Gains Tax should arise on a sale of France.*

### *3.3 Paper for paper*

*If a purchaser should make a paper offer for the France shares the proposal does not give rise to any insurmountable problems. The paper for paper relief is merely a deferral of the Capital Gains Tax liability which would eventually crystallise if the paper is held by an Irish residence company.*

## ***4. UK Alternative***

*The above proposal assumed that Drake BV invest in Newco and subsequently acquire Subco. The proposal could also work if one of the group's UK Companies "Drake UK" was used instead of Drake BV. If there was any doubt regarding the tax residence of Drake BV, it would be preferable to use Drake UK, if its tax residence in the UK can be more readily established. The critical point is that, at the time Newco is liquidated and the shares in Subco are distributed, the holder of the 24 "B" ordinary shares is a non resident company and therefore outside of the Drake Irish CGT group.*

*4.1 It may also be somewhat easier to effect a change of residence for Subco from Ireland to the UK rather than to the Netherlands. From an optical point of view, it is less likely that a change of residence to the UK will raise Revenue queries as the UK is not perceived as a tax haven. Subco brings itself within the scope of UK Capital Gains Tax and it might make it more difficult for the Irish Revenue to tax any gain given the provisions of the Irish/UK Tax treaty.*

*4.2 The downside to using Drake UK rather than Drake BV is that, unlike the Netherlands, any increase in value of the France shares between the date they were acquired by Subco and the date they*

*were eventually sold to the third party will be taxable in the UK. Subco will, however, obtain a step up in value to the market value of the shares in France at the date it acquired them from Drake. It will also be possible to transfer Subco to Drake UK in the first instance, establish a UK tax residence for Subco and then, before there has been any significant increase in the value of Subco/France, liquidate Subco. Drake UK could then sell its investment in France to Drake BV without material UK tax cost. Alternatively, following the change of tax residence to the UK, Drake UK could sell Subco to Drake BV. Subco could be liquidated at this stage or could change its tax residence to the Netherlands.*

*4.3 One further possible advantage to using the UK rather than the Netherlands is that, if Drake UK borrows from a Bank to acquire the Subco/France shares any interest in such borrowings will be available to shelter other taxable income of the Drake group in the UK, although part of the interest will be absorbed in sheltering dividends received from France. (See paragraph 7.2).*

## *5. **Burman –v- Hedges and Butler***

*The above proposal is a variation of a plan used in the UK case of Burman –v- Hedges and Butler in which the taxpayer was successful in mitigating its tax liability on the disposal of shares held in a large UK group of Companies. (In the Burman case, the holder of the 26 "B" ordinary shares was the third party purchaser rather than a non-resident group company).*

*In the Burman case, the Revenue argued that, as the liquidation of Newco was envisaged from the start, the 76 "A" ordinary shares were beneficially owned by the purchaser at all times. They also*

*argued that Subco was acting as nominee for the purchaser. Based on the facts of the case, however, both contentions were rejected by the Courts but care will need to be taken to ensure that these arguments cannot be successfully made by the Irish Revenue in the present case.*

*Following the Burman case the UK legislation was amended to prevent the creation of "artificial" Capital Gains Tax groups and the avoidance, in certain circumstances of the UK equivalent to Section 135 by liquidation. No similar legislation was introduced in Ireland.*

## ***6. Anti-Avoidance Legislation***

*General. There is no specific anti avoidance legislation which would impact on the proposal. The UK case of Burman –v- Hedges referred to above, although not binding in an Irish Court, would certainly tend to support our conclusions on the matter.*

*Section 86 Finance Act 1989. From a tax perspective, there are a number of different areas which might give rise to concern regarding Section 86.*

*Transferring France to Subco. Our proposal differs from the Burman case in that Newco is not controlled by the purchaser (Drake BV) at the time France is transferred. In any event, it is difficult to see what tax advantage is gained by this step.*

*Liquidation of Newco. There is no immediate tax advantage to the group as Subco retains the low base cost of the group's investment in France. I believe it would be difficult for the Revenue to sustain*

*a Section 86 argument where the tax payer is relying on a specific provision such as the provision of Section 135 (1) relating to liquidations.*

*Change of residence of Subco followed by sale of France. I would have thought that if Revenue were to attack this aspect of the proposal it is more likely to be on the grounds that Subco remains tax resident in Ireland rather than on Section 86 grounds.*

*The Revenue could seek to link all the different stages of the proposal and argue that, when taken as a whole, the transactions are designed to eliminate tax on the eventual disposal of the group's investment in France.*

*I think the Revenue will have great difficulty in applying Section 86 but in view of the amount of the tax at issue, I would strongly recommend that you obtain Counsel's Opinion on the proposal.*

***7. Dividends***

*At present, dividends received by Drake from France are not taxable as they constitute franked investment income. Similarly, Subco would not be taxed on any dividends received from France for as long as it remains tax resident in Ireland.*

*If Subco changes tax residence, the dividends will no longer constitute franked investment income but will not be taxable in Ireland as they will be received by a non-resident company. If Subco is resident in the Netherlands, the dividends should be exempt from Dutch tax but we need to confirm this with C&L Amsterdam. If Subco is tax resident in the UK, it will be subject to UK tax but it*

*should be possible to shelter this with additional interest expenses (See Paragraph 4.2).*

*The proposal will have an impact on the tax credit to dividends paid by Drake but its overall impact on the group's dividend policy should not be material.*

## *8. Conclusion*

*You will appreciate that the proposal is aggressive from a tax point of view. There is, however, little downside from the group apart from costs. As the group has a minority interest only in France (and therefore no possibility of dividend stripping) and as it is held directly by Drake, the options available to the group in minimising tax on the disposal of its investment are limited. One alternative is to purchase Capital Gains Tax losses but as well as being difficult to source such a course of action is itself open to Revenue attack.*

*To my knowledge this type of arrangement has not previously been implemented in Ireland. There are a number of Irish and non-Irish tax issues to be checked, there are legal and accounting issues to be confirmed and I would propose to obtain the opinion of Senior Counsel. Subject to these considerations it is my opinion this proposal has a high probability of success and I would recommend its implementation.*

*I trust that you will find the above useful. If you have any queries please do not hesitate to contact either Terry or me.*

*Kind Regards,*

*Pat Wal".*

8.1.6 On the 31st March, 1995 Mr. Wall wrote to Fergal O'Dwyer of DCC in the following terms:

*"Dear Fergal,*

*I refer to our recent telephone conversation and attach a copy of Counsel's Opinion on the matter discussed. The case put to Counsel was a hypothetical one and our discussions were strictly on a "no names" basis. We did not send him a copy of our letter of the 21st March but he was provided with a briefing paper which summarised the issues discussed in that letter. Broadly speaking, Counsel does not see any technical difficulty in implementing the proposal put to him. If you wish to discuss the matter in greater detail please do not hesitate to contact me.*

*Kind regards,*
*Yours sincerely,*
*Pat Wall"*

8.1.7 Counsel's Opinion dated the 27th March 1995 was attached. It read as follows:

*"Dated this 27th day of March 1995.*
*Querists:-*
*The Drake Group.*
*Re : Capital Gains Tax.*
*Counsel's Opinion.*

*Having carefully considered the facts of this matter and the law applicable thereto, I am of the opinion as follows:-*

*I propose to approach the problems in the following case by advising on such points as appear to arise from Agent's instructions to me and shall do so in the order in which they arise in those instructions and by reference to the numbers which they are therein given.*

1. *I do not think that anything arises out of this sub-paragraph. Some discussion took place towards the end of my consultation with Agents in relation to the nature of the shares in Newco but I really do not see that any great difficulty arises. It would seem to me that all that is necessary is that the Articles of Association of Newco should provide that both classes of shares are to rank pari passu save that in a winding up the amounts paid up or credited as paid up on the A ordinary shares shall be repaid to the holders of those shares in priority and that once those sums have been paid the amount paid up or credited as paid up on the B ordinary shares shall be paid to those shareholders and any surplus assets remaining shall be distributed to the B ordinary shareholders in proportion to the amounts paid up or credited as paid up on their shares: the mere fact that there may be nothing to distribute to the B ordinary shareholders under this last provision is, in my opinion, irrelevant.*

   *Quite clearly Newco will be a member of Querist's group of companies (assuming, of course, that it is tax resident in this country) it will be a 75% subsidiary falling within Section 129 of the Corporation Tax Act, 1976, because 76% of its ordinary shares will be held by Newco – the A ordinary shares are, of course, ordinary shares because they do not merely confer right to a dividend at a fixed rate.*

*I agree that 1% capital duty will be payable on the issue of the shares in Newco, but as I understand that only 100 shares will be issued that duty will, of course, be limited to £1.00 as the shares will not be issued at a premium*

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2.1 *I agree that provided Subco is resident in Ireland, it will form part of the same group as Querists and Newco.*

2.2 *I also agree that capital duty on incorporation of Subco will be minimal as the shared capital will be minimal.*

3. *There does not seem to be a discussion in my instructions as to how Drake BV will provide funds to enable Subco to purchase the shares in France but I assume that a loan will be made for that purpose – in any event this does not seem to impact greatly on the taxation matters upon which my advice is sought. The main question as far as I'm concerned is what stamp duty will be payable in connection with the transfer of the shares in France.*

3.1 *I agree that as Subco is within the Drake Group for Capital Gains Tax purposes no tax will arise on the transfer of the shares in France – this is the consequence of Section 130 of the Corporation Tax Act. Subco will, of course, be deemed to have acquired the shares in France at the same time and cost as they were acquired by Querists.*

3.2 *I agree with Agents that if the relief from stamp duty promised in the 1995 budget is claimed on the transfer to Subco that relief would almost certainly be clawed back at step 4 (assuming that Step 4 takes place within the two year period specified in Section 19 (6) of the Finance Act, 1952 : I am, of course, assuming that Section 19 of that*

*Act will apply and that the amendment to be introduced will merely provide for a nil rate of stamp duty in (1) of the Section. As the stamp duty claw back would appear to amount to about £300,000.00 it is clearly most desirable that steps be taken to avoid that liability. From the point of view of the "optics" of the situation there would, of course, be clear advantages in incurring this liability if it should arise – the relief could in the first instance be obtained and if the two years elapsed then the claw back would not appear to arise whereas if the two years did not elapse before a sale to an outsider, the claw back would arise but there would be the cash with which to discharge it. However if it is desired to avoid it it would seem to me that this could be done by entering into a contract for the sale of the shares and purchase monies being paid on foot of the contract – on payment of the purchase monies, the beneficial interest in the shares will pass to the purchaser. Care would, in my opinion, have to be taken in the drafting of the contract : it should, in my opinion, provide for a closing date which is, say, some days or weeks after the date of the contract : I do not think that such a contract could be stamped as a transfer even if the purchase price were paid because Section 81 of the Companies Act, 1963 provides that it shall not be lawful for a company – "... to register a transfer of shares in or debentures of the company unless a proper instrument of transfer has been delivered to the company": The effect of this is, it would seem to me, to require a proper instrument of transfer and I do not think that a contract can be a proper instrument of transfer even if the entire purchase monies have been paid there under – a proper instrument of transfer will normally be one which satisfies the provisions of the Articles of Association which usually require that a transfer would be in the "usual form" and such form would normally be the form provided by the Stock Transfer Act 1963. Perhaps, however, to copper fasten the position it might be desirable*

*to issue the shares as not fully paid up – if, for example, 5p were left unpaid on each share, then the company has a clear interest in ensuring that a transfer in the form provided by the Stock Transfer Act, 1963, has been executed so as to enable the company to recover the unpaid portion of the purchase price. However this is by no means essential – it would seem to me that the Revenue would have great difficulty in establishing that a contract for sale was in itself a transfer, particularly if the contract could be made into a fairly lengthy document containing various covenants and so forth by the Vendor. The point of this discussion is, of course, to avoid the Revenue being able to claim with success that the contract was itself a transfer – I think it highly unlikely that they would make such a claim and if they did I would consider even more unlikely that they would succeed – consequently it would seem to me that it should be sufficient for the usual form of contract to be entered into – Agent said at our consultation that they had in fact adopted this course in the past and in my opinion it should be safe so to do using the normal forms of contract which they have used in the past. In relation to the passing of the beneficial interest – this will, in my opinion, pass upon the payment of the entire purchase price – see inter alia Tempany -v- Hynes. [1976] I.R. 101 in which it was held that the beneficial interest passes to the extent to which the purchase price has been paid. Care must, of course, be taken to ensure that no receipt is issued for the purchase price in case such receipt could be regarded as being itself a transfer – what I would suggest is that a letter be written by the purchaser, Subco to Querists stating that they enclose a draft for the entire purchase price due on foot of the contract and that Querists merely lodge that draft as a separate lodgement to whatever may be their appropriate account for the purpose so that it can be traced into it, and that they do not at any stage issue an acknowledgement to the purchaser, thought they*

*could pass a director's resolution acknowledging receipt of the purchase monies and directing them to be lodged to the specified account as a resolution is not a transfer not being a document (it being, rather, a mere record of a verbal transaction). See* ***Vaughton -v- Brine BV, (1841) Man & C 559, Beeching –v- Westbrook, (1841) 8M&W 411 and Hughes -v- Budd, 1848 Dowel T PC, 478.*** *Cases which are quoted with approval by Monroe & Nock on Stamp Duty, at paragraph 10.36.*

*4.1 Quite clearly on the liquidation of Newco, Subco will leave the Drake group but the proviso to Section 135 of the Corporation Tax Act will, in my opinion, prevent the crystallisation of any Capital Gains Tax liability though Subco will, of course, at this point continue to hold the shares in France at their original base cost to Querists. I note that Agent stated this point (See P.3 of the case submitted to me to advise), that Newco would be regarded as disposing of its shares in Subco but as these would have no value no Capital Gains Tax would arise. I presume from this that it is intended to capitalise Subco by way of loan. I agree with Agent that both Querists and Drake BV would be regarded as disposing of their shareholdings in Newco at market value but this is negligible.*

*4.2 I agree that no stamp duty will arise on the transfer of the shares in France to Drake BV as the transfer will be a distribution in specie by the liquidator of Newco. At this point Agent once again return to the claw back provisions of Section 19 of the Finance Act, 1952 – I have already discussed them but I would agree with Agent that the optics are much better if there is a transfer of the shares in France to Subco and the relief is claimed – I have already discussed them but I would agree with Agents that the optics are much better if there is a transfer of the shares in France to Subco and the relief is claimed –*

*and that the shares should be held for a period of two years (assuming that that is the period retained in the forthcoming legislation) then the relief should not be lost – but I think that this is a matter for Querists and certainly if the shares are likely to be sold within the next two years I would have thought that an improvement in the optics would be unlikely to be worth the stamp duty cost of £300,000.00!*

*-3-*

1. *If the shares in Subco are sold to a purchaser while that company continues to hold the shares in France such sale should not, subject to Dutch law, give rise to any tax cost for Drake BV. There is, of course, the difficulty noted by Agents that a purchaser would acquire the shares in Subco at a base cost which is very small for Irish Capital Gains Tax purposes and he would, accordingly, seek a reduction in the price to compensate him for that fact, but if the purchaser were resident abroad it should be possible to change the residence of Subco to a country where the purchaser is resident and then no Irish Capital Gains Tax will arise. This last point does, of course, depend upon the terms of any new legislation in relation to residence – this was discussed at the consultation which I attended with Agents but one clearly cannot know the position until the Finance Act has been passed. I would also agree with Agents that the option of selling Subco rather than the shares in France is only appropriate where there is a sale to a single purchaser and would be entirely inappropriate if there were general offer to purchase France.*

2. *I would agree that if Subco can and does in fact change its residence prior to the disposal by it of the shares in France the gain deferred*

*at the time of the transfer by Querists of the France shares would not crystallise under Section 135 because the non-resident company Subco would not be liable to Irish tax on the subsequent disposal by it of the shares in France. Of course whether Subco will be able to change its resident with east or at all will depend on any new legislation which is in force at the time when it purports do so – I cannot advise on this at present.*

3. *I agree that if the purchaser should make a paper offer for the France shares that proposal would not give rise to any real difficulty for the reasons given in this paragraph (which appears on page 5 of my instructions).*

*-4-*

1. *I agree with Agents that the proposal would work if Drake UK was used instead of Drake BV and that indeed there would be advantages in using Drake UK if its tax residence in the UK can be more readily established than the tax residence of Drake BV. This is, of course, a point upon which I do not have sufficient instructions to advise with certainty but I did gather at the consultation which I attended that there might be some difficulty in establishing that Drake BV was tax resident in the Netherlands while it appears that there might be more substance to the claim that the United Kingdom company was in fact resident in the United Kingdom.*

2. *Again I agree that from an optical point of view it would be preferable to have a change of residence to the UK rather than to the Netherlands – the Irish Revenue would be less likely to raise questions for a change of residence to the UK for the reason given by Agents – that is to say that it is not perceived as tax haven and if*

*Subco comes within the United Kingdom Capital Gains Tax legislation the Irish Revenue would find it difficult to tax any gain having regard to the provisions of the convention with the United Kingdom.*

3. *It is, of course, true that an increase in the value of these shares in France between the date when they were acquired by Subco and the date when they were eventually sold to a third party would be taxable in the United Kingdom if Subco was resident in the United Kingdom – but even in those circumstances it would seem that Subco would obtain an increase in the value of the shares. I also agree with the suggestions made by Agents in paragraph 4.3 of my instructions.*

4. *My instructions do not enable me to comment upon the point made in this paragraph (which appears on page 6 of my instructions) : I assume, however, that Drake UK does have sufficient borrowings to shelter other taxable income of the Drake group in the United Kingdom.*

-5-

1. *I do not think it necessary for me to comment upon this paragraph – it is merely a statement of fact.*

2. *I do not see how the Irish Revenue could make with success the arguments made by the British Revenue in the Burman case as set forth in this sub-paragraph any more than the British Revenue did unless, of course, they called in aid Section 86 of the Finance Act, 1989 to which I refer below and which, in my opinion they would be most unlikely to call in aid. I do, however, agree that care will have*

*to be taken to ensure that the facts do reflect those in the Burman case.*

3. *The fact that the English legislation was amended and the Irish legislation was not does, of course, afford some assistance in establishing that the proposals are satisfactory in the Irish context – the Irish Courts will not, of course, pay any regard to amendments made after the events which the Court is considering because the Court must consider the statute as it exists at the time of the events before it and not at any subsequent time (See the Judgment of Griffin J. in Cronin -v- Cork and County Property Company Limited 3 ICR at Page 210 when he said:-*

> *"With regard to the submission of Counsel for the company that the amendment of Section 18 by the Finance Act, 1981, Section 29 was an implied acceptance by the Oireachtas of the construction of Section 18 for which he contended, the Court cannot in my view construe a statute in the light of amendments that may thereafter have been made to it. An amendment to a statute can, at best, only be neutral. It may have been made for any one of a variety of reasons. It is, however, for the Courts to say what the true construction of a statute is, and that construction cannot be influenced by what the Oireachtas may have subsequently it to be."*

> *In the present case, however, one would not be arguing that there had been an amendment of the Irish Act subsequent to the date upon which the transactions had been effected – what one would be pointing out would be that the English have in fact legislated to cover this exact point and while it would not be a very strong argument it would be a point to be*

*made and would not fall within the prohibition enunciated by Griffin J.*

*-6-*

1. *I agree that there is no specific anti-avoidance legislation which would impact on the proposal.*

2.2 *At the consultation which I attended with Agents I explained to them that in my view Section 86 is a difficult Section for the Revenue – they are faced with the problem that they must determine that certain facts are facts when in fact they are not facts, and it would seem to me that they must run a grave risk of being in breach of the provisions of Article 34 – 3 – 1 of the Constitution which provides that:*

> *"The Courts of first instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal."*

*One of the basic functions of a Court is to determine the facts of a case and then to apply the law to it – this is evidence, for example, in the case of O' Sullivan –v- P, 3 IPC 355, 2ITR, 464 in which it was held that the Courts had to determine the true nature of the transaction entered into by the taxpayer without paying attending to words used by him and then apply the law to that nature as so found. If, however, the Revenue, when acting under Section 86, must first of all determine the facts to be other than they are, and that would seem to be an essential, then it would seem to me that they are flying in the face of the Constitution and in my opinion an Irish Court*

*would in all probability determine that that was a void and invalid procedure   Indeed I can think of nothing more subversive to the whole concept of constitutional justice than that the independence of the judiciary should be subverted in this particularly blatant manner. Consequently it would seem to me that the Revenue must be weak if they sought to enforce Section 86 – and perhaps that it why they have not done so to date – and did not, for a period of 30 years and more, seek to enforce Section 15 of the Finance Act 1944 which gave an Inspector draconian powers to ignore steps taken with a view to the avoidance of Corporation Profits Tax).   I do, however, agree with Agents that it is difficult for the Revenue to sustain an argument by reference to Section 86 where the tax payer provides on a specific provision such as the proviso to Section 135 (1) of the Corporation Tax Act – I do not consider that Section 86 enables the Revenue to re-write the legislation and if legislation applies to a particular fact then in my opinion the Revenue would be in serious difficulty in causing in aid Section 86.*

*2.3 In view of the foregoing I would agree with Agents that if the Revenue were to attack this transaction they are more likely to do so on the basis that Subco remained resident in Ireland rather than on Section 86 grounds.*

*2.4 I do not think that the Revenue could fly in the face of the decision of McGrath –v- McDermott and merely look to the underlying economic nature of the transaction – one of the problems facing the Revenue if they adopted that course is that procedure was ruled out as a possibility in the McGrath case, but in addition, even if they relied on Section 86 to reintroduce it they would have to do so in a way which would appear to be in conflict with Article 34 of the Constitution – in other words what they would have to say is the*

*Court is not to adopt its normal and proper methods of construction of fiscal statutes nor is it to determine what the facts are  but it is to look to something other than the facts and to adopt a construction of the statutes dictated by the Revenue Commissioners.  In my opinion the Court is unlikely to accede to such arguments.  One cannot of course, guarantee this position – Section 86 is there, it has the benefit of a presumption (which is, of course, capable of being rebutted and which in my opinion should be rebutted, that it is constitutional and the Courts will not be favourably disposed towards the corporation which is engaged in their tax avoidance scheme as a result of which it will save a very large amount of money – but notwithstanding those factors it would seem to me that Section 86 should not provide a refuge for the Revenue.*

*2.5 Accordingly I agree with the view expressed by Agents in this sub paragraph that the Revenue would have great difficulty in applying Section 86, and as the amounts are so large and as there does not appear to be any serious downside risk involved in the transactions, if a Section 86 attack should be successful it would seem to me that Querist should proceed on the basis that that Section will not be relief on or,  if relied upon, will be defeated even though there is always the possibility that it would not be defeated; one cannot guarantee the position but one would do nothing if one stood in fear of the Section (which was the Revenue desire) and in my opinion there are many and varied arguments which can be made against its application.*

*-7-*

*1. I agree that Subco would not be taxed on dividends received from the shares in France for as long as it remains resident in Ireland.*

2. *Again I agree that if the residence of Subco is changed dividends would not constitute frank investment income but would not be taxable in Ireland as they would be received by a non-resident company. I am not competent to advise upon the Netherlands position and in relation to the United Kingdom I take Agent's point that it should be possible to shelter dividends with additional interest expenses though that clearly is a practical and not a legal matter.*

3. *Clearly I cannot comment upon the impact on the group's dividend policy if the proposals are implemented as I do not have sufficient instructions to do so and in any event that is ever much a business/accountancy matter.*

*-o0o-*

*As it would appear from the foregoing I am of the opinion that these proposals are soundly based – there is always a danger in relation to Section 18 but I have already expressed my views on that point and do not consider the danger to be sufficient to prevent the proposals being adopted. In my opinion they are proposals which should succeed in achieving the desired ends.*

*Nothing further occurs.*

*Dated this 27th day of March, 1995.* *Thomas S. McCann*

*Wakefield House,*
*York Road,*
*Dun Laoghaire,*
*Co. Dublin*

8.1.8 On the 7th April, 1995, Mr. Alvin Price of William Fry, Solicitors, wrote to Ms. Daphne Tease of DCC making reference to a telephone conversation they had conducted, and stated:-

> "*In my view where there is no change in the registered shareholder and no movement of the beneficial ownership of the relevant shares in a company (say, Company A) outside the shareholder's 100% owned Group, no new requirement to notify Company A arises.*"

8.1.9 This short letter is of some significance and will be referred to again in the course of many of the interviews on the 1995 Transactions. This together with a more detailed letter written by Mr. Price on the 21st July 1995 formed the basis for the companies decision not to notify the 1995 transactions to Fyffes or the Stock Exchange.

8.1.10 The merits and demerits of the tax avoidance scheme in general and a decision as to whether the residence of "Subco" would be transferred to the UK or the Netherlands was the subject of a letter from Pat Wall of CooperS&Lybrand to Fergal O'Dwyer of DCC on the 2nd May, 1995. The said letter summarised the telephone conversation which had taken place on the 21st April between Mr. Wall and Mr. O'Dwyer and the conclusions reached by them. It stated as follows:-

> "*The UK is less tax aggressive and in view of the existing substantial UK activities it may be easier to demonstrate a transfer of residence. On the downside any future uplift in the value of shares would be subject to UK Capital Gains Tax. In view of the uncertain nature of any plans for a future disposal we agreed that the downside would outweigh the advantages.*
>
> *A transfer of residence to the Netherlands is feasible and the additional tax risks are manageable. The principal risk is that the Irish Revenue might be more inclined to attack the transfer on the basis that the Netherlands is a Capital Gains Tax free environment (i.e. a "tax haven"). In addition, the*

*commercial case for the Netherlands might be somewhat weaker given your less tenuous business links with that country. However, I believe that these additional difficulties can be overcome by taking great care to ensure that the transfer of residence will stand up to Revenue assault. To ensure that this is the case it will be vital to be able to demonstrate that the effective management and control of Subco is in the Netherlands. All Board meetings will need to take place there and great care will have to be taken to ensure that the company is not de facto controlled from Ireland. We discussed the possibility that you might open a staff office in the Netherlands and this would significantly add to our defences.*

*In these circumstances I would be of the opinion that the Netherlands option is feasible and that there is a high probability that the proposed structure will succeed in achieving the objective of avoiding Irish Capital Gains Tax. There is obviously some risk of a successful Revenue attack particularly if they were to invoke the provisions of section 86.*

*As a first step toward implementation of the proposal I have asked for a formal opinion from my Dutch colleagues which I expect to receive this week. I would aim to agree a final time table with you in the coming days.*

*Kind regards.*

*Yours sincerely,*

*Pat Wall"*

8.1.11 On the 11th May, 1995, Mr. Terry O'Driscoll of CooperS&Lybrand wrote to Mr. O'Dwyer of DCC, copying Daphne Tease with the letter. He attached a copy of a letter of advices dated the 10th May, 1995, from Mr. Peter van der Hoeven and Mr. Andrew Casley of CooperS&Lybrand, Amsterdam, which considered the Dutch tax consequences

of the transfer of "*Target to Drake BV*". The principal issue arising from the letter from CooperS&Lybrand, Amsterdam, as set out by Mr. O'Driscoll, was the necessity to:-

> "*seek a ruling from the Dutch authorities confirming Subco's entitlement to the participation exemption in respect of dividends received from Target and any gains arising from the eventual disposal of Target".*

8.1.12 The letter also referred to the fact that:-

> "*On the Irish side, a proposed change to the Finance Bill has been introduced at Committee stage which would obliged [sic] Irish registered companies which are not tax resident here to report certain information to the Revenue. This proposed change will impact on Subco once it becomes non-resident*."

8.1.13 The letter also attached a copy of the draft legislation.

8.1.14 The CooperS&Lybrand, Amsterdam, letter summarises the position of the contemplated transfer of shares under Dutch law, and states that under the Dutch "*participation exemption*" no distinction is drawn between dividends received and capital gains realised. Therefore, dividends received and capital gains realised by a company resident in the Netherlands (Subco) from a foreign subsidiary (Target) were exempt from Dutch corporate income tax, if the following conditions were met:

- "*The company resident in the Netherlands holds 5% or more of the nominal share capital of the subsidiary;*
- *The subsidiary is subject to a tax on profits;*
- *The shares in the foreign subsidiary are not held as inventory;*
- *The shareholding in the foreign subsidiary can not be considered a portfolio investment."*

8.1.15 CooperS&Lybrand, Amsterdam, stated that although it appeared from the facts that they had received from CooperS&Lybrand, Dublin, that the first three conditions had been met, there was some concern over the fourth condition, and it was suggested that the Dutch Tax Inspector might argue that the shares in Target were held as a "portfolio investment" since the activities of Target were not in line with the activities of the Drake Group, and therefore, the participation exemption would not be applicable.

8.1.16 The letter went on to suggest that a ruling request be filed with the Dutch tax authorities in order to agree in advance that the participation exemption would apply on the shares of Target. DCC were advised that a ruling request in the Netherlands was required to contain the real names of the companies involved. However, the view of Coopers and Lybrand, Amsterdam, was that this should not compromise confidentiality, since a tax ruling would not be published and would remain private between the Tax Inspector and DCC. DCC were further advised that obtaining a tax ruling from the authorities would take a period of approximately one to three months. CooperS&Lybrand, Amsterdam, also stated their awareness of the need for some urgency from the DCC perspective.

8.1.17 The letter then explained what would be required of Subco to become tax resident in the Netherlands as follows:-

> "*In order to become a tax resident in the Netherlands from a Dutch perspective, the shareholders of Subco should decide in a shareholders' meeting to move Subco to the Netherlands. Subco should file a final corporate income tax return in Ireland, file a registration form with the Dutch Chamber of Commerce, rent an office in the Netherlands and appoint Dutch director(s). Board meetings and shareholder's meeting of Subco should be held in the Netherlands. Subco should be registered in the Netherlands for Dutch corporate income tax purposes.*"

8.1.18 Finally, the letter from CooperS&Lybrand, Dublin, included an extract from a committee report of the Finance Bill, 1995, in which it was proposed that there would be an amendment to Section 141 of the Corporation Tax Act, 1976. If implemented, it would have required every company incorporated in the State and resident in the State, carrying on a trade, profession or business therein, to deliver to the Revenue Commissioners a statement in writing within thirty days of the date on which it commenced to carry on a trade, profession or business, wherever carried on, and any time at which there was a material change in information previously delivered by the company under the subsection. The statement in writing was to contain particulars of a number of matters including *"such other information as the revenue commissioners consider necessary for the purpose of determining the territory in which the company is resident for the purpose of tax*."

8.1.19 On the 12th May, 1995, Mr. Alvin Price of William Fry, Solicitors, wrote to Ms. Daphne Tease of DCC enclosing a first draft of the Memorandum and Articles of Association of both Marjove Limited ("Newco") and Lotus Green Limited (Subco). The letter and attachments were copied to Terry O'Driscoll of CooperS&Lybrand.

8.1.20 On the 23rd May, 1995, Peter van der Hoeven and Andrew Casley of CooperS&Lybrand, Amsterdam, sent a fax to Terry O'Driscoll and John Kelly of CooperS&Lybrand, Dublin, enclosing a detailed check list of the steps that had to be taken towards implementing the proposed tax avoidance scheme. The said schedule envisaged completion of all the necessary steps by the 4th July, 1995. Also on the 23rd May, 1995, Mr. Brendan Heneghan of William Fry, Solicitors, wrote to Daphne Tease of DCC enclosing initial draft of the following documents:-

1. *Loan Agreement;*
2. *Share Purchase Agreement; and*
3. *Put and Call Option Agreement.*

8.1.21 These documents were also simultaneously sent to Terry O'Driscoll and John Kelly in Price Waterhouse in Dublin.

8.1.22 On the 25th May, 1995, Mr. Brendan Heneghan of William Fry wrote again to Daphne Tease of DCC referring to the Minutes of Marjove Limited which she had sent to him. He made a number of minor amendments to the Minutes and attached same for her attention. In the third paragraph of the letter, he stated the following:-

> *"I would mention that it is necessary for the directors of Marjove Limited and Lotus Green Limited to notify their shareholdings in DCC to each company under the Companies Act. This should be done within five business days of the Company becoming a DCC subsidiary".*

8.1.23 The obligation referred to arose by virtue of the provisions of Part IV, Chapter 1 of the Companies Act, 1990.

8.1.24 On the 25th May, 1995, Mr. Fergal O' Dwyer of DCC met with Mr. Pat O'Brien of SKC in connection with the proposed scheme. Some handwritten notes in the hand of Mr. O'Dwyer record that "*residence is likely to be looked at by Revenue*" and "*aggressive position for a plc to be in*". There is a further undated DCC file note, which is believed to have been created by Mr. Fergal O' Dwyer, referring to the meeting with Mr. Pat O'Brien. The said note records the following:-

> "*MEETING WITH PAT O'BRIEN (23/5/95)*
>
> - *Such schemes are normally effected when a disposal has occurred or is about to occur.*
> - *If revenue attack the scheme it is likely to be over the change of residence - unlikely to attack until such time as there is a realised gain.*

- *Believes the scheme to be well constructed with a fair timetable but is reasonably aggressive – only aggressive because it is being done in the absence of any imminent disposal.*
- *Will write to DCC with his advice and will look specifically at whether the scheme could in any way bring about a tax liability now without there having been a realisation for DCC."*

8.1.25 On the 7th June, 1995, Alvin Price of William Fry wrote to Fergal O'Dwyer of DCC enclosing engrossments in duplicate of Agreements in respect of the shares in Fyffes which were being sold by DCC and S&L Investments Limited to Louts Green Limited. Mr. Price confirmed that the Agreements were in line with those envisaged in Tommy McCann S.C.'s Opinion whereby:-

> *"(a) on payment for the shares being made, the beneficial ownership will pass to the Purchaser and (b) the Share Purchase Agreement itself should not be treated as a transfer attracting stamp duty".*

8.1.26 On the 7th June, 1995, Terry O'Driscoll of CooperS&Lybrand, Dublin, wrote to Fergal O'Dwyer of DCC attaching a copy of a fax which he had received from Peter van der Hoeven in relation to the latter's discussions with the Dutch tax authorities. Mr. O'Driscoll also confirmed that he had reviewed the documentation prepared by Alvin Price and that Mr. Price would write to Mr. O'Dwyer to confirm that:-

1. *"Signing the transfer agreement followed by the subsequent bank transfer from Lotus Green to DCC plc and S&L will be sufficient to transfer the beneficial ownership of the Exampleco shares to Lotus Green.*

2. *The agreement, as drafted, should not give rise any stamp duty liability."*

8.1.27 Mr. O'Driscoll also stated that it was his understanding that, subject to receiving confirmation from Alvin Price on the above points, it was proposed to proceed with the following steps *"tomorrow (8th June):-*

1. *Drake Properties Limited lends purchase consideration to Lotus Green. We have reviewed a draft loan agreement dated 23 May and discussed this with Brendan Heneghan. The draft agreement required certain minor amendments but we have not seen a second draft as yet. This should be prepared as soon as possible.*

2. *S&L, DCC plc and Lotus Green execute the two transfer agreements in relation to the shares in Exampleco.*

3. *Full consideration is paid by Lotus Green to S&L and DCC plc.*

4. *An option agreement in relation to the ExampleCo shares is completed between Lotus Green and Vencap Investments Holdings Limited."*

8.1.28 The letter then confirmed that there were no tax reasons why these steps should not be implemented "*tomorrow*". Finally, the enclosed fax from Peter van der Hoeven referred to one question which had been asked by the Rotterdam Tax Inspector who had enquired why Lotus Green Limited should be an Irish company, resident in the Netherlands, rather than a Dutch company. Mr. van der Hoeven explained that he had informed the Rotterdam Tax Inspector that this was "*for Irish reasons*".

8.1.29 There is a further manuscript note of a meeting between Pat O'Brien of SKC and Fergal O'Dwyer of DCC on the 9th June, 1995. In the note Mr. O'Dwyer records the following points:-

"*Revenue will see it!*

*DCC plc tax returns*

- *Disposal of ExampleCo*
- *Disposal of Newco*

*Lotus Green Tax Returns*

- *Acquisition of ExampleCo*
- *Lotus Green gone non resident – file a return."*

8.1.30 On the 9th June, 1995, Mr. Michael Scholefield of DCC sent a memorandum to Mr. Jim Flavin, also of DCC, in which he responded to a request to consider whether Mr. Flavin had any obligation in his capacity as a director of Fyffes to notify the details of the "ExampleCo" transaction to Fyffes, and whether any of the insider dealing provisions of the Irish Companies Acts were applicable. Mr. Scholefield dealt with the request under the two headings as follows:-

"***Listing Rules***

*I specifically considered the provisions of the following chapters of the Listing Rules:-*

*Chapter 9: Continuing Obligations;*
*Chapter 10: Transactions;*
*Chapter 11: Transactions with Related Parties; and,*
*Chapter 16: Directors.*

*Given that Fry's have confirmed that there are no requirements to notify the proposed transaction under the Companies Acts and given that Chapter 10 of the Listing Rules appears to relate solely to transactions outside the Group, there are no provisions within Chapters 9 and 10 which are relevant. The provisions of Chapter 11 would only be relevant in the context of a transaction between DCC and Fyffes (and Fyffes is not party to*

*the transaction). Chapter 16 includes provisions in relation to the notification of interests of directors and connected persons. The definition of a connected person is set out in Section 26 of the 1990 Companies Act. This states that 'a body corporate should also be deemed to be connected with the director of a company if it is controlled by that director'. Since DCC is not 'controlled' by you, I don't believe you are under an obligation to notify any interest of a DCC subsidiary as a connected person to you in your capacity as the director.*

*I am conscious of the fact that the current period is a close period for Fyffes plc. As a director you would be prohibited from dealing during this period. In my view the ExampleCo transactions might constitute 'dealing'. However your duty as a director under the Model Code is to seek to prohibit dealings by yourself and connected persons and we have already established that DCC is not a connected person.*

*I do not believe there are any other provisions of the Listing Rules which may be applicable to the current situation.*

*I am not aware that there are any agreements between DCC and Fyffes or indeed between you in your capacity as director of Fyffes and Fyffes in relation to corporate governance matters which would require a notification of the ExampleCo transactions.*

***Insider Dealing***

*The insider dealing provisions of Irish law are contained in the Companies Act 1990. Again the ExampleCo transaction might, in my view, constitute 'dealing' as the definition does not on the face of it seem to exclude purchases and sales within the same group. The basic rule is that a person who is connected with a company may not deal in that company's securities*

*if 'by reason of his being connected with that company he is in possession of information that is not generally available, but if it were would be likely to materially affect the price of those securities'. These provisions are extended to a company (e.g. DCC) when any officer is precluded from dealing. However where the decision to enter into the transaction was taken on its behalf by a person other than the officer and there are written arrangements to ensure that the information was not communicated to that person and that no advice relating to the transaction was given by a person in possession of the information, and the information was not so communicated and such advice was not so given, then a company is not precluded from entering into a transaction at any time by reason only of information in the possession of an officer of that company.*

*My conclusions to the above are as follows-:*

*(i) If you are not in possession of price sensitive information in relation to Fyffes plc, then there is no problem;*

*(ii) If you are in possession of price sensitive information in relation Fyffes plc it is my belief that the insider dealing rules are not relevant because the decision to enter into the transaction have been made by persons other than yourself (the Board) who would not be aware of any price sensitive information in relation to Fyffes. However in these circumstances it might be appropriate if you did not participate in the Board decision and that we review the 'written arrangements' referred to above.*

*Would you like me to get Alvin price to confirm any of the above?*
*Michael"* (Scholefield).

8.1.31 There is a manuscript note taken by Michael Scholefield at or around the time when he was writing to Jim Flavin in connection with the transaction. Insofar as it is relevant to this investigation it states, inter alia, as follows:-

> "*No exemption for intra Group transaction*
> *There is a "dealing"*
> *Don't think we would be prosecuted.*
> *Technically unlawful*
> *Not too concerned*
> *If there was*
> *Nothing immediately contemplated*
>
> *1. No price sensitive info;*
> *2. Price sensitive info fairly - robust view.*
> *3. Our intentions."*

8.1.32 Following on from the memorandum of the 9th June, Mr. Scholefield wrote again to Mr. Flavin on the 14th June. The memorandum recites the following:-

> "*I spoke with Alvin Price as agreed on the insider dealing implications of the above. On reflection, Alvin agreed with my original conclusion that the transaction might technically be construed as insider dealing but only if you were in possession of price sensitive information in your capacity as a director of Fyffes. If you are not in possession of such information (i.e. which is not generally available but, if it were, would be likely materially to effect the price of the shares), then there is no problem.*
>
> *If you are in possession of price sensitive information Alvin thinks we would need to review fairly seriously whether the transaction should be undertaken at a time when that was the case. At a minimum we would need to have a very careful look at the drafting of the documentation.*

*In relation to your query on the working of the Act about "advice being given" Alvin said that this might relate to, for example a recommendation from a broker on the basis of the price sensitive information to enter into the transaction and, more generally, not participating in the decision as an equal. AP also mentioned that if the transaction was being entered into for specific purpose and that purpose might be construed to be price sensitive so far as the shares involved were concerned, then that might also be a problem. However if the purchase related to a possible transaction in the future rather than something specifically imminent, he thought that wouldn't really be an issue.*

*Perhaps we should discuss the above.*

*Michael"*

8.1.33 On the 15th June, 1995, Terry O'Driscoll wrote to Daphne Tease at DCC dealing with a number of what were referred to as "*ExampleCo Issues*" including Section 86 and the question of tax residence and shareholder approval.

8.1.34 Also on the 15th June, 1995, Fergal O'Dwyer sent Jim Flavin a memorandum attaching a copy of a letter from Pat O'Brien of KMPG Stokes Kennedy Crowley and a summary of the CooperS&Lybrand review on the points raised in Pat O'Brien's letter. He informed Mr. Flavin that Pat O'Brien intended to add a conclusion paragraph on the overall merits of the scheme. Mr. O'Dwyer suggested that it might be useful for Mr. Flavin to hear Mr. O'Brien's comments "*first hand*", and suggested a telephone call. It was clear from the memorandum that CooperS&Lybrand were not aware that Mr. O'Dwyer had sought Mr. O'Brien's assistance in the matter. Pat O'Brien's detailed letter of the 12th June, 1995, was in the following terms:-

"*Dear Fergal,*

*You have asked me to comment on the Capital Gains Tax planning structure which has been proposed a view to minimising any future Irish tax liabilities on a possible disposal of your shares in France.*

*My understanding of the proposed structure, and my comments below, are based on a Brief which was presented to Tommy McCann SC on 16 March 1995 (the text which I have is marked "draft" but I assume it is the final paper submitted to Mr. McCann) and on his Opinion dated 27March 1995. I understand that you have taken tax advice (which I have not seen) from CooperS&Lybrand.*

*The following summarises the comments on the structure which I made at our meeting last Friday.*

*1. <u>Profile</u>*

*Even if there is not an early sale of the shares in France, I believe the tax structure should be assessed against the likelihood that it may have a reasonably high profile with Irish Revenue. As I mentioned, the transfer by Drake of the shares in France to Subco will be a disposal and acquisition for tax purposes in the hands of Drake and Subco, respectively. The establishment of Newco will be an acquisition for tax purposes for Drake while the (admittedly small) distribution on liquidation of Newco will be a disposal for Drake (probably in the same accounting period as the acquisition). Any non-cash liquidation distributions made by Newco (the prime example here is, of course, the distribution to Drake BV of the shares in Subco) will be a disposal for tax purposes by Newco. Finally, the change of residence of Subco will mark the end and beginning of tax accounting periods for that company (section 9, Corporation Tax Act 1976) if the change of residence takes place on a date other than the normal accounting*

*date of the company. In any event, the change of residence of Subco is something to which one would want to draw the attention of Irish Revenue.*

*I make these points not to suggest any weakness in the tax structure proposed. Rather, I am pointing out that, given the number of steps in the structure which have some Irish tax significance, it must be possible that Irish Revenue will take some interest in it even if the shares in France are not sold for some time.*

## *2. General approach*

*As I mentioned when we spoke, the approach which I took in reviewing the papers was to look at what I think are the relevant technical tax issues before considering the possible impact of section 86. I will reverse the sequence here and comment first briefly on section 86.*

## *3. Section 86 Finance Act 1989*

*As you are aware, Section 86 was introduced following the failure of Irish Revenue to persuade the Supreme Court to make a "substance over form" approach in applying tax law to commercial transactions. The facts in the McGrath case were very similar to those in earlier UK cases where Inland Revenue had been successful. Once the Supreme Court declined to follow the UK precedent, the Irish authorities felt they had little choice but to introduce a general anti-avoidance section.*

*Developments over the past few years in the UK and Ireland would suggest that the taxpayer's win in McGrath was something of a Pyrrhic victory. UK case law over the past decade has seen a narrowing of the potential scope in the earlier decisions in the UK McGrath-type cases. The result is that taxpayers and their advisers have some practical guidance as to the scope of the substance over form doctrine.*

*In Ireland, we have a very widely drafted anti-avoidance section. We have no case law guidance on its possible scope or limitations for the very simple reason that the Irish authorities have not taken any case under the section.*

*I would expect Revenue to be very cautious in their use of section 86. It is probably stating the obvious to say that they will only take a case which they are very confident of winning. However, experience on the UK side would suggest that even a judgment in favour of Revenue might result in some narrowing of the perceived potential scope of the section. That seems to me to be a risk which Revenue would sensibly run only if the potential upside in terms of tax yield is sufficiently attractive. Thus it would be strange to see Revenue running a case under section 86 where the tax involved is, say, £100,000 but they might feel they had little to lose where the tax involved is, say, £50M. It would be little more than speculation to hazard a guess as to where £7M lies on this continuum!*
*I would like to make two comments on section 86 in its possible application to your proposed structure.*

*When we first met, I wondered whether Counsel was assuming an early sale of the shares in France in the light of his comment (at page 12 of the Opinion) "as the amounts are so large and as there does not appear to be any serious downside risk involved with the transaction, if a section 86 attack should be successful". The Brief made it quite clear (at paragraph 1.1) that Drake has no definite intention to dispose of its investment in France. Nevertheless, in the light of the extract from the Opinion have just quoted I think it would be prudent to ask Counsel what he had in mind in drafting that.*

*One of the points which we discussed when we met was whether section 86 could in any event be applied by Revenue prior to the sale of the shares in*

*France. My own view is that the section could be so applied and I have two reasons for saying this.*

*If section 86 is to be applied, the Revenue Commissioners must form the opinion that a transaction is a tax avoidance transaction. This involves the Revenue Commissioners forming the opinion that a transaction gives rise to, or would but for section 86 give rise to, a tax advantage. The term "tax advantage" is defined in section 86(1) to mean "a reduction, avoidance or deferral of any charge or assessment to tax, including any potential or prospective charge or assessment". This wording seems to me to be sufficiently broad as to catch a transaction even where there is no current tax saving.*

*Assume for the moment that I am correct in what I have just suggested so that it is necessary to point to a current tax saving achieved by the transaction if section 86 is to apply. It seems to me that we could still be within the ambit of section 86 even if the ultimate sale of the shares in France has not taken place. The reason for this is that a straight sale of the shares in France by Drake to Drake BV would give rise to a tax liability in Drake on the basis of* an *assumed open market price for the transaction. Thus it could be argued that the various steps which result in the shares in France being owned by a Dutch-resident wholly-owned subsidiary of Drake BV are susceptible to attack under section 86 even if the ultimate sale of the shares in France has not taken place.*

*In any event, my main purpose in raising these points is to suggest to you that Mr. McCann be asked to clarify the extract quote above from his Opinion. To the extent that the transaction proceeds on the basis of his view that section 86 should not apply, I think you might usefully ask whether he would be equally confident in this conclusion if, as the Brief clearly envisages, the shares in France might not be sold for some time, if at all.*

*Clearly the worst possible answer is that you end up paying tax where you have not realised a third-party sale of the shares in France. A second concern, and one which I think should also be put to Counsel, is the timing of any possible tax charge in the event of the successful application of section 86 by Revenue. The concern here is that a reduction in the value of the shares in France prior to their sale outside the group might give a higher tax liability than would have been suffered if no planning had been done.*

*Mr. McCann's main thesis in relation to section 86 is that Revenue would have difficulty in applying it on constitutional grounds. I am very aware of the strength of feeling of Counsel on this point but I fear it is not something on which I can usefully comment since I have no expertise in constitutional law.*

*4. Timing*

*Since the shares in France are quoted securities, I think that we need to be careful that movements in the share price in the course of the implementation of the proposed structure do not give rise to tax costs. As the Brief notes (at paragraph 2.4.1), the distribution to Drake BV of Newco's shares in Subco would be regarded as a disposal for Irish tax purposes. The Brief suggests that no Capital Gains Tax will arise since the shares in Subco would have no value.*

*The question which I have here is whether the time which will elapse between the transfer of the shares in France to Subco and the distribution in specie of the shares in Subco to Drake BV in the course of the liquidation of Newco might leave some value in the shares in Subco arising from an increase in the underlining value of the shares in France. You mentioned that some form of option arrangement might be put in place to cap this but I*

*cannot comment on these agreements because I do not have information on them. However, I did say that the effectiveness of any such arrangements should be assessed in the light of provisions in section 33 Capital Gains Act 1975 dealing with transactions between connected persons.*

*The impact of any increase in the value of the shares in France should also be assessed at the level of Drake BV. In this case the question, which I understand you are having addressed, is whether an increase in the value of the shares in France (which would result in the increase in the value of the shares in Subco and Drake BV's shares in Newco) would cause any tax issue in the Netherlands or would be covered by the participation exemption…*

*5. <u>Trading</u>*

*The brief to Counsel makes it clear that the shares in France are not trading stock for Drake. For the reasons which I outlined at our meeting, and which I summarise below, I think it is equally important to be dissatisfied that the shares will not be seen as trading stock of Subco.*

*Briefly, Section 131 Corporation Tax Act 1976, when combined with paragraph 15 of Schedule 1 to the Capital Gains Tax Act 1975, provides that where a group company (Subco) acquires an asset (shares in France) as trading stock from another group member (Drake) for which the asset was not trading stock, the acquiring company is treated as having acquired the asset as a capital asset and then as having disposed of and reacquired the asset at its market value. The net result of this is that the transferee company is taxed on the chargeable gain but gets an uplift to market value in the carrying cost of the asset as trading stock. The tax charge on the capital gain can be avoided if the transferee (Subco on our facts) elects that its carrying costs of the asset as trading stock be reduced by the amount of*

*the chargeable gain. The intended effect of this is that the gain should be picked up as an income gain when the property is ultimately sold.*

*Notwithstanding my earlier comments on the profile which this overall transaction may have with Revenue in any event, I think would be reluctant to give the structure the additional prominence which an election made under paragraph 15 would involve. In addition it should be noted that an election under paragraph 15, with a view to avoiding the tax charge on the unrealised capital gain, may be made only where the taxpayer "is chargeable to income tax (or corporation tax) in respect of the profits of the trade under Case 1 of Schedule D." It could certainly be argued that this condition is met in circumstances where Subco is in the first instance resident in Ireland but it is not, I think, an argument which I would like to be running in the event of a fairly quick change in the residence of Subco. In summary, I believe everything possible should be done, consistent with the overall tax planning for your group companies, to ensure that Subco-cannot be regarded as a trading company. In doing this, I think some attention should be paid to UK tax cases which have been decided on the corresponding UK legislation (while these cases dealt with attempts to convert capital losses income losses rather than with chargeable gains, the findings as to what did and did not constitute a trading are interesting). I think it would also be important to be able to reach a fairly firm conclusion on this point, even against the possible background of a fairly early disposal of the shares in France. One of the key factors in the determination of trading status is the intention of the taxpayer with regard to the asset when it was acquired. However, we should bear in mind that Revenue are invariably looking at matters such as this with the benefit of hindsight.*

*6.* *Residence*

*I agree with the analysis in the Brief (at section 6.2.3) that the purported change in residence of Subco is one of the most likely areas of attack from Revenue. As I mentioned earlier, the change of residence is something to which you will want to draw the attention of Revenue. It is, accordingly, critical that all possible steps be taken to support the desired tax position.*

*As you aware, there is no statutory definition of residence for Irish corporation tax purposes. Old UK case law, which is binding here in this matter, points to corporate residence being located at the place where the central management and control of the company is exercised. The location of a company's central management and control is a question of fact to be determined in the light of the available evidence.*

*Under the proposed structure, it is as important that Subco be resident in Ireland at the outset (in order to facilitate a tax-free transfer to it of the shares in France under section 130) as it is that Subco should be resident outside Ireland at the time of the ultimate disposal of the shares in France (with a view to avoiding a charge to Irish tax on the disposal). Thus it would be necessary at some stage to be able to point to a change in residence of Subco and to be able to point to facts which support this.*
*If Subco's only purpose is to hold the shares in France, it occurs to me that the only times at which evidence might be available as to the location of significant strategic decision-making on behalf of the company is on the acquisition of the shares from Drake and on the ultimate sale of the shares in France to a third party. At all other times it seems likely that the Board of Subco will have little to do but to observe the normal statutory formalities. For this reason, and with a view to giving the board some occasion to meet and make decisions at the time of its purported change in residence (which by definition will have to precede a decision of the sale of the shares in France), I suggest that you consider having some other activity or investment in Subco.*

*If this is not done, I would certainly have some concern about the point which you raised on Friday about the parent company consent which will be required for any sale of the shares in France. Presumably the consent is a shareholder consent but is my understanding that such a consent would normally involve a recommendation from the directors of the parent company. The immediate concern which you raised is that the exercise in Ireland of the functions which lead to the shareholder consent might have some implications for the residence position of Subco.*

*I think this concern is well founded."*

*The following extract from Taxation of Companies and Company Reconstructions (Bramwell – Fourth Edition – paragraph 12.03) is in point.*

*"The central management and control, or as it is sometimes expressed "the superior and directing authority" of a company is not the same as the day to day supervision of the company's business although the two may often be vested in the same person or body of persons. It is the authority which decides upon matters of general policy relating to the company's business. For example it will decide whether the company will continue to carry on an existing business or diversify into other activities whether the company should carry on business at all, how the business of the company should be financed. In other words, a body will exercise the central management and control of a company if it takes decisions on "strategic" or fundamental questions of policy relating to the direction of the business. Thus in one case where the directors of a company, carrying on business in America, held regular meetings of the committee of the board of directors in America, but reserved matters of major importance for board meetings in the United Kingdom, it was held that the company was resident in the United Kingdom. The Lord Chancellor said: "… it is clear that the directorate in Manchester*

*was a directorate of paramount authority as is shown not only by the fact that the reserved subjects are kept for them in extraordinary session, but by this that…they were constantly supervising and guiding the policy of the company, even as regards matters which belonged to manufacture and trading."*

*I attach for your information a copy of a Statement of Practice issued by the UK Inland Revenue in March 1983 on company residence. I would refer you in particular to the material in paragraphs A07 and A08. From this it will, I think, be clear that the fact that a decision to sell the shares in France will be subject to approval in Ireland will cause some concern on residence. This concern will not be eliminated by having other matters which engage the attention of the directors of Subco but I do think it will be helpful if the shares in France do not constitute the only business asset of Subco so that one can point to activities of the directors of Subco in other areas as a counter balance to the significance which might be attached to the Irish approval of the sale of the shares in France.*

*7.* <u>*Bushmills Precedent.*</u>

*The brief (at Section 5) refers to the two arguments made by the Inland Revenue in the Bushmills case. (Burman –v- Hedges and Butler) and Counsel in his opinion gives it as his view that these arguments, if advanced in an Irish Court, would not be successful.*

*Since that case is 16 years old, I think it would be useful also if the opinions which you have taken on this proposal were to refer to a line of thinking advanced far more recently by Inland Revenue on the scope of the "liquidation exclusion" from the charge to tax under Section 135 Corporation Tax Act 1976. Inland Revenue expressed the view, at a time when the legislation was identical to ours, that the proviso which prevents a*

*charge to Capital Gains Tax in the case of a liquidation applies only in a case in which an asset is transferred from a single subsidiary to its parent and the subsidiary is subsequently liquidated so that the group constituted by these two companies ceases to exist.*

*The UK introduced legislation in 1992 (but effective November 1991) which is intended to confirm the narrower interpretation of the proviso. The Inland Revenue's contention that the legislation prior to its amendment should also be interpreted in this narrow way found little favour with UK tax commentators. However, since the 1991/92 amendment was somewhat controversial and might be looked at by an Irish Inspector of Taxes seeking to levy tax on your proposed structure, I think it would be as well that the matter is include in the opinions which you have. I should say that it is my view that the narrower interpretation is simply incorrect and that, subject to meeting the various requirements of the legislation, a tax charge would not arise under Section 135 by virtue of the liquidation of Newco.*

*8. Shareholdings in Newco.*

*There may be some Dutch tax advantage from having a 75-25 rather than a 76-24 shareholding arrangement in Newco. This will not present any Irish difficulty since the requirement for an Irish group structure is that Drake should hold at least 75% of the ordinary share capital of Newco.*

*9. Funding of Subco.*

*I understand that the current intention in relation to the funding of Subco is that Drake will make an interest free loan to it. In the event that you have some taxable income in the Netherlands and that Subco, following the transfer of its residence to the Netherlands, is part of the Drake BV tax consolidation group (fiscal unity) it might be interesting to consider whether*

*there is any case for a claim for a deduction for deemed interest expense on the inter company loan applying arms length principles.*

*10.* *Interest Relief.*

*I understand that the various steps in the proposed structure have been assessed to ensure that they do not cause any difficulty for any of your existing interest relief claims under Section 33 of the Finance Act 1974/Section 10 Corporation Tax Act 1976.*

*11.* *Stamp Duty.*

*I understand that William Fry are looking at the stamp duty implications of the proposal and I make no comments on this.*

8.1.35 The Inland Revenue guidance document attached with Mr. O' Brien's letter provided at paragraphs A-07 and A-08 as follows:-

*A-07 – Place of "Central Management and Control".*

*4.* *In determining whether or not an individual company is resident in the UK it thus becomes necessary to locate its place of "central management and control". The case law concept of central management and control is, in broad terms, directed at the highest level of control of the business of a company. It is to be distinguished from the place where the main operations of a business are to be found, though those two places may often coincide. Moreover, the exercise of control does not necessarily demand any minimum standard of active involvement. It may, in appropriate circumstances be exercised tacitly through passive oversight.*

5. *Successive decided cases have emphasised that the place of central management and control is wholly a question of fact. For example Lord Rathcliffe in Unit Construction said that "the question where controlling management abide must be treated as one of fact or "actuality" (Page 741). It follows that factors which together are decisive in one instance may individually carry little weight in another. Nevertheless the decided cases do give some pointers. In particular a series of decisions has attached importance to the place where the company's board of directors meet. There are very many cases in which the board meets in the same country as that in which the business operations take place, and central management and control is clearly located in that one place. In other cases central management and control may be exercised by directors in one country though the actual business operations may, perhaps under the immediate management of local directors, take place elsewhere.*

6. *But the location of board meetings, although important in the normal case, is not necessarily conclusive. Lord Rathcliffe in Unit Construction pointed out (page 738) that the site of the meetings of the directors' board had not been chosen as "the test" of company residence. In some cases, for example, central management and control is exercised by a single individual. This may happen when a Chairman or Managing Director exercises powers normally conferred by the company's articles and the other board members are little more than cyphers. or by reason of a dominant shareholding or for some other reason. In those cases, the residence of the company is where the controlling individual exercises his powers.*

7. *In general the place of directors' meetings is significant only insofar as those meetings constitute the medium through which central management and control is exercised. If for example the directors of*

*a company were engaged together actively in the UK in the complete running of a business which was wholly in the UK, the company would not be regarded as resident outside the UK merely because the directors held formal board meetings outside the UK. While it is possible to identify extreme situations in which central management and control plainly is, or is not, exercised by directors in formal meetings, the conclusion in any case is wholly one of fact depending on the relevant weight to be given to various factors. Any attempt to lay down rigid guidelines would only be misleading.*

8. *Generally, however, where doubts arise about a particular company's residence status, the Inland Revenue adopt the following approach:-*

   i) *They first try to ascertain whether the directors of the company in fact exercise central management and control.*

   ii) *If so, they seek to determine where the directors exercise the central management and control (which is not necessarily where they meet).*

   iii) *In cases where the directors apparently do not exercise central management and control of the company, the Revenue then look to establish where and by whom it is exercised.*

*A-08 – Parent/Subsidiary Relationship.*

9. *It is particularly difficult to apply the "central management in control" test in the situation where a subsidiary company and its parent operate in different territories. In this situation, the parent will normally influence, to a greater or lesser extent, the actions of the subsidiary. Where that*

*influence is exerted by the parent exercising the powers which a sole or majority shareholder has in general meetings of the subsidiary, for example to appoint and dismiss members of the board of a subsidiary and to initiate or approve alterations to its financial structure, the Revenue would not seek to argue that central management and control of the subsidiary is located where the parent company is resident. However in cases where the parent usurps the functions of the board of the subsidiary (such as Unit construction itself) or where that board merely rubber stamps the parent company's decisions without giving them any independent considerations of its own, the Revenue draw the conclusion that the subsidiary has the same residence for tax purposes as its parent.*

*10. The Revenue recognise that there may be many cases where a company is a member of a group having its ultimate holding company in another country which do not fall readily into either of the categories referred to above. In considering whether the board of such a subsidiary company exercises central management and control of the subsidiary's business they have regard to the degree of autonomy which those directors have in conducting the company's business. Matters (among others) that may be taken into account are the extent to which the directors of the subsidiary take decisions on their own authority as to investment, production, marketing and procurement without reference to the parent.*

8.1.36 In his memorandum to Jim Flavin of 15 June, 1995, Fergal O'Dwyer listed the points raised by Pat O'Brien in his draft letter, and again by CooperS&Lybrand. The memorandum contained the following tabulated points:-

| ***Pat O'Brien's Points*** | ***CooperS&Lybrand Review*** |
|---|---|
| *1. The scheme (even before any realisation) will be signaled to the Irish Revenue* | *We have accepted all along that this is the case.* |

| | |
|---|---|
| *2. Section 86 – Did Counsel believe a sale of ExampleCo was imminent when he drafted his opinion.* | *The brief to Counsel was quite clear that there was no definite intention to dispose. Counsel is away until Monday. They will check again with him if we so wish.* |
| *3. The Irish Revenue could attack the scheme before any sale on the basis of a "potential or prospective" gain to the tax payer.* | *The possibility of a successful attempt to assess a potential tax advantage at say, the time of the transfer of the shares in ExampleCo to Subco is, in the opinion of Counsel, very unlikely. The Revenue would face extreme practical difficulties in calculating the potential tax advantage. Notwithstanding the above, there can be no guarantee that the Revenue would be unsuccessful in seeking to apply the section particularly as the section has yet to come before the Irish courts. In his opinion however the Section 86 risk is not sufficient to prevent the proposals being adopted. He also believes that there is a "grave risk that Section 86 is unconstitutional".* |
| *4. Timing – i.e. could any movements in ExampleCo's share price between the date of transfer of ExampleCo to Subco and the ultimate liquidation of Newco (Subco's holding company) give rise to Irish CGT.* | *CooperS&Lybrand are now recommending that the transfer take place on a Friday and the liquidation of Newco take place on a Monday so there is no time delay.* |

| | |
|---|---|
| *5. Trading – i.e. could Subco be considered to be a share trader for Corporation Tax purposes. The length of time Subco owns ExampleCo could be relevant in this regard.* | *It is difficult to be categorical on this issue. Based on CooperS&Lybrand's knowledge of the facts in the present case it is their view that it would be extremely difficult to establish that the shares in ExampleCo are being acquired by Subco as trading stock. They have also suggested the following:*<br>• *The Loan Agreement from DCC Properties to Subco be a long term loan (10-15 years) and subordinated.*<br>• *We need to review recent board Minutes for DCC plc and other relevant documentation to ensure that these contain nothing which would indicate that the shares are being transferred to Subco as trading stock.* |
| *6. Residence – i.e. impact of, the possible need for shareholder approval in relation to any possible future disposal of ExampleCo shares, on Subco's residence in Holland.* | *Subco will be tax resident outside Ireland if it is managed and controlled in Holland. This is a question of fact and it is clearly an issue on which care needs to be taken. CooperS&Lybrand do not believe that the requirement for shareholder consent should significantly impact on the tax residence of Subco.* |
| *7. Burman v Hedges and Butler precedent – i.e. whether any subsequent UK legislation has* | *CooperS&Lybrand's view is that Irish legislation is much wider than UK equivalent.* |

*impacted on the scope of Section 135 of the Irish equivalent legislation which permits the liquidation route for Newco.*

8.1.37 Mr. O'Dwyer concluded his memorandum by stating that he would welcome an opportunity to discuss the overall scheme with Mr. Flavin.

8.1.38 On the 20th June, 1995, Mr. Michael Scholefield, as Compliance Officer, sent a memorandum to Jim Flavin and Fergal O'Dwyer, at the request of Jim Flavin, concerning the potential impact of the insider dealing legislation on the "ExampleCo Transaction", given Jim Flavin's position as a director of Fyffes plc. The memorandum stated as follows:-

"*The proposed transaction will take place entirely within the DCC Group between wholly owned subsidiaries of DCC plc. As such there is no net purchase or sale of the shares by the Group. Any potential for gain or loss falls entirely within the Group and will not impact on any third party.*

*I have discussed with Jim Flavin his current knowledge of corporate development and other relevant matters within Fyffes plc. I am satisfied on the basis of my discussion with Jim that he is not aware of any matter that would cause a material movement in the share price of Fyffes plc and on that basis I conclude that he is not in possession of price sensitive information in relation to that company. I would note that it is proposed that the Example Co Transaction does not take place within a close period for Fyffes plc.*

*Together with Jim Flavin and Fergal O'Dwyer I have discussed with Alvin Price of William Fry the possible relevance of the insider dealing legislation to the above transaction, the details of which he is fully conversant. Alvin confirmed that the decision to enter into a transaction would need to be based*

*on price sensitive information in order to fall foul of the insider dealing legislation, which in practical terms anyway was probably not intended to apply to transactions between wholly owned subsidiaries of the same company. Alvin has already separately confirmed to Fergal that there is no requirement to notify Fyffes plc of the above transaction which will involve a change of beneficial ownership only and not a change of registered shareholding.*

*From the above I conclude that the proposed transaction does not fall within the insider dealing provisions of the Companies Acts.*

*Michael"* [Scholefield]

8.1.39 On the 20th June, 1995, Pat O'Brien wrote to Fergal O'Dwyer, referring to their telephone conversation of the previous evening. He made reference to section 7 of his draft letter of the 12th June, in relation to which he had agreed to prepare something which might be put to Counsel, for a view on how an Irish court might respond to the suggestion that the "*liquidation exclusion*" from the charge to tax under Section 135 should be narrowly interpreted. He attached to this letter such a note, prepared on a "*devil's advocate"* basis. That two page memorandum was sent on to Tommy McCann SC on the 21st June.

8.1.40 On the 23rd June, 1995, Senior Counsel replied to Mr. O'Driscoll of CooperS&Lybrand informing them that, having considered the proviso to Section 135(1) of the Corporation Tax Act, 1976, he could not agree with the views expressed by the "*other adviser*". He explained that:-

> "*The consequence of the winding up of a company is that the liquidator must distribute the assets of the company in accordance with the provisions of the Companies Acts - those provisions require that surplus assets should be distributed to the contributories. Consequently a distribution by a liquidator is, in my opinion, made in consequence of a company being*

*wound up – indeed in my opinion the reference to a company being wound up in the foregoing passage is not a reference to the dissolution of a company (which is the final stage in a winding up) because the passage refers also to a dissolution but a reference to actions taken in the course of the company being wound up, which procedure commences with the presentation of the petition or the passing of the resolution as the case may be. I would have no hesitation in advising that the forgoing is the correct view*."

**Intervention of Fyffes**

8.1.41 On the 23rd May, 1995, Mr. Carl McCann, Chief Executive of Fyffes, sent a memorandum to Mr. Neil McCann and Mr. Denis Bergin, also of Fyffes. The memorandum provided as follows:-

*"Subject: DCC*
*Date: 05/23/95*
*Dad/Denis,*

*During lunch Jim mentioned that he was transferring his Fyffes stake to an off-shore structure so that they could take advantage of a disposal, if it ever arose, without needing to pay tax. The essence of such an arrangement, if it works, is that control must be with directors who reside off-shore. This implies a technical change of control. Perhaps such an event requires (1) the Chairman's formal approval and/or (2) Disclosure, which might be self-defeating both in terms of its potential effect on our share price (hardly to our advantage) or which might damage its tax-effectiveness.*

*Perhaps, in any case, Jim should be writing to seek your permission to make any such change. Maybe he is trying to keep the file right by deeming his*

*casual reference last Thursday to be notice. Would he try to construe the fact you didn't openly disagree to be your technical acceptance?*

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

*Let's see what Denis thinks.*

*Carl"*

8.1.42 There is no record of Carl McCann doing anything about this for some weeks. Almost a month later on the 19th June, 1995, Carl McCann recorded the following notes following a telephone conversation with Jim Flavin:-

*"19 – June – 1995*

1. *Suicide Tax Scheme.*
2. *DCC Directors all aware of our figures and business, on a on going basis,*
3. *They should have not any information other than the market generally*
4. *Particularly in the light of JF statements that, if he did not get a board position that DCC would intend to be a seller of shares.*

   *(i) 'Suicide' tax scheme involving our shares being transferred to a foreign resident company, with no JF or any DCC director on its Board, and for the purpose of the scheme."*

8.1.43 On the 21st June, 1995, Carl McCann wrote a memorandum 'to DCC file' with a copy to Neil McCann, for his information. The memorandum reads as follows:-

"*We had the Audit Committee meeting today, 20th June 1995. The Committee approved the Interim Results. Jim Flavin turned up over an hour late when the meeting was finished, then proceeded to go through the numbers and process. He looked at the adjustments between the management accounts and the interim accounts, and he probed the necessity for the various adjustments. He then announced that our monthly figures were being consolidated with DCC's monthly figures and being presented to the DCC board as part of their package, not perhaps in detail, but rather as the one line net profit attributable. The meeting, including Denis and Gerry, were rather surprised. Denis challenged him on the point, and Jim said that this was perfectly normal practice and a reasonable thing to do. I think everyone was too surprised to say any more about it. This follows on Jim's phone call to me the previous at c. 6.15pm where he indicated he was planning to transfer ownership of DCC shares in Fyffes to a Dutch BV. He sought waiver of any requirement to inform the Chairman and so on. He said his advice was that there was no requirement to do same. I told him I felt that was a requirement. I told him that I would try and revert to him on this point."*

8.1.44 On the same day, the 21st June, 1995, Mr. Michael Meghen of Arthur Cox, Solicitors, wrote to Carl McCann as follows:-

"*Dear Carl,*

*I refer to our telephone conversation of last week in the course of which you asked me to let you know the nature and form of any notifications which might be required consequent upon a transfer by DCC of its entire shareholding in Fyffes.*

*I would be obliged if you could let me have details as to precisely what is intended. In particular I will need to know if legal* and *beneficial ownership of*

*the shares in question will pass to a new entity together with some particulars as to the nature of the new entity concerned and it relationship to DCC.*

*I am sorry to bother you for the detail but I am sure you will appreciate that advice given on the basis of a misunderstanding of what is intended would be of no value.*

*I look forward to hearing from you.*

*Regards.*

*Yours sincerely,*

*Michael Meghen"*

8.1.45 The said letter, which was faxed from Arthur Cox to Carl McCann at 11:11 on the 21st June, 1995, was faxed on to Jim Flavin by Carl McCann at 14:40 on the same day. An undated memorandum in the hand of Jim Flavin referring to a conversation with Carl McCann records the following:-

"*Responsibility on DCC to convince you as to why not.*
*C. McCann off to States on Weds AM*

*Carl is saying:*
*If anyone wants to deal in the stock they are required to notify the Chairman.*

*He is concerned that we are transferring ownership to an entity that is not under our control (for tax purposes)… it amounts to a transfer of ownership outside the*

*We don't control the BV.*

*Since they are aware of it they want chapter and verse to make sure that no notification is required."*

8.1.46 On the 23rd June, 1995, Carl McCann wrote to Jim Flavin in the following terms:-

"*Dear Jim,*

*I have spoken to Michael* [Scholefield] *and we have faxed him a copy of a letter of today's date from Michael Meghen.*

*There may be an obligation to notify the Chairman in advance, in writing, of a prospective transaction about which you recently informed us.*

*Kind regards.*

*Yours sincerely,*

*Carl McCann"*

8.1.47 On the fax copy which Jim Flavin received, he wrote the following in manuscript:-

"*MS please note and keep on file.*
*Jim*"

8.1.48 The letter from Michael Meghen to Carl McCann dated 23rd June which was faxed to Michael Scholefield stated as follows:-

*"RE: DCC – Proposed transfer of shares*

*Dear Carl,*

*Further to my letter of Wednesday, I received a phone call yesterday from Michael Scholefield in the course of which he gave me a brief outline of what is proposed. In essence I understand that the beneficial ownership of the shares in Fyffes plc currently registered in the name of DCC will be transferred to a non-resident BV.*

*Whilst I do not have detail as to the precise steps which would be involved in the proposed transaction it appears in the face of it that the provisions of Chapter II of the Companies Act, 1990 ("the Act") may be applicable.*

*The sections of the Act which are particularly relevant to the proposed transaction are Sections 67, 77 and 91. I set out below a brief synopsis of the relevant Sections.*

***Section 67***

*Provides that where a person to his knowledge requires an interest in voting shares in a public limited company or ceases to be interested in such shares he shall be under an obligation to make notification to the company of the interest which he has, or had, in its shares.*

***Section 77 (2)***

*Provides that a reference to an "interest" in shares is to be read as to be including an interest of any kind whatsoever in the shares.*

***Section 91 (2)***

*Provides that where a person becomes aware that he has acquired or ceased to have an interest in shares to which that Section applies he shall, in addition to the obligation of disclosure to the company under Section 67, be under an obligation to notify the Exchange of his interest in the said shares.*

*In view of the foregoing I would be interested to know on what basis it has been determined that the proposed transaction does not fall within Chapter II of the Act.*

*Yours sincerely,*

*Michael Meghen"*

8.1.49 On the 5th July, 1995, Mr. Neil McCann prepared a detailed memorandum in relation to a number of conversations with Jim Flavin and Michael Meghen concerning the proposed transfer of shares from DCC to an off-shore company. It was headed '*Private and Confidential – Proposed Transfer of Shares from DCC to Offshore Company'*:-

"*JF* [Jim Flavin] *had mentioned informally that he was considering setting up an offshore company and Carl was wondering if this meant formal notification. He mentioned the matter to Jim and to Mike Meghen. Mike thought that disclosure and formal request might be necessary. Carl passed on this view to Jim who was somewhat upset and seemed to think we were being difficult. He said there had been careful investigation of the situation and he had taken advice from his Solicitors, Accountants, Tommy McCann, Coopers, Alvin Price and others. He was certain that there was no problem and he was now going ahead as a matter of urgency. In fact he spoke to Carl on Friday the 23rd June saying he was going on holidays on Sunday and the matter could not wait. At this stage, he had not set out a case on paper nor had he advised us that the matter was urgent until then.*

*Jim rang Miltown on Friday evening looking for me and asking would I take call from him early on Saturday morning to deal with a particular problem which was most urgent as he was going on holidays the following day. He duly rang on Saturday morning the 24th and explained the situation in broad outline. I told him that I was not familiar with the problem as I had only heard about it in the last few days and I was not aware that there was a deadline. He told me that he was absolutely familiar with all the details and he knew there was no necessity to make a formal application for permission. I said to him if he wasn't asking me for a decision and if he felt he had no occasion to approach me for an opinion either formally or otherwise, then I didn't have any decision to make. He also assured me that as far as DCC were concerned, this transfer changed nothing in the existing DCC obligations. The new company would be the same as a subsidiary of DCC and would have the same obligations regarding transfers and permission as DCC itself. I asked him to confirm that he wasn't asking me for a decision and that he is sure he doesn't need to advise me formally. He said that this was the case.*

*I suggested to him that it might be helpful, for the sake of good order, if Alvin Price wrote me a Letter of Comfort – acceptable to Mike Meghen – confirming the situation that there was no problem and that they would take responsibility for ensuring that everything is in order. J agreed to this immediately and, in fact, said that he would get Alvin Price to contact Mike Meghen so that they could liaise to prepare an acceptable Letter of Comfort.*

*As of Friday evening Jim had stressed to Carl that Saturday was the absolute deadline and that the wheels were being put in motion the following Monday or Tuesday. I thought it was a little odd on Saturday morning when Jim said he thought it was unlikely that anything would happen while he was away.*

*M. Meghen rang me today to say he had a phone call from Alvin Price saying that technically he thought Mike's opinion was correct but commercially DCC will probably go ahead. However, he was not saying this positively and I think there may have been a change of view. There was no mention of a Letter of Comfort.*

*Spoke to Alvin Price during week commencing 3rd July regarding Letter of Comfort. He waffled on a bit and indicated that he was not familiar with the arrangement and said that the project did not appear to be a matter of urgency at the moment. However, he felt sure the matter would be raised again.*

*5 July 1995"*

8.1.50 Returning back to the tax advice, on the 7th July, 1995, Mr. van der Hoeven of CooperS&Lybrand, Amsterdam, wrote to Mr. Fergal O'Dwyer and Ms. Daphne Tease of DCC in the following terms:-

"*Dear Fergal and Daphne*

*DCC International Holdings B.V. . Lotus Green Limited*

1. *With reference to the Dutch tax ruling regarding DCC International Holdings B.V. and Lotus Green Limited, which was signed by the tax Inspector on June 30, 1995, we would like to comment as follows.*

2. *As mentioned in the ruling request (paragraph 25) it is the intention that Lotus Green, after liquidation of its parent company Marjove Limited, will change its residence to the Netherlands. Please note that in order to become a resident tax payer in the Netherlands, the following conditions should be met:*

*(i) the company should rent an office in the Netherlands;*

*(ii) the company will have to register with the Chamber of Commerce and the tax authorities;*

*(iii) the company should appoint a Dutch managing director(s,) who will deal with day-to-day management of the company;*

*(iv) Board meetings and shareholders' meetings should be held in the Netherlands.*

*Please note that the Dutch tax Inspector may check, based on the above conditions, whether the residence of the company has actually been changed.*

3. *Could you please inform us when the company is going to move residence to the Netherlands. We would be pleased to assist you in drafting the documents which need to be filed (registration forms etc.). We assume you will use the offices of Henri Roskam at the Keizersgracht in Amsterdam and will appoint Hein Roskam as director.*

4. *Can we bring Henri Roskam up to date about the facts as described in the ruling?*

*Please do not hesitate to contact us should you require any additional information or assistance.*

*Yours sincerely*
*CooperS&Lybrand*

*Peter G.A. van der Hoeven*

*c.c. Pat Wall, Terry O'Driscoll (C& L Dublin)"*

8.1.51 On the 7th July, 1995, Michael Scholefield sent a memorandum to Jim Flavin recording his conversations with Alvin Price about his (Alvin Price's) conversations with Michael Meghen on which Jim Flavin has handwritten:-

> "*Thank you*
> *We have spoken*
> *Keep on compliance file*
> *Jim"*

8.1.52 The memorandum itself stated the following:-

> "*Alvin Price finally managed to speak with Michael Meghan at the end of the week ended 30th June in relation to the above* [the Example Co Transaction]. *According to Alvin he had a good telephone conversation with Michael, whose attitude he felt was positive. While Michael pointed out that the legislation if applied to the letter could be interpreted to provide that any transfer of interest was notifiable, it is my understanding that he accepted that the intent of a legislation was not such and that he did not agree with Alvin's argument that the proposed transfer was not necessarily notifiable.*
>
> *I endeavoured this week to contact Michael confirm this interpretation and ensure he was entirely happy but I found he was on holidays, to be back in the office on 10th July.*
>
> *Michael Meghan did not raise with Alvin any of the other arguments raised by Carl with me relating to any requirements on a director of Example Co to notify dealings of a company of which he was a director. However I took the opportunity to confirm clearly with Alvin that under company law and the*

*Model Code there are no such requirements (unless the director controls that company) and I don't believe Example Co.'s Code of Dealing Practice extends these principles.*

*Michael"*

8.1.53 On the 10th July, 1995, a draft letter was prepared by Michael Scholefield to be sent to Mr. Carl McCann. This letter was not apparently sent, but as composed provided as follows:-

"*Dear Carl,*

*I refer to your letter of 23 June 1995 to Jim Flavin and Michael Meghen's fax to you of the same date which you copied to me. Jim has asked me, as Group Compliance Officer of DCC, to write to you in relation to this matter.*

*I believe that both you and Michael Meghen are informally aware of the proposed actions which will take place entirely within the DCC Group. DCC has been advised on the matter by Alvin Price of William Fry. We have taken great care to consider closely the legal and Stock Exchange implications for the proposal. It is our view having taken appropriate legal advice that no formal notification to you under the Companies Acts is required.*

*Since your letter of 23 June I have arranged for Alvin Price to speak directly with Michael Meghen on the legal issues raised by Michael in his fax of 23 June. I understand that the interpretation of Sections 67, 77 and 91 of the Companies Act 1990 is not necessarily clear cut but that Michael and Alvin were able to agree it was not intended to refer to transactions between a company and its wholly owned subsidiaries. Indeed we have not come across any record of such transactions having been notified. On this basis I understand that our respective legal advisers agreed that it is a reasonable*

*interpretation of the relevant sections to conclude that they do not give rise to an obligation to make a formal notification in this instance..*

*You did raise one other issue with me in connection with the interpretation Fyffes plc's Code of Practice in relation to Directors Dealings. This follows the Model Code set out in the Listing Rules in The Stock Exchange. As a listed company DCC is also obliged to observe these rules. The Model Code provides that a director of a listed company is obliged to notify a transaction in the shares of that company by another company with which he is connected only if the director has a controlling interest in that second company. Since Jim Flavin does not have a controlling interest DCC, he is not obliged either under the Model Code or the Fyffes Code of Practice to formally notify a transaction of the nature proposed in the shares of Fyffes plc. As you are aware Jim has informally made both yourself and the Chairman aware of the nature of the proposal, although he was under no obligation to do so. I am sure you appreciate that this reflects both Jim's and DCC's consideration and regard for the long standing and excellent relationship between the parties.*

*I hope this letter answers in full any concerns you may have in relation to this matter.*
*Yours sincerely,*

*Michael Scholefield*
*Group Compliance Officer"*

8.1.54 On the 10th July, 1995, Mr. Pat O'Brien of KPMG Stokes Kennedy Crowley wrote to Daphne Tease enclosing the original of his letter to Fergal O'Dwyer, which he asked her to pass on to Mr. O'Dwyer on his return from leave. The letter from Mr. O'Brien to Mr. O'Dwyer was in the following terms:-

"*Dear Fergal*

*You have asked me to comment on the Capital Gains Tax planning structure which has been proposed with a view to minimising any future Irish tax liabilities on a possible disposal of your shares in France.*

*My understanding of the proposed structure, and my comments below, are based on a Brief which was presented to Tommy McCann SC on 16 March 1095 (the text which I have "draft" but I assume it is the final paper submitted to Mr. McCann) and on his Opinion dated 27 Match 1995. I understand that you have taken tax advice (which I have not seen) from Coopers and Lybrand.*

*The following summarises the comments and the structure which I made at our meeting.*

1. *Profile*

   *Even if there is not an early share of the sale of the shares in France, I believe the tax structure should be assessed against the likelihood that it may have a reasonably high profile with Irish Revenue. As I mentioned, the transfer by Drake of the shares in France to Subco will be a disposal and acquisition for tax purposes in the hands of Drake and Subco, respectively. The establishment of Newco will be an acquisition for tax purposes by Drake while the (admittedly small) distribution on liquidation of Newco will be a disposal for Drake (probably in the same accounting period as the acquisition). Any non-cash liquidation distributions made by Newco (the prime example here is, of course, the distribution to Drake BV of the share in Subco) will be a disposal for tax proposed by Newco. Finally, the change of residence of Subco will mark the end and the beginning of tax accounting periods for that company (section 9, Corporation Tax Act 1976) if the change of residence takes place on a date other than the normal accounting*

*date of the company. In any event, the change of residence of Subco is something to which one would draw the attention of Irish Revenue.*

*I make these points not to suggest any weakness in the tax structure proposed. Rather, I am pointing out that, given the number of steps in the structure which have some Irish tax significance, it must be possible that Irish Revenue will take some interest in it even if the shares in France are not sold for some time."*

8.1.55 The balance of the letter deals with matters upon which he had previously advised. The letter concludes by stating the following:-

*This letter responds to your request for a second view on the issues relevant to the proposed plan. Since I have not been involved in devising the plan or in its implementation, you will appreciate I cannot and do not accept responsibility for any tax costs which may arise from implementation".*

8.1.56 There are a number of manuscript notes on the copy of the letter one of which reads:-

*"If postponement change in legislation as in UK."*

8.1.57 On the 11th July, 1995, Mr. Michael Scholefield sent a short fax to Mr. Michael Meghen of Arthur Cox referring to a telephone conversation between the two men in relation to a letter which they agreed should be sent to Neil McCann. Mr. Scholefield asked Mr. Meghen to consider whether it would be appropriate to send something in the form of the draft letter which he attached. The short draft letter was as follows:-

*"Mr. Neil McCann*
*Chairman*
*Fyffes plc etc.*

*Dear Neil,*

*I have talked to Alvin Price of William Fry about the proposed transfer by DCC within their group of their holding of Fyffes plc.*

*Notification obligations in relation to a share transfer lie with the shareholder rather than the company in which the holding is held.*

*It is for DCC to decide whether a notification is required under the Act.*

*Alvin Price is advising DCC that as the transfer is within the same group a notification is not necessary.*

*Yours sincerely etc.*

*c.c. Jim Flavin"*

8.1.58 On the 14th July, 1995, Daphne Tease wrote to Alvin Price, at the request of Michael Scholefield, in which she stated that Michael was "*anxious to get a rather more specific letter setting out the situation with regard to Companies Acts, Yellow Book, Blue Book etc*." She attached to her fax the short letter which Alvin Price had sent to her on the 7th April, 1995. On the attachment to the fax in manuscript was written "*Companies Acts, Yellow Book, Blue Book.*" She further informed Mr. Price that she was on holiday from the 15th July to the 30th July, and asked that he revert to Michael Scholefield in relation to this matter. This letter from Daphne Tease resulted in the detailed letter from Alvin Price of the 21st July, 1995.

8.1.59 On 14th July, 1995, Daphne Tease wrote to Jim Flavin, copying Fergal O'Dwyer and Tommy Breen, in connection with a point made in Pat O'Brien's letter of the 10th

July that a tax charge could arise before cash (from an external sale of the shares) would be available to pay it. In the memorandum she stated that:-

"*This could arise because of*

*a. assessment under Section 86*

*or*

*b. SubCo. held to be a company trading in shares – crystallisation of CGT liability on acquisition of shares by SubCo. (Section 131 CTA 1976)*

*Because of the possibility of the above, SKC have only seen the planned tax structure used where a sale was imminent – if CGT payable, realisation proceeds available to pay it*

*I discussed Pat O'Brien's conclusion (page 7 of letter) with Terry O'Driscoll of Coopers. He made the following points:*

*If restructuring is proposed until sale imminent:*

1. *because of the short time frame between restructuring and disposal – more difficult to establish the tax residency of SubCo offshore*

2. *increases the risk of SubCo being seen as a trading company*

3. *enables the Revenue to quantify tax saved for the purpose of a Section 86 assessment.*

*He also made the point that if we postpone the tax structuring we run a not insignificant risk of a change in the Irish legislation to close the loophole as in UK.*

***However, we have to assess the risks of getting caught with a tax liability pre disposal outside the Group if we go ahead with the restructuring."***

8.1.60 There is also a short manuscript note, undated, which is believed to have been written at this time and is in the hand of Michael Scholefield which reads as follows:-

"*Proposal to transfer beneficial ownership in Fyffes from DCC and S&L initially to XYZ and then to BV*

*Shares won't go outside group and registered holding is the same.*
*Advise that there is no requirement to notify."*

8.1.61 On the 18th July, 1995, John Kelly of CooperS&Lybrand, Dublin, sent a copy of the Dutch tax ruling in respect of DCC International Holdings B.V. to Fergal O'Dwyer. The ruling (which is in Dutch) appears to have been signed by the Dutch Tax Inspector on the 30th June, 1995.

8.1.62 On the 19th July, 1995, Michael Meghen of Arthur Cox wrote to Michael Scholefield in relation to the possible share transfer and the application of 'Chapter II' (sic) of the Companies Act, 1990, as follows:-

"*Dear Michael,*

*I refer to our telephone conversations of last week in connection with the above and to the draft letter which you forwarded to me under cover of your fax of July 11th.*

*I had cause to speak with Neil McCann on Friday morning on another matter and took the opportunity to bring him up to date with my discussions with yourself and Alvin Price.*

*In summary I explained to Neil that Alvin had no disagreement with the points made in my fax to Carl of June 23rd and I pointed out that it was for DCC to decide whether it is incumbent upon them to make any notification under the Act.*

*In view of my conversation with Neil McCann I do not propose to write to him in relation to this matter unless there are new developments of which he should be made aware.*

*Many thanks.*
*Regards.*

*Yours sincerely,*

*Michael Meghen*
*Arthur Cox"*

8.1.63 The following day, the 20th July, 1995, Fergal O'Dwyer sent Jim Flavin a memorandum in connection with the proposed transaction, having reviewed the various exposures that existed and, in particular, those that might accelerate a tax liability without having an actual external disposal, as follows:-

*"Before proceeding with the proposed transfer of ExampleCo I have reviewed again the various exposures that exist and in particular those that might accelerate a tax liability without there having been an actual disposal.*

***Section 86***

***The Irish revenue could pursue DCC on the grounds that DCC had gained a "tax advantage" i.e. a reduction accordance or deferral of any charge or***

***assessment to tax, including any potential or prospective charge or assessment.***

*C&L have advised as follows:*

- *it is Counsel's view that there is a "grave" risk that Section 86 is unconstitutional and he is of the opinion that Section 86 could not be successfully applied to the ExampleCo proposal*

- *the possibility of a successful Revenue attempt to assess a potential tax advantage at say the time of transfer of Exampleco to Subco is in Counsels opinion very unlikely. The Revenue would face extreme practical difficulties calculating the potential tax advantage*

*I believe the risk of Section 86 being used by the Revenue to accelerate a tax payment is remote.*

*In the event of any future disposal of ExampleCo however the Revenue might resort to Section 86 to pursue the matter. The additional remote downside here is that the Revenue calculate the tax due based on the transfer value of Examplco into Subco which might be higher than any ultimate realisation value.*

***<u>Section 131</u>***

***Subco might be deemed to be a share trader and would be deemed to have disposed of ExamapleCo at market value and then bought it back at the same value thereby accelerating an immediate taxable gain.***

*C&L advises as follows:*

*"it is difficult to be categorical on this issue as so much depends on the facts of each case and the conclusions that may be drawn from these facts by the*

*Courts. Based on our knowledge of facts and the present case, however, in our view it would be extremely difficult for the Revenue to establish that the shares in ExampleCo are being acquired as trading stock."*

*Facts that support this would be:*

- *ExampleCo is in an associate of the DCC group i.e. held for the long term*
- *Subco is receiving a long term subordinated loan from DCC to acquire ExampleCo i.e. not a short term trading loan*
- *there is nothing in DCC's/Subco's Minutes/documentation which would suggest any intention to dispose of the shares in ExampleCo*
- *in a scenario where the Revenue would use Section 131 to attack the scheme in advance of a disposal – clearly there would have been no disposal, at that time, of ExampleCo by Subco.*

*I believe the risk of Section 131 being used by the Revenue to accelerate a tax liability is remote.*

*Obviously the Revenue might consider using Section 131 if Subco were to dispose of ExampleCo very soon after it acquired it. Notwithstanding that there is no current intention to dispose of ExampleCo it is always possible that, in certain circumstances, the shares might be sold by Subco after acquisition. However, this does not mean that the transaction is necessarily a trading transaction. Much would depend on the circumstances surrounding the sale e.g.*
*if a purchaser were to make a general offer to all shareholders and Subco was unaware of this at the time of the acquisition, the acquisition of the shares in ExampleCo is less likely to be a trading transaction that is Subco, immediately after its acquisition of the ExampleCo shares place these shares on the market. However, the only additional downside here in this situation, over and above the situation which already exists, is that the ultimate disposal price is less than*

*the price at which the shares were transferred to i.e. tax is calculated on a higher disposal profit than that actually earned.*

***<u>Section 135</u>***

***This is the particular relief that prevents any CGT gain crystallising in Subco when it leave the DCC Irish tax group as "consequence of another member of the group being wound up or dissolved". Clarification was required as to whether a dividend in specie of the shares in ExampleCo by the liquidator of Newco falls within this relief or whether a more narrow definition of "ceasing to exist" could be applied i.e. the final act of the striking the company off the Company's Register.***

*Both Counsel and C&L particularly strong on this fact having researched the matter in some detail.*

*If it is an issue I believe it is a very remote one.*

***<u>Conclusion</u>***

*In summary, if we proceed with the transfer of ExampleCo to Subco and then change the residence of Subco to Holland, I believe the risks of this accelerating a tax liability are remote.*

*Notwithstanding the fact that there is no current intention to dispose of the shares in ExampleCo, any ultimate disposal, would, given the materiality of the transaction, give rise to a fair anoint of scrutiny of the Revenue and a possible action under any of the above headings. Again however compared to the existing situation in relation to the CGT and the potential gain on ExampleCo shares, the only additional downside would be that ultimately CGT is calculated*

*on a profit which is higher than any realised profit. The question of the costs of defending against any action by the Revenue would also have to be considered*

*Fergal"*

8.1.64 In response to the earlier request from Daphne Tease, Alvin Price of William Fry, Solicitors, wrote to Michael Scholefield on the 21st July, 1995. This letter is of some significance:-

> *"Dear Michael,*
>
> *I refer to previous discussions in regard to the proposal whereby the beneficial ownership of the DCC Group's shareholdings ("the Relevant Shares") in the relevant plc ("the Relevant Plc") is intended to move from the two existing wholly owned DCC Group companies by which the Relevant Shares are currently held ("the Existing Holders") to a third wholly owned DCC Group company.*
>
> *As you know, the question that has arisen is whether this internal move within the wholly owned DCC Group must be notified to the relevant plc and to the Stock Exchange.*
>
> *A somewhat unusual feature of what is proposed here is that only the beneficial ownership (i.e. not the legal ownership) is to move and the Relevant Shares will at all relevant times remain registered in the names of the two DCC Group companies which are the existing holders.*
>
> *As a matter of pure contract law, the beneficial ownership of any or all of the Relevant Shares can be (and always could be) moved around within the DCC Group any number of times without any involvement by the Relevant*

*Plc or any third party, since no legal transfer of the Relevant Shares is involved.*

*The question which arises, therefore, is whether the 1990 Act has created an obligation to notify a movement of this type in an intra Group situation.*

*Undoubtedly, the relevant provisions of the 1990 Act are very widely drawn, in that they refer to an acquisition or disposal by a person of any inertest of any kind whatsoever and, therefore, on a strictly literal basis, an argument can be made that the individual wholly owned DCC Group companies should therefore notify their respective acquisitions and disposals of an interest in the Relevant Shares. When construed on a purposeful basis, however, a contrary view can be taken, in that the purpose that the relevant Sections of the 1990 Act are clearly to enable public limited companies to know who are the true owners of a particular substantial block of shares, such as the Relevant Shares. In this case, I take the view that the true owner is the DCC Group, and the Relevant Plc and public have already been very clearly notified of that fact in accordance with the requirements of the 1990 Act, and that the 1990 should not be construed in the literal manner which would now require a further notification of essentially the same information. The wording at S. 72(3) of the 1990 Act provides support for this view i.e. that one should for these purposes treat a group of companies as a single person.*

*While making notification is clearly the more cautious approach, I should stress, as previously advised, that this issue is strictly one for the DCC Group alone to decide upon, given the legal and commercial considerations involved. The Relevant Plc would only become involved if the Relevant Shares are presented for registration or, of course, if the relevant DCC Group companies decided to make a formal notification.*

*Yours sincerely,*

*Alvin Price*
*William Fry*
*Solicitors"*

8.1.65 Four days later, on the 25th July, 1995, Mr. Price wrote again to Mr. Scholefield in relation to the insider dealing implications of the proposed transaction as follows:-

"*Dear Michael,*

*I refer further to the proposed intra Group transaction referred to in my letter of Friday last dealing with the issue of the possible notification of that transaction under the 1990 Companies Act.*

*I confirm that very similar considerations arise in relation applicability to that transaction of the insider dealing provisions of the Companies Acts. Again, for essentially the same reasons as were outlined in my letter of last Friday, in our view there would be no question of any criminal or civil liability arising under those insider dealing provisions in consequence of the movement of the beneficial ownership of the relevant shares within the wholly owned DCC Group of companies.*

*Kind regards.*

*Yours sincerely,*

*Alvin FM Price*
*William Fry*
*Solicitors"*

8.1.66 Page 10 of the DCC Chief Executives Report for the DCC board Meeting of the 31st July, 1995, contains the following note:-

***"6. CHANGES IN THE BENEFICIAL OWNERSHIP WITHIN THE DCC GROUP OF SHARES HELD***

*We are planning to transfer the beneficial ownership in the Group's shareholding in Fyffes plc, which is currently held in Ireland, to a Dutch subsidiary of DCC. Whilst there is no current intention to dispose of the Group's shareholding in Fyffes plc, we have been advised that any gain arising on a disposal of the shareholding would not be taxed in Holland. Appendix 1 contains letters from Alvin Price of William Fry re Companies Act provisions on the notification of interests and insider dealing on which I wish to have an agreed board position."*

8.1.67 The note of the record in the Minutes of the meeting of the 31st July is contained in a later section summarising the Minutes of the relevant meetings of the companies.

8.1.68 Subsequent to the DCC board Meeting of the 31st July 1995, on 3rd August, 1995, Terry O'Driscoll of Coopers and Lybrand, Dublin, wrote to Daphne Tease of DCC advising DCC in relation to the currency of the loan between DCC Properties and Lotus Green Limited and to ensure that the agreement between DCC Properties and Lotus Green Limited did not constitute a "*debt on security*" for Irish tax purposes.

8.1.69 On the 9th August, 1995, the Share Purchase Agreement between S&L Investments Limited and Lotus Green Limited was executed. The agreement recited that the Vendor, S&L Investments Limited, was the registered and beneficial owner 7,667,500 ordinary shares of IR£0.05p in the capital of Fyffes plc. The consideration payable in respect of the ordinary shares was an amount of IR£8,050,875. Completion was to take place at the registered office of the Vendor at 12 noon on the "completion date".

8.1.70 A similar Purchase Agreement was entered into on the 9th August, 1995, between DCC plc and Lotus Green Limited in respect of the 23,109,507 ordinary shares of IR£0.05p in the capital of Fyffes plc and 4,621,901 IR£8.25p (net) convertible cumulative preference shares of IR£1 each held by DCC plc in Fyffes. The consideration payable in respect of the ordinary shares was IR£24,264,982.35p and IR£6,147,128.33p for the preference shares.

8.1.71 Also on the 9th August, 1995, a Loan Agreement was entered into between DCC Properties Limited and Lotus Green Limited whereby DCC Properties Limited made the sum of IR£38,462,985 available to Lotus Green Limited. The agreement provided that the loan would be free of interest for the first year of the term and each subsequent year the lender and borrower should agree whether the loan is to bear interest for that year and, if so, the applicable rate. The term of the loan was to be fifteen years and was to be repayable at the end of the term, subject to certain conditions.

8.1.72 On the 9th August, Fergal O'Dwyer recorded a telephone conversation with Paul Burke of Davy's at 3.40pm in a memorandum, whereby he enquired as to the current share price of Fyffes plc. Mr. O'Dwyer ascertained that the ordinary share dealt at IR£1.05 and the convertible preference shares last dealt at IR£1.33.

8.1.73 On the 9th August monies were lent and discharged in accordance with the table set out below:-

***DCC plc: Exampleco***

| | ***DCC*** | ***S&L*** | ***Total*** |
|---|---|---|---|
| *No. of ordinary shares* | *23,109,507.00* | *7,667,500.00* | *30,777,007.00* |
| *Latest traded price* | *1.05* | *1.05* | *1.05* |

| | | | |
|---|---|---|---|
| *Market value – ordinary* | *24,264,982.35* | *8,050,875.00* | *32,315,857.35* |
| *No. of preference shares* | *4,621,901.00* | | *4,621,901.00* |
| *Latest traded price* | *1.33* | | *1.33* |
| *Market value – preference* | *6,147,128.33* | *0.00* | *6,147,128.33* |
| *Total market value* | *30,412,110.68* | *8,050,875.00* | *38,462,985.68* |
| *Cost per investment ledger* | | | |
| *- ordinary shares* | *8,508,363.00* | *5,032,949.00* | *13,541,312.00* |
| *- preference shares* | *5,084,091.00* | | *5,084,091.00* |
| *Unrealised profit* | *16,819,656.68* | *3,017,926.00* | *19,837,582.68* |

8.1.74 On the 14th August, 1995, Terry O'Driscoll of CooperS&Lybrand wrote to Fergal O' Dwyer advising DCC in relation to the issues which would need to be dealt with at the board meeting of Lotus Green, which was scheduled to be held in the Netherlands within a week or so. He advised that the board meeting should deal with the following issues:-

"*1. Resignation and appointment of directors.*

*2. Closing the existing deposit account and opening a deposit account in the Netherlands.*

*3. The re-denomination (from IR£ to NLG) of the loan from DCC properties to Lotus Green. Perhaps you might discuss with Alvin Price how best this can best be effected.*

*Peter van der Hoeven wrote to you on July 7 advising on the various steps which need to be taken to ensure that Lotus Green will be treated as tax resident in the Netherlands for Dutch tax purposes. This requires the filing of certain*

*forms and I assume that you will liaise with Peter directly on this. If we can be of any assistance, however, please let me know.*

*Kind regards.*

*Yours sincerely,*

*Terry O'Driscoll*
*for Coopers and Lybrand"*

8.1.75 On the 22nd August, 1995, Alvin Price wrote to Daphne Tease of DCC thanking her for sending the translation of the Articles of Association of the BV company. He stated, however, that he was unsure how relevant the Articles were to Louts Green Limited:-

> "*Lotus Green Limited is and will remain an Irish registered company, governed by the Irish Companies Acts, and, therefore, I feel we need to go to some lengths to support the contention that its base of management is not in Ireland. In that respect, I enclose draft resolutions amending the Articles of Association which we prepared in another case to support a change of tax residency (in that case to Jersey). The crucial resolutions are those at paragraphs 2 and 3 but you will see that each of the other resolutions are designed to demonstrate that the Company is severing its links with Ireland (other than the link which cannot be severed, namely its place of original incorporation). Perhaps we could have a word when you have reviewed the attached."*

8.1.76 By an undated agreement between ING (Nederland) Trust and Lotus Green Limited, Lotus Green appointed ING (Nederland) Trust as Company Secretary of the Company as of the 25th August, 1995. As Company Secretary, the Secretary was

required to assist in managing the business of the company in accordance with the terms and conditions of the agreement. The duties were set out in Article II as follows:-

> 1. *"The Secretary will assist the Management with the control and the conduct of the business of the Company in accordance Company's Articles of Association, the resolutions of meetings of its shareholders, the laws of the Republic of Ireland, the laws of The Netherlands, and any other written instructions the Secretary may receive from the Company.*
>
> 2. *The Secretary will assist the Management in maintaining the proper existence and good standing of the Company under the laws of The Netherlands.*
>
> 3. *The Secretary will provide such facilities to the Management as may be appropriate or deemed useful, including company secretarial services.*
>
> 4. *In the execution of its duties, the Secretary shall take due care of the interests of the Company to the best of its ability."*

8.1.77 By a further undated agreement between Mr. Diepenhorst, Lotus Green Limited and DCC International Holdings B.V., Mr. Diepenhorst was appointed by the Directors of Lotus Green Limited as the General Manager of the Company's activities, and was also appointed as a "B Member" to the board of Directors for an indefinite period of time. As General Manager, the Manager was required to take care of the day to day management of the Company in accordance with the terms and conditions set out in the agreement. The duties were set out in Article II of the agreement as follows:-

> *"Article II Duties*
>
> 1. *The Manager will render domicile and provide day to day management of the Company in accordance with its articles of association, the*

*resolutions of (the meetings of) the board of Directors and/or of the shareholders and any other written instructions the Manager may receive from the Beneficial Owner.*

2. *The Manager will provide such facilities to the Company as he may deem appropriate or useful, all in consultation with prior written approval from the Beneficial Owner.*

3. *The Manager may sub-contract one or more of his duties to third parties, all in consultation with and with prior written approval from the Beneficial Owner.*

4. *In the execution of his duties the Manager shall take due care of the interests of the Company to the best of his ability."*

## 8.2 2000 Transactions Documents

8.2.1 By comparison with 1995, there are far fewer documents centrally relevant to the legal provisions with which my investigation is concerned under Parts IV and V of the Companies Act, 1990, in relation to the 2000 transactions. For completeness, as with the 1995 booklet of core documents, I have appended all of the documents in Appendix B to my Report, even though many of these documents were not referred to in the days of interviews which I conducted with the individual directors, officers and advisers to the companies.

8.2.2 In view of the comprehensive finding by Ms. Justice Laffoy that Jim Flavin 'dealt' I did not concern myself with this issue nor with the transcripts of the telephone conversations between Jim Flavin and the Stockbrokers.

8.2.3 The first document of note is a memorandum dated the 2nd November, 1999, from Mairead O'Malley to Fergal O'Dwyer alerting him to changes in the Finance Act, 1999,

requiring all Irish incorporated companies, whether or not they were resident in Ireland, to provide certain information on prescribed forms to the Revenue Commissioners. Ms. O'Malley informed Mr. O'Dwyer that the Revenue was issuing these forms to companies incorporated before the 11th February, 1999, which were not tax resident in Ireland. She pointed out that Lotus Green Limited and two other DCC companies had received the forms. She attached, for Mr. O'Dwyer's benefit, the completed forms which had, in turn, been reviewed by Mr. Terry O'Driscoll to be sent with each form to show that they had come from the UK or the Netherlands, as appropriate. She further attached draft covering letters. The penultimate paragraph of the memorandum reads as follows:-

> *"The Revenue are already fully aware that these companies are not Irish resident and these forms have been issued as a routine matter to all Irish incorporated non-resident companies."*

8.2.4 On the same day, Ms. O'Malley sent the completed form to Elodie Van Sytzema of ING Trust in Amsterdam requesting her to arrange to have the forms signed by the Company Secretary and to return it with an enclosed covering letter to the "*TCRO Section*" of the Revenue Commissioners in Dublin. Finally, Ms. O' Malley asked Ms. Van Sytzema to send her a copy of the signed documentation for her files. The draft letter on Lotus Green Limited headed notepaper, with an address at Keizersgracht 534 in Amsterdam, addressed to the Office of the Revenue Commissioners read as follows:-

> *"Dear Sir,*
>
> ***Section 882 Taxes Consolidation Act, 1997***
>
> *We enclose a completed form 11F CRO in respect of Lotus Green Limited.*
>
> *Yours faithfully,*

*ING Trust Netherlands B.V.”*

8.2.5 The registered office on the form was given as Fitzwilton House, Wilton Place, Dublin 2, and the business address as Keizersgracht 534, 1017 EK Amsterdam. The nature of the trade, profession or business was set out as an “*Investment Holding Company*”. The company’s accounting date was given as the 31st March, and the name of the country in which the company was resident for tax purposes was given as the Netherlands. The name of the quoted company which controlled the company was given as DCC plc, DCC House, Stillorgan, Blackrock, Co. Dublin.

8.2.6 On the 14th December, 1999, Ms. O’Malley sent out the board papers, including the Agenda, for the Lotus Green meeting scheduled for the 16th December, 1999. The third item on the Agenda for the meeting, to be held at Keizersgracht 534, was a review of the Preliminary Results Announcement for Fyffes plc for the year ended the 31st October, 1999. The Minutes of the previous board meeting of Lotus Green, held on Tuesday the 19th October, 1999, also in Amsterdam, were appended to the Agenda. The Minutes recorded that the meeting was attended by Mr. Venneboer, Mr. Diepenhorst and Mr. O’Dwyer as Directors, with apologies from Mr. Roskam, and Ms. Van Sytzema in attendance. Under the heading “*Fyffes plc*” it recited as follows:

> *“The Directors noted that the Company had received an ordinary dividend of IR£256,556.10 from Fyffes plc in July 1999.*”

8.2.7 Under the heading “*Loan Interest to DCC International Holdings B.V.*” the Directors noted that loan interest amounting to IR£257,391.24 had been prepaid to DCC International Holdings BV on the 30th September, 1999. There was also an extensive minute of the discussion and resolution of the board in relation to certain bank account transactions. The board papers also included the Management Accounts for the period ended the 30th November, 1999 and a copy of the Fyffes Preliminary Announcement for the year ended the 31st October, 1999. The latter was dated the 14th December, 1999.

8.2.8 The next relevant document is a memorandum from Peter van der Hoeven and Friedrich Esterhuyse of PWC, Holland, to Paraic Burke in Ireland, who sent it on to Terry O'Driscoll, setting out PWC's initial comments regarding the potential purchase of shares in DCC plc by either Lotus Green Limited or DCC International Holdings B.V. It stressed that it was very important that such a purchase be financed out of "*own equity*", and that DCC International Holdings or Lotus Green *"must be able to demonstrate this through the relevant documentation and flow of funds (i.e. separate bank account)."*

8.2.9 Two days later on the 21st January, 2000, there was a conference call between Fergal O'Dwyer, Terry O'Driscoll, Paraic Burke (of PWC Dublin), Peter van der Hoeven and Friedrich Esterhuyse. The memorandum of that meeting from Peter van der Hoeven and Friedrich Esterhuyse recited the subject of the conference call as being the "*Buy back of shares in DCC Plc*." The introduction to the memorandum began as follows:-

> *"It is considered by the DCC group that the price of the shares held by Lotus Green Ltd in Fyffes plc has reached their full potential. The group is now considering selling these shares. As a result, excess cash will be available in the Netherlands. These funds may be utilised to acquire between 5% and 10% of the issued shares in DCC plc. The group believes that the share price of DCC Plc is currently under-valued."*

8.2.10 The memorandum then went on to explain how the shares would be treated as "*treasury shares*" and Mr. van der Hoeven advised, from a Dutch tax law perspective, on the best mechanism for implementing this.

8.2.11 On the 31st January, 2000, Mr. Henri Roskam, who signed himself as "*Chairman, DCC Amsterdam, the Netherlands*" wrote to Mr. O'Dwyer in Dublin in the following terms:-

> *"Dear Fergal,*

*I recently noticed that the Fyffes plc share price has moved ahead strongly since its result announcement in December 1999 and is currently trading around Euro 3.3. It therefore seems to me that we perhaps should consider a board meeting to update ourselves on this development especially as this pertains to our important investment in this company.*

*Kind Regards,*
*Henri Roskam."*

8.2.12 On the 1st February, 2000, Mr. Alvin Price, Solicitor of William Fry, created a memorandum to file recording a telephone conversation between himself and Jim Flavin on the 31st January. The memorandum recorded as follows:-

"*TO: FILE*
*FROM: AP*

*DATE: 1st February 2000*

[in manuscript above February is the word "*typed*"]

*CLIENT: DCC plc*
*MATTER: Miscellaneous*
*FILE NO: 2439-002*

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

*He said that he had examined his conscience with regard to any price sensitive information and felt he didn't have any.*

*The share price had risen rather strongly in recent times largely on the back of the publicity in regard to the World of Fruit.com venture. The company had recently briefed analysts and done a road show and accordingly the market had up to date information in regard to the company. He did mention that the company's year ended on 31st October and that to his knowledge the first two month's trading had not been all that wonderful. He indicated however that the company's track record was to have an uneven pattern of results and two relatively poor months would not have been unusual in the past. Having discussed the matter with him we confirmed that we shared his view that there did not appear to be any legal obstacle to their proceeding with the full disposal of the shareholding.*

*We then went on to discuss the company's attitude to such a sale at this time and Mr. Flavin was unclear as to whether the company would find the sale of the shareholding a positive or negative development."*

[This memorandum, typed on the 1st February, 2000, was sent by fax to Mr. Flavin by Mr. Price on the 21st March 2000.]

8.2.13 On the 1st February, 2000, Mr. Michael Scholefield prepared a memorandum to the Compliance File in the following terms:-

"*To: The Compliance File*
*From: Michael Scholefield*
*Date: 1st February 2000*

*Fergal O'Dwyer has informed Jim Flavin and myself that the Directors of DCC Lotus Green Limited may be considering realising the company's*

*investment in Fyffes plc. In the light of this, Jim Flavin discussed with me, as Compliance Officer, the following matters:*

1. *Jim is aware that the profits of Fyffes for the first two months to 31 December are behind last year. However, we both 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. *Jim only has information on the first two months of the year and this information is 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 of profitability in Fyffes is banana prices, which are closely followed by industry analysts. This knowledge and trading commentaries from other companies in the sector means that a reduction in the profitability in the first two months of Fyffes' current financial year would not be unexpected by these analysts.*

4. *Fyffes' share price has more or less doubled since it announced the launch of its online trading entity, worldoffruit.com and both Jim and I surmised that this launch had been a major factor in the share price performance.*

5. *Jim informed me that Fyffes had been active in making presentations since the results and therefore the market is likely to be as well informed as he is.*

*6. We noted that any decision in relation to Fyffes' shareholding was in any event a matter for the board of Lotus Green Limited.*

*I confirmed to Jim that, on the basis of the above facts, I could see no reason why the board of that company would not be free to deal in Fyffes' shares if they so wished. Jim informed me that he had discussed this matter with Alvin Price of William Fry and that Alvin's view was similar to my own. He also confirmed that under the Model Code, DCC was not a connected party.*

*Signed: Michael"*

8.2.13 There follows a manuscript note made at the time of that conversation which recorded as follows:-

*"JF and MS discussed facts*
*Profits ↓ x 2 months*
*History. Despite good overall profit growth little evidence of smoothness between 1 month and previous.*
*Info. For 1st 2 months*
*JF same info as on prelim. results announcement*
*Active in making presentations recently since the results.*
*Similar conversation with AP.*
*Banana prices followed by analysis*
*SP more or less doubled since WoF – surmise big element.*
*Discussed with AP in Fry'S&Likewise agrees.*
*DCC under the Code – DCC not a connected party.*
*Indeed in any event decision for Dutch board."*

8.2.14 The next document is a memorandum dated the 2nd February, 2000, headed "Lotus Green Limited", to the board of Lotus Green from Henri Roskam and Gerard Jansen Venneboer, in relation to Fyffes plc. The memorandum reads as follows:

*"At a board meeting held on 28 July 1998 the board reviewed the strategic options available to Lotus Green (LG/"the company") in relation to its important strategic interest in Fyffes and their resulting impact on the development strategies available to the Company. At each subsequent board meeting the board has been updated on the performance of Fyffes.*

*The attached paper updates the board of Lotus Green's on developments in Fyffes since the 10.8% was acquired by the Company.*

*Fyffes share price has roughly doubled since its annual results announcement in December 1999 driven in the main by favourable investor sentiment to the worldoffruit.com venture. Whilst this is a very positive development for Fyffes ultimately the potential for this venture is like most internet investments extremely difficult to call and this business will incur losses as it develops. Having regard to the volatility of "internet" valuations the sustainability of Fyffes valuation is unpredictable this is particularly so given that the recent increase in Fyffes share price has been driven off reasonably thin trading volumes.*

*The meeting on 28 July 1998 summarised the following strategic options available to LG which are still relevant today:*

***Increase the Company's shareholding in Fyffes***

*The Company already has a significant investment in Fyffes on which it has related borrowings of NLG96.3 m. Also whilst it is hoped the EU banana Regime will be sorted out in Fyffes favour there is always the risk that this*

*will not be the case and in addition the worldoffruit.com venture will be loss making.*

***Leave the existing interest in Fyffes unchanged***

*Staying with the existing holding in Fyffes will provide a steady annual cash flow in the form of dividends (approximately NLG3.5 m) which will be available to pay down the Company's loans.*

***Dispose of some or all of the Company's shareholding in Fyffes***

*A disposal of some or all of the Company's shareholding in Fyffes would free up significant financial resources to allow the Company to repay its existing debts and/or pay a dividend to its parent company and to pursue new development opportunities which might include either:*

- *Acquisitions of or equity investments in DCC Group companies*
- *Loans to DCC Group companies*
- *Acquisition of or investments in non DCC Group companies*

*Overall whilst the Company remains satisfied with its interest in Fyffes the conclusions reached previously by the board at the 28 July 1998 meeting are still appropriate i.e. 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.*

*Henri Roskam/Gerard Jansen Venneboer*"

8.2.15 There are certain manuscript notes on the memorandum with calculations of the total number of shares held. The memorandum also had attached to it a four-page, five-section paper on Fyffes plc, with Appendices including a 5-year summary in respect of Fyffes, the profit and loss cash flow balance sheet and notes for the accounts to the year ended the 31st October, 1999. It also included two public statements on "worldoffruit.com" and the announcement in respect of the completion of the Capespan and Fyffes transaction.

8.2.16 The next document is a list of the names and telephone numbers (work, mobile and home) for each of Mr. Diepenhorst, Mr. Roskam, Mr. Venneboer and Ms. Van Sytzema which was sent by Fergal O'Dwyer to Jim Flavin on the 3rd February, 2000.

8.2.17 There followed a number of documents in relation to the precise Fyffes shareholding and the calculation of the profit on sale of half of those Fyffes shares.

[Included in the core booklet is a copy of the fax from Kyran McLaughlin of Davy Stockbrokers to Jim Flavin, sent on the 3rd December, 2001, in respect of the transcripts of the conversations between Davy's, Goodbody's and Jim Flavin on the 3rd February.]

8.2.18 The next document of note is a memorandum dated the 3rd February from Mairead O'Malley to file detailing two telephone conversations as follows:-

> *"Note of telephone conversation:*
>
> *DCC: Michael Scholefield*
> *Mairead O'Malley*
>
> *William Fry: Alvin Price*
>
> *In relation to a change of ownership of 1% in the Groups holding in France we discussed with Alvin Price the Group's obligations in relation to S67 of the Companies Act 1990 given that the registered and beneficial owners of the shares are different.*

*Alvin stated that the registered holders and the beneficial owners were required to inform France of the % change in ownership. This could be achieved by:*

- *(i) the registered holders merely stating that they were informing France on behalf of the registered and beneficial owners, or*
- *(ii) the registered owners could state the name of the beneficial shareholder, or*
- *(iii) in addition to the registered holders completing a S67 notice, LG could complete an additional S67 notice on its own behalf.*

*Either of the above three options ensure our legal obligation would be met.*

*We also discussed if a contract note could be concluded with the beneficial owners and Alvin said that legally it could unless there was something within the CREST system which did not allow it.*

*Note of telephone conversation:*
*DCC: Michael Scholefield*
*Mairead O'Malley*
*PWC: Terry O'Driscoll*

*Terry had no strong preference in relation to the S67 notice and felt that by doing it in the name of the registered owners was in line with everything we had done to date.*

*He had a preference to have the contract note in the name of Lotus Green Limited.*

*Signed: Michael/Mairead"*

8.2.19 On the 4th February, 2000, DCC issued a Stock Exchange announcement as follows:

"***STOCK EXCHANGE ANNOUNCEMENT***

*DCC Realises Profit of €40 million*
*on the Sale of Part of its Shareholding in Fyffes*

*4 February 2000*

*DCC plc, the value added marketing and distribution group, announces the disposal of 17,895,697 ordinary shares in Fyffes plc, the European fresh produce group, for a cash consideration of €57.3 million, being €3.20 per share. The sale results in a profit on cost of €45 million and of €40 million on book value.*

*The shares sold were placed with institutional investors jointly by Davy Stockbrokers and Goodbody Stockbrokers at €3.20 per share.*

*DCC continues to hold 70, 895,697 shares (ordinary and convertible preference) in Fyffes, representing 5.2% of Fyffes' capital inclusive of preference shares.*

***Commenting on the disposal, Mr. Jim Flavin, Chief Executive and Deputy Chairman of DCC, said:***

> ***"We are pleased to have disposed of part of our shareholding in a manner which has enabled Fyffes to significantly broaden its institutional shareholder base.***

***Under the visionary leadership of its Chairman, Neil McCann, Fyffes has emerged as the leading fresh produce business in Europe. The recent launch of worldoffruit.com opens up an exciting new avenue for its continued growth into the future.***

***DCC plans to re-invest the funds realised by accelerating the development of our core business activities both organically and by acquisition."***

8.2.20 A further memorandum from Mairead O'Malley to the Lotus Green File dated the 3rd/4th February, 2000, records further telephone conversations as follows:

*"Note of telephone conversation:*

*DCC: Fergal O'Dwyer*
*Mairead O'Malley*
*PWC: Terry O'Driscoll*
*Peter van der Hoeven*

*We discussed the attached schedule which sets out the % of the Fyffes shares which we hold and details of the disposal which had occurred. The calculations had been prepared on the basis of the number of shares. However during an earlier conversation between FOD and PVDH, PVDH advised FOD that the calculation should be prepared on the basis of the nominal value of the shares. The attached schedule includes of the details of the % of shares held using the nominal value basis also.*

*We reviewed the calculations and concluded that post the disposal of 17,895,697 ordinary shares, LG continued to hold 7.43% on the nominal*

*value basis. It was agreed that LG should not convert any of the convertible preference shares to ordinary shares (this had been suggested previously).*

*PVDH confirmed that the disposal of 17,895,697 ordinary shares would qualify under the participation exemption and that no tax liability would arise on the disposal.*

*In relation to the remaining shares (13,273,796 ordinary and 4,621,901 preference) PVDH stated that all the experts would agree that LG should continue to qualify for the participation exemption. If for some reason the tax authorities believed that the participation exemption no longer applied after the initial disposal, LG would step up its base costs for tax purposes to the current market value. Any subsequent gain on a further disposal would be taxable @ 35% and at the year end any unrealised gain would be taxable.*

*In summary PVDH confirmed that the current sale would qualify for the participation exemption and all the experts agreed that LG should continue to qualify for the participation exemption.*

*Telephone conversation dated 4 February 2000*
*Attendance – as above and Friedrich Esterhuyse (PWC Amsterdam)*

*We discussed an updated schedule (attached) which was dealing with a possible additional sale of 13,273,796 ordinary shares. This would leave us owning 6.54% of the nominal value of the shares.*

*PVDH confirmed that this sale would qualify for the participation exemption and that no tax liability would arise.*

*On the issue as to whether the participation exemption would continue for the remaining preference shares PVDH stated that there was good technical support that the participation exemption would continue to apply. We will be required by the Dutch Tax Authorities to inform them over the coming weeks of the change in shareholding and this will give us certainty going forward as to our position. If the participation exemption cease to apply LG's base costs for tax purposes would be stepped up to the current market value.*

*Paragraph 20 of the original application for the participation exemption outlined that JF was on the board of Fyffes and a member of various committees. It also outlined that DCC Corporate Finance was an adviser to Fyffes. PVDH confirmed that if JF was to resign from the board of Fyffes, LG would need to inform the Dutch Tax Authorities of this. The Tax Authorities may consider this a significant change of the commercial facts and the participation exemption may be withdrawn. In this instance LG would get a step up on its base cost for tax purposes to the current market value.*

*TOD is to confirm the facts discussed in a note to us.*

*Fergal/Mairead"*

8.2.21 There followed a number of documents, dated the 4th February, 2000, whereby Mr. Diepenhorst, on behalf of Lotus Green Limited, requested Mr. Scholefield, on behalf of S&L Investments Limited and Development Capital Corporation Limited, to deliver certain share certificates to Davys in respect of the sale of the first tranche of shares on the 3rd February, 2000.

8.2.22 On the 4th February, Mr. O'Driscoll of Price Waterhouse Coopers, Dublin, sent a fax letter of advices confirming the contents of the telephone conversation between PWC

Netherlands, PWC Dublin and Mr. O'Dwyer and Ms. O'Malley of DCC. On the same day Mr. van der Hoeven of PWC, Amsterdam, also wrote to Mr. O'Dwyer confirming the position under Dutch tax law and confirming the advice that had been given on the telephone. On the same day Mr. van der Hoeven also wrote to Mr. O'Driscoll, and copied Mr. O'Dwyer, confirming that Mr. O'Driscoll had understood correctly the matters discussed in the telephone conversation, subject to two small amendments. Later on the same day, the 4th February, 2000, Mr. van der Hoeven made the amendments to his letter and sent it to Mr. O'Dwyer and to Mr. O'Driscoll.

8.2.23 On the 4th February, 2000, Mr. Michael Scholefield, on behalf of S&L Investments Limited, sent a Section 67 notice to Mr. Philip Halpenny, Secretary of Fyffes, in the following terms:-

"*S&L Investments Limited*
*DCC House*
*Stillorgan*
*Blackrock*
*Co Dublin*

*4 February 2000*

*Philip Halpenny Esq.*
*Secretary*
*Fyffes plc*
*1 Beresford Street*
*Dublin 2*

***Section 67 Companies Act 1990***

*Dear Philip,*

*In compliance with our obligations under the above we hereby notify you on our own behalf as registered holders, and on behalf of Lotus Green Limited, a fellow subsidiary of DCC plc, as beneficial owner, of the disposal on 3 February 2000 of 7,765,280 ordinary shares in Fyffes plc being the entire holding of ordinary shares in Fyffes plc registered in our name.*

*Yours sincerely,*

*Michael Scholefield*
*Secretary"*

8.2.24 On the same day, DCC plc sent a similar note in the following terms:-

*DCC*

*MS/MD*

*4 February 2000.*

*Philip Halpenny Esq.*
*Secretary*
*Fyffes plc*
*1 Beresford Street*
*Dublin 2*

***Section 67 Companies Act 1990***

*Dear Philip,*

*In compliance with our obligations under the above we hereby notify you on our own behalf as registered holders, and on behalf of Lotus Green Limited, subsidiary of DCC plc, as beneficial owner, of the reduction in our holding of ordinary shares in Fyffes plc from 23,404,213 ordinary shares to 13,273,796 ordinary shares through the disposal of 10,130,417 ordinary shares on 3 February 2000.*

*Yours sincerely,*

*Michael Scholefield*
*Secretary"*

8.2.25 On the same day, Mr. Halpenny notified the Stock Exchange that Fyffes had received the notification from S&L Investments Limited and DCC plc.

8.2.26 On the 4th February Mr. Neil McCann of Fyffes sent a 'Private and Confidential' letter to Mr. Flavin in the following terms:-

*"Fyffes plc*
*The Ramparts*
*Dundalk*
*Co. Louth*

*Private & Confidential*

*4 February 2000*

*Mr. J. F. Flavin,*
*Deputy Chairman & Chief Executive,*
*DCC plc,*
*Brewery Road,*
*Stillorgan, Blackrock,*

*Co. Dublin.*

*Dear Jim,*

*Further to our meeting last evening it is encouraging to know 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 augurs well for the balance.*

*With regard to your resignation, it is helpful that you are prepared to remain on the board if we so desire until the AGM. I think perhaps it should take effect from the end of next week, by which time the newspaper publicity should have died down. I will give you an answer on this point early next week after I have consulted at this end.*

*I very much appreciate and accept unreservedly your assurance of co-operation on other matters, as discussed last evening.*

*Kind regards.*

*Sincerely,*
*Neil"*

8.2.27 Mr. Flavin replied to that letter on the same date, copying Mr. Denis Bergin and Mr. Gerry Scanlan, in the following terms:-

*"DCC*

*Strictly Private & Confidential*
*JFF/cl*

*4 February 2000*

*Mr. Neil McCann*

*Chairman*

*Fyffes plc*

*The Ramparts*

*Dundalk*

*Co. Louth*

*Dear Neil,*

*I very much enjoyed the meeting with you and David last night and I appreciated the thought behind the bottle of bubbly. I think our part exit and likely complete exit in the near term is good for Fyffes and for DCC. More about that if and when a complete exit takes place.*

*As I said last night I think it is appropriate that I should resign from the board which I think we should implement in a sensible time from Fyffes' perspective. I would appreciate hearing back from you on this point. In the meantime I would like to formally resign from the Chairmanship of the Compensation Committee with immediate effect. It has been a very onerous and time consuming responsibility and I'm not quite sure this was recognised. Furthermore, if the board has concluded that I am not independent under the terms of the Combined Code (a view with which I disagree) I think it is another reason for replacing me with one of the "independent" directors.*

*I believe there is a very positive reaction in the market to the level of institutional interest in Fyffes stock. The sale of part of our holding has served to illustrate that the current run up in the share price is very real.*

*With best wishes*

*Yours sincerely*
*Jim Flavin*
*Chief Executive/Deputy Chairman*

*c.c.* *Denis Bergin*
*Gerry Scanlan"*

8.2.28 A further Stock Exchange Announcement was made by DCC on the 9th February, 2000, announcing the sale of a further 8 million ordinary shares in Fyffes.

8.2.29 Also on the 9th February, Mr. Flavin wrote again to Mr. Neil McCann, Chairman of Fyffes as follows:-

"*DCC*

*Strictly Private & Confidential*
*JFF/cl*

*9 February 2000*

*Mr. Neil McCann*
*Chairman*
*Fyffes plc*
*The Ramparts*
*Dundalk*
*Co Louth*

*Dear Neil,*

*Further to my call this morning I confirm that I am resigning with immediate effect from the board of Fyffes plc.*

*As agreed I spoke to Mary Finan about a minor adjustment to the release to reflect the fact that we have now disposed of most of our shareholding. I very much appreciate the kind and generous comments in the announcement.*

*As you know I have not found the role of non-executive director on the board of Fyffes easy but I depart the scene with very considerable admiration and respect for you and your family and with a sense of nostalgia. I will write to you separately to record our appreciation of your terrific drive and commitment which has resulted in a very substantial profit for DCC.*

*With every good wish*

*Yours sincerely*
*Jim Flavin*
*Chief Executive/Deputy Chairman"*

8.2.30 A further Section 67 Notice was sent by Michael Scholefield, on behalf of DCC, to Philip Halpenny on the 9th February in respect of the sale of the further 8 million shares.

8.2.31 The draft minute from the DCC board meeting of the 7th February, 2000, included the following extract:-

*"During a discussion on DCC's food division it was noted that the board of Lotus Green, a Dutch subsidiary of the Group, had recently reviewed its strategy in relation to its interest in Fyffes and had on 3 February 2000 disposed of 17.9 million ordinary shares in Fyffes realising for the Group proceeds of €57.3 million, a profit on cost of €45 million and a profit on book value of €40 million."*

8.2.32 There is a manuscript note on this document which says *"talk to TOD and make sure its ok ASAP".* Below this comment there is a tick followed by *"agreed with TOD, MOM 10/2/00".*

8.2.33 On the 15th February a third and final Stock Exchange Announcement was issued by DCC in relation to the sale of the balance of its 5,273,796 ordinary shares in Fyffes, and stating that DCC continued to hold 4,621,901 convertible preference shares in Fyffes. It also stated that, following this disposal and the disposals announced on the 4th and 9th February, DCC had sold its entire holding of 31,169,493 ordinary shares in Fyffes, which had realised proceeds of €106.7 million, a profit on costs of €85 million and a profit on book value of €76 million.

8.2.34 In respect of each of the three tranches of shares sold, Mairead O'Malley drafted a note for Tom Diepenhorst to send to the Stockbrokers formally confirming agreement to the sales at the respective prices. This was, in turn, faxed by Mr. Diepenhorst from Holland to either Davys or Goodbody's, respectively.

8.2.35 On the 7th March, 2000, Fergal O'Dwyer and Mairead O'Malley wrote to Jim Flavin by internal memorandum:-

"*Re: Disposal of Shares in Fyffes by Lotus Green*

*Under the terms of our Participation Exemption for Lotus Green's interest in Fyffes we are required to inform the Dutch Tax Authorities of any*

*changes relating to Lotus Green's interest in Fyffes. We attach, for your information, draft letter which PwC are proposing to submit outlining the recent disposals of shares in Fyffes and noting your resignation from the Board of Fyffes.*

*Lotus Green continues to hold more than 5% of the nominal value of the paid up share capital and this should ensure that the participation exemption should continue to apply. If the Dutch Tax Authorities decide that the participation exemption will no longer apply, Lotus Green's base costs in Fyffes will be stepped up to the market value at the date from the which the Tax Authorities decide the participation exemption is no longer applicable from.*

*Mairead*
*Fergal/Mairead"*

8.2.36 On the 20th March, 2000, Fyffes plc made a Stock Exchange Announcement as follows:-

***"Fyffes Plc***
***Stock Exchange Announcement***

*Statement by Neil McCann, Chairman,*
*at the Fyffes' Annual General Meeting*
*on 20 March 2000*

***Fresh produce trading***

*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 months 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."*