

THE REASONABLE INVESTOR TEST ACROSS TWO CONTINENTS

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I. INTRODUCTION

Fyffes Plc v DCC Plc [2007] IESC 36 (*'Fyffes'*) is a recent appeal decision of the Supreme Court of Ireland concerning the 'reasonable investor' test for insider trading.

At first instance, applying the 'reasonable investor' test in the earlier 2005 Irish High Court¹ decision, Justice Laffoy found that the relevant information was not 'price sensitive' and therefore could not form the basis of a claim of insider trading. The civil liability action had been taken by Fyffes Plc (Fyffes) against one of its directors, Mr James Flavin, and the company he had founded, DCC Plc (DCC).² In a unanimous decision in 2007, five justices of Ireland's highest court rejected the 'reasonable investor' test as construed by Laffoy J. The Supreme Court stated that the test was not provided for in the Irish statute or in the applicable EU Directive.³ The court allowed the appeal against Mr Flavin and DCC and awarded damages to Fyffes.

Laffoy J deduced that a 'hypothetical test' may be needed to profile the reasonable investor:

As a general proposition, it is not clear to me that it should be necessary to profile the 'reasonable investor' any more than it is necessary to profile the reasonable man in applying the principles of the tort of negligence. However, on the facts and arguments in this case, a question has arisen as to whether the profile has to take account ... of the enthusiasm for internet stocks ... The question is whether it must be assumed that the reasonable investor would be infected by, or immune from, the market's infatuation with internet stocks or stocks with an internet dimension.⁴

The 'reasonable investor' test is an extension of the test in tort and refers, with varying degrees of complexity, to a 'reasonable person'⁵ who could be considered an investor in the relevant securities. In Australia, legislative changes to the insider trading provision were introduced largely as a result of the recommendations of the Griffiths Report⁶ in 1989 and the earlier Anisman⁷ study of insider trading in Australia. Both documents recognised the issue as 'essentially a problem of non-disclosure'.⁸ Non-disclosure accentuates the difference between the value of the securities, as the insider knows it, and the value placed on these securities by the marketplace. In the second recommendation in the Griffiths Report, the Committee 'suggested that 'materiality' be defined by reference to a reasonable

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1 *Fyffes Plc v DCC Plc* [2005] IEHC 477.

2 A discussion of this earlier High Court decision by Laffoy J may be found in: Josephine Coffey 'A Civil Liability Action for Insider Trading: *Fyffes Plc v DCC Plc* [2005] IEHC 477' (2006) *ALTA Refereed Conference Papers* 'Company Law' Interest Group, 1-14.

3 *Fyffes Plc v DCC Plc* [2007] IESC 36 (Denham, Fennelly, Macken, Finnegan JJ and Geoghegan J concurring).

4 *Fyffes Plc v DCC Plc* IEHC 2002 No. 1183P (21 December 2005), 232.

5 The standard to be applied to the materiality of undisclosed information could be borrowed from s 52 of the *Trade Practices Act 1974* (Cth). Deane and Fitzgerald JJ in *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177, 202 rely on an expansive reasonable person test, used by Lockhart J in *Puxu Pty Ltd v Parkdale Custom Built Furniture Pty Ltd* (1980) 31 ALR 73 (*'Puxu'*). The class of 'reasonable' persons that is likely to be misled or deceived is wide. It includes 'the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations': *Puxu* (1980) 31 ALR 93 (Lockhart J). This process for applying the reasonable person is 'more concerned with describing the class than with identifying any particular member. The criterion for selecting the class member is reasonableness': *National Exchange Pty Ltd v Australian Securities & Investments Commission* [2004] FCAFC 90, 25.

6 Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of the Commonwealth of Australia, *Fair Shares for All: Insider Trading in Australia* (1989) (Griffiths Report).

7 Philip Anisman, *Insider Trading Legislation for Australia: An Outline of the Issues and Alternatives* (1986).

8 *Ibid* 2.

person test'.⁹ The majority of the Griffith Report's recommendations were accepted by the Government and new provisions on insider trading came into effect on 1 August 1991. One of the new provisions was:

a statutory definition of inside information based on a "reasonable person" test; a person will be prohibited from trading in securities whilst knowingly in possession of information that is not generally available and if it were generally available a reasonable person would expect it to have a material effect on the price or value of securities.¹⁰

The 'reasonable investor' test has become more complex and forms part of the definition of 'material effect' for the insider trading prohibitions and the continuous disclosure requirements in the *Corporations Act 2001*.¹¹ The Federal Court of Australia employed the 'reasonable investor' test in determining the materiality or price sensitivity of information in the failed 2007 initial corporate civil penalty proceedings against Citigroup¹². Are there any implications for Australian law in the Supreme Court of Ireland's *Fyffes* decision to reject the 'reasonable investor' test?

II. AUSTRALIAN INSIDER TRADING CASES

In Australia, there is no example comparable to the civil liability action¹³ taken by Fyffes against one of its directors for insider trading in the company's securities. Insider trading proceedings in Australia are traditionally initiated by the regulator or referred to the Director of Public Prosecutions (DPP) if a criminal action is pursued. A review of the main Australian insider trading cases discloses little detailed discussion of the 'reasonable investor' test in s 1042D of the *Corporations Act 2001*. In most instances, the court appears to treat the test as if it were a simple 'materiality' test of the information's price sensitivity. Alternatively, the definition in the provision is quoted without further attempt at application of the 'reasonable investor' test¹⁴ to the share price. On other occasions, it is simply ignored. However, in three recent Australian insider trading cases, against Hannes, Petsas and Citigroup,¹⁵ the Australian courts attempted some interpretation of the requirements for materiality of the information in the context of insider trading.

9 Roman Tomasic, B Pentony, *Casino Capitalism? Insider Trading in Australia* (1991) 129.

10 Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of the Commonwealth of Australia, *Corporate Practices and the Rights of Shareholders*, (1991) 2.6.2-3.

11 'When a Reasonable Person would take Information to have a *Material Effect* on Price or Value of Division 3 Financial Products: For the purpose of this Division, a reasonable person would be taken to expect information to have a *material effect* on the price or value of particular Division 3 financial products if (and only if) the information would, or would be likely to, influence persons who commonly acquire Division 3 financial products in deciding whether or not to acquire or dispose of the first-mentioned financial products.' *Corporations Act 2001* (Cth) s 1042D. Also, 'Sections 674 and 675 – Material Effect on Price or Value: For the purposes of sections 674 and 675, a reasonable person would be taken to expect information to have a material effect on the price or value of ED securities of a disclosing entity if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the ED securities.' *Corporations Act 2001* (Cth) s 677.

12 *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Limited* [2007] FCA 963, 569-570.

13 *Corporations Law 2000* (Cth) s 1317E enables ASIC to take a civil penalty action against a director for misuse of insider information under s 183 and the company may apply for a compensation order s 1317H(2) under s 1317J whether or not a declaration of contravention has been made. A similar financial services compensation order is also available to the company under s 1317HA following a contravention of s 1043A.

14 *TSC Industries Inc v Northway Inc* 426 US 438 (1976), 449 is cited as authority for the test in several Australian cases, including failure to comply with the continuous disclosure provision. See, eg, *Kim Riley in His Capacity as Trustee of the Ker Trust v Jubilee Mines NL* [2006] WASC 199, 289. Also at 59, the simpler 'reasonable person' test found in the then ASX listing rule 3A is applied: 'There are two concepts present in that requirement. The first is that from the point of view of a "reasonable person" that it is to be determined whether the information would have an effect on the price. It is not from the point of view of a stockbroker or a geologist or a seasoned trader, but of a reasonable person. Second, the information is only to be released if there is an expectation that it would have a "material effect" on the price or value of securities. So information that might be thought to cause a stock trading at \$20 to jump by 1 cent would probably not be "material", whereas information that might cause a stock trading at 10 cents to jump by 1 cent, would be "material".'

15 *R v Hannes* [2002] NSWSC 1182 ('Hannes') was a criminal prosecution that resulted in a conviction. *ASIC v Petsas and Miot* (2005) 23 ACLC 269 was the first civil penalty proceeding for insider trading. It was uncontested as the defendants pleaded guilty. *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Limited* [2007] FCA 963 ('Citigroup') was an unsuccessful civil penalty action against a corporate entity.

Jacobson J, in *Citigroup*, a case about corporate insider trading, at Issue 15 discussed whether the information was ‘price-sensitive’:

In order for the information to be taken to have the necessary material effect on the price of Patrick shares, it had to be information that ‘would, or would be likely to, influence persons’ who commonly acquire shares in deciding whether or not to acquire or dispose of Patrick shares.¹⁶

Although Jacobson J found that much of the alleged information was supposition and was not generally available, he concluded that if the information had been available to the market, then the better view was: ‘that it would not have had the requisite material effect at the time when the first insider trading is alleged to have taken place’.¹⁷ Further, at Issue 18, Jacobson J, while alluding to the ‘reasonable investor’ test in the provision, actually used the market reaction to the information as establishing materiality, as per Denham J in *Fyffes*:

Moreover, it seems to me to be likely that information as to the timing of the bid would have been price sensitive within the test stated in s 1042D of the *Corporations Act*. This seems to me to be borne out by the fact that Patrick shares opened on the day of the announcement at AUD\$7.15, being 10.9% above the closing price on Friday 19 August 2005, and, during the course of very heavy trading on 22 August 2005, rose to AUD\$7.38.¹⁸

Earlier in *Hannes*, an insider trading criminal case, the court referred to the market reaction in determining the materiality or price sensitivity of the information. In the final appeal case¹⁹ of Simon Hannes in the NSW Court of Criminal Appeal, Basten JA²⁰ acknowledged that ‘for the purposes of materiality, the information must be assessed objectively in the context of what is generally available’. In Hannes’ earlier appeal to the NSW Court of Criminal Appeal, Spigleman CJ highlighted the nexus between objective materiality and actual price movement. In doing this he cited the original lower court decision of Backhouse DCJ where she explained clearly ‘material effect’ in the provision:²¹

That is price sensitive, that is what that means, and where would you be likely to find that out, and where would people who commonly invest in securities [go] to find out information of a kind which may affect the price of the particular security, and that is in the market place. (AB2082-3)²²

In the first civil penalty action for insider trading, against Petsas and Miot in the Federal Court, Finkelstein J relied on a straightforward variation of market price to determine the materiality of the information:

The defendants did not have long to wait to learn that their strategy was successful, at least in a financial sense. On Tuesday January 14, BRL announced that it was in merger discussions with Constellation. The price of its shares immediately rose by about 17% to close at \$8.95. The share price kept rising until it reached \$10.50, being the cash value

¹⁶ *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Limited* [2007] FCA 963, 566.

¹⁷ *Ibid* 571.

¹⁸ *Ibid* 578.

¹⁹ Australian Securities & Investments Commission, ‘Court of Appeal dismisses appeal by Simon Hannes against conviction’ (*ASIC Media Release* 06-410, 2 November 2006): ‘Mr Hannes, a former executive director of Macquarie Bank Limited, was convicted on one charge of insider trading in the securities of TNT Limited (TNT) and two charges under the Financial Transactions Reports Act in the Sydney District Court in August 1999. He was jailed for two years and two months and fined \$110,000. However, the convictions were quashed following a decision by the New South Wales Court of Criminal Appeal in December 2000, and he was released after serving 15 and a half months of the sentence. In September 2002, following a 15-week retrial in the Supreme Court, Mr Hannes was again found guilty of the same offences. He was sentenced in December 2002 to two and a half years jail and served four months and nine days, in consideration of previous time served. This Court of Appeal judgment confirms that his conviction will stand’.

²⁰ *Hannes v DPP (Cth) (No 2)* [2006] NSWCCA 373, 385.

²¹ *Corporations Law 2000* (NSW) s 1002C.

²² *R v Hannes* [2000] NSWCCA 503, 253.

attributed to the shares under the proposed merger which, in due course, was effected by a scheme of arrangement.²³

III. RECENT DEVELOPMENTS IN THE IRISH COURTS

A. *The Irish High Court Decision*

The securities of both Fyffes and DCC were listed on the Irish Stock Exchange (ISE) and the London Stock Exchange (LSE). Fyffes, the issuer of the securities, took proceedings against DCC and companies associated with Mr Flavin, who was also one of Fyffes' directors, for trading on the basis of confidential management reports. The sale of more than 31 million Fyffes shares by Mr Flavin, as agent²⁴ for DCC and other companies, occurred from 3-15 February 2000 at the height of 'dot.com' speculation. Mr Flavin resigned as a director of Fyffes during this period, on 9 February 2000.²⁵ Following investigation of the transactions by the ISE and LSE, neither the Director of Public Prosecutions (DPP) in Ireland nor the regulator took action against the perpetrators for insider trading in Fyffes' shares. After a considerable delay,²⁶ Fyffes initiated a civil liability action for unlawful insider dealing based on s 108²⁷ of Part V of the *Irish Companies Act 1990* (IE).

The *Fyffes*²⁸ lower court decision rested on the judicial interpretation of price sensitivity and whether the defendant had knowledge that the information was price-sensitive at the time of dealing in the Fyffes' shares. The factual component, that the specific information contained in the reports to the board was not generally available, was not disputed by the parties.²⁹ It was the materiality or price sensitivity of the information that was contentious. As Laffoy J pointed out, there was very little guidance in the *Companies Act 1990* (IE) as to how the price-sensitivity test in s 108(1) should be applied and, as this was the first case in which any of the civil remedies provided for in Part V had been invoked, there was no authority within the jurisdiction to assist the Court.³⁰

After a three month hearing that concluded in July 2005, Laffoy J handed down her decision on 21 December 2005. Fyffes failed in its petition for €106 million compensation as Laffoy J concluded that:

Mr Flavin was not in possession of price-sensitive information at the dates of the share sales. Therefore, the dealing was not unlawful under s 108 and no civil liability arises under s 109.³¹

Subsequently, on 8 April 2006, Fyffes announced that it would appeal the decision to the superior court, the Irish Supreme Court.

B. *The Irish Supreme Court Decision*

All five justices of the superior court concurred in the judgment delivered on the 27 July 2007. Denham J, in delivering the judgment, stated that in spite of the many complex

²³ *Australian Securities and Investments Commission v Petsas* [2005] FCA 88, 9.

²⁴ *Fyffes Plc v DCC Plc* IEHC 2002 No. 1183P (21 December 2005), 58.

²⁵ *Ibid* 330.

²⁶ During this period, the Irish Supreme Court upheld on appeal the decision of the High Court in a separate dispute that expert reports were still deemed privileged when they were viewed by the ISE. *Fyffes Plc v DCC Plc* [2005] IESC 3 (Fennelly, McCracken JJ and Geoghegan J concurring in the Supreme Court of Ireland upheld on appeal the decision of Smyth J in the High Court of Ireland).

²⁷ Section 108(1) of the *Companies Act 1990* declares that: 'It shall not be lawful for a person who is, or at any time in the preceding 6 months has been, connected with the company to deal in any securities of that company if by reason of his so being, or having been, connected with that company he is in possession of information that is not generally available, but, if it were, would be likely materially to affect the price of those securities.' The full text of the provision is shown in the Appendix to this paper.

²⁸ *Fyffes Plc v DCC Plc* IEHC 2002 No. 1183P (21 December 2005).

²⁹ *Ibid* 228, 229.

³⁰ *Ibid* 206.

³¹ *Ibid* 363.

issues that had come before Laffoy J in the 87-day High Court hearing, the Supreme Court was only required to consider a single issue, that of 'price sensitivity', in the context of alleged insider dealing.³² The appeal court found that the trial judge had failed to assess the information by reference to the price-sensitivity or materiality test in the statute. '[I]nstead she purported to develop a "reasonable investor" test, by reference to case law'.³³

Denham J believed that version of the 'reasonable investor', formulated by Laffoy J in the High Court, found no support in any of the authorities and it was not provided for by the statute. It was inconsistent with what the Court was required to do under the statute.³⁴ The test was not considered by the appeal court to be an appropriate legal tool as there is no reference to the 'reasonable investor' in s 108 of the *Companies Act 1990* (IE), which implemented the EU Council Directive on insider dealing that was current at the time of the share sales.³⁵

The Supreme Court reasoned that it was more appropriate to apply a retrospective test of materiality by viewing the impact of the information on the price of the relevant securities once the information was finally made public. Denham J was critical of the lower court's approach:

The trial judge failed to pay any regard whatsoever to the actual impact upon Fyffes' share price when the information in the possession of Mr Flavin on the dates on which he dealt (or information substantially similar thereto) was ultimately released to the market on 20 March 2000.³⁶

Ignoring the market reaction on release of the information, the High Court used a legal principle referred to as the 'reasonable investor'³⁷ to deduce whether, as a matter of probability, on the 3 February 2000, the reasonable investor would conclude the information would impact on Fyffes' share price 'in the context of the total mix of information available ... would probably impact on Fyffes' share price to a substantial or significant degree'.³⁸ *TSC Industries Inc v Northway Inc* is US authority for a judicial test where materiality was held to be a function of the size of the effect that an event has on a company.³⁹ Marshall J, in delivering the opinion of the US Supreme Court, stated that there must be '... a substantial likelihood that the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available'.⁴⁰

In *Fyffes*, Denham J stated that there were 'a myriad of factors and investors in a market, and to choose some or either as representative of a reasonable investor appears subjective and arbitrary'.⁴¹ The real issue is the effect of the information on the share price in the market and there is 'no reason in law to view the market through the prism of a "reasonable investor"'.⁴² The Supreme Court found no assistance from the United States case law that had been so persuasive in the High Court's acceptance of the 'reasonable investor' test. To quote Denham J: 'I respectfully disagree with the adoption by the learned trial judge of a test grown upon such cases. Irish statute law is different to that of the United States'.⁴³

Jeremiah Burke⁴⁴ has provided detailed academic analysis of the High Court decision of Laffoy J from the perspective of US securities law. Burke accepted the use of the

³² *Fyffes Plc v DCC Plc* [2007] IESC 36, 1.

³³ *Ibid* 7(ii).

³⁴ *Ibid*.

³⁵ *Council Directive* 13 November 1989 (89/592/EEC).

³⁶ *Fyffes Plc v DCC Plc* [2007] IESC 36, 7(iii).

³⁷ *Fyffes Plc v DCC Plc* IEHC 2002 No. 1183P (21 December 2005), 342.

³⁸ *Fyffes Plc v DCC Plc* [2007] IESC 36, 22.

³⁹ *TSC Industries Inc v Northway Inc*, 426 US 438 (1976)

⁴⁰ *Ibid* 449.

⁴¹ *Fyffes Plc v DCC Plc* [2007] IESC 36, 22.

⁴² *Ibid* 23.

⁴³ *Ibid*.

⁴⁴ Jeremiah Burke, 'Ireland Goes Bananas: Irish Insider Trading Law and Price-sensitive Information after *Fyffes v DCC*' (2007) 30 *Hastings International and Comparative Law Review* 453.

‘reasonable investor’ test but acknowledged other commentators on the case who thought that a simpler ‘materiality’ test, indicated by ‘a market reaction might be a good indicator of whether information is material’⁴⁵ or price-sensitive. The article concluded with the statement that: ‘Irish insider trading law focuses on whether the information is price-sensitive rather than merely on whether the information is material’.⁴⁶ This distinction between ‘price sensitive’ and ‘material’ information in the market is perplexing and does not seem to apply in the context of either the Irish or Australian statute, where the terms seem synonymous.

The Supreme Court found that the relevant test, as set out clearly in the *Companies Act 1990* (IE) s 108(1),⁴⁷ is an objective test — that is, if the information was made generally available, would it be likely to materially affect the price of the shares on the market? The Court reasoned that the answer was equally clear:

There was information. It was not generally available. It was bad news, it was information of a risk, it would concern the market. It was information likely to affect the price of the shares on the market. In considering the information it is not appropriate to offset that with information already in the market.⁴⁸

Based on this simplified ‘materiality’ test, the Supreme Court allowed the appeal and awarded damages to Fyffes. Denham J concluded: ‘I am satisfied that the November and December 1999 Trading Reports contained price-sensitive information’.⁴⁹

IV. LEGISLATIVE DEVELOPMENTS

Fyffes, in its action against DCC and Mr Flavin, invoked the provisions of the *Companies Act 1990* (IE), which implements the EU Council Directive on insider dealing.⁵⁰ Part V of the Act creates civil liability (s 109) and criminal liability (s 111) in relation to insider trading. Section 108 was the basis of the civil liability claim and it is specifically concerned with a person connected with the company.

Legislation was introduced in 1995 to implement the 1993 EC Investment Services Directive,⁵¹ which named the Central Bank and Financial Services Authority of Ireland as the competent authority for authorising stock exchanges in Ireland.⁵² The Minister then designated the ISE as the competent authority for the purpose of implementing the EU directives already adopted by Ireland under the *European Communities (Stock Exchange) Regulations 1984*.⁵³ By means of the statutory authority of the *Companies Act*,⁵⁴ the ISE undertook reviews of relevant company announcements and unusual price movements, as part of its responsibility for the investigation of possible cases of insider trading. The insider trading activity in Fyffes shares occurred within this regulatory environment.

A. The ‘MAD’ Effect on Corporate Law in Ireland

The *Market Abuse (Directive 2003/6/EC) Regulations 2005* (Ireland)⁵⁵ came into operation on 6 July 2005 to implement the Market Abuse Directive (MAD) of the European Community. Part 2 of the Regulations is concerned with insider trading and, in particular, reg 5 prohibits the use or disclosure of inside information by a person who is in possession of such information.⁵⁶ There is no explicit or implied reference to a ‘reasonable person’

45 Ibid 465.

46 Ibid 474.

47 *Companies Act 1990* (IE) s 108 (1).

48 *Fyffes Plc v DCC Plc* [2007] IESC 36, 31.

49 Ibid 32.

50 *Council Directive* 13 November 1989 (89/592/EEC).

51 European Commission, 1993, *Directive* (93/22/EC).

52 *Stock Exchange Act 1995* (IE), Part II Stock Exchanges, s9 Grant of approval.

53 *European Communities (Stock Exchange) Regulations 1984*, reg 7.

54 *Companies Act 1990* (IE) s115.

55 Irish Statute Book, *Statutory Instruments* S.I. No 342/2005.

56 Ibid reg 5(1), (2).

test in this prohibition. In contrast to reg 5, reg 10 is similar to the Australian ‘continuous disclosure’⁵⁷ provision and places an obligation on the issuer to publicly disclose inside information without delay:

Regulation 10(1)...the issuer of a financial instrument shall publicly disclose without delay inside information –

- a) which directly concerns the issuer, and
- b) in a manner that enables fast access and complete, correct and timely assessment of the information by the public.⁵⁸

The obligation referred to above in reg 10 of the *Market Abuse Regulations* is conveyed in terms similar to those of the Financial Services Authority (FSA) in its Handbook,⁵⁹ as discussed below. The Financial Regulator is now the competent authority in Ireland for the purposes of the Regulations and has issued additional Rules⁶⁰ for the guidance of disclosure under reg 10 that explicitly require the issuer to use the ‘reasonable investor’ test in identifying insider information. Rule 5 provides the issuer with general guidance on disclosure, while r 5.3 is specific guidance to the issuer in identifying inside information using the ‘reasonable investor’ test.

To implement another EC Directive,⁶¹ the *Stock Exchange Act 1995* (IE) has been replaced by the *Markets in Financial Instruments and Miscellaneous Provisions Act 2007* (IE) as the relevant legislation governing the ISE.⁶² Certain duties are still delegated to the stock exchange and the ISE retains sole responsibility for the investigation of insider trading activities under Part V of the *Companies Act 1990* (IE). ‘[H]owever, since the introduction of MiFID the Exchange is obliged to report any market abuse identified on its markets to the Financial Regulator’.⁶³

B. The Relationship with UK Regulation

The ‘reasonable investor’ test is also excluded from the definition of inside information in the *Criminal Justice Act 1993* (UK). This statute is in accord with the Irish *Companies Act 1990* (IE) in that it employs the simpler market-related test of price sensitivity or materiality of the information.

[I]nside information is ‘price-sensitive information’ in relation to securities, if and only if the information would, if made public, be likely to have a significant effect on the price of the securities.⁶⁴

However, the *Market Abuse Directive* has been implemented in the *Financial Services and Markets Act 2000* (UK), which adopts the following ‘reasonable investor’ test.

[M]arket abuse is behaviour... [that] is based on information which is not generally available to those using the market but which, if available to a ‘regular user’ of the market, would or would be likely to be regarded by him as relevant when deciding the terms on which transactions in investments of the kind in question should be affected.⁶⁵

In this section, a ‘regular user’, in relation to a particular market, means a ‘reasonable person’ who regularly deals on that market in investments of the kind in question.⁶⁶

⁵⁷ *Corporations Act 2001* (Cth) s 674.

⁵⁸ Irish Statute Book, *Statutory Instruments* S.I. No 342/2005, reg 10.

⁵⁹ Financial Services Authority (UK), ‘Disclosure of inside information by issuer’, *FSA Handbook*, DTR 2.2.4 <<http://fsahandbook.info/FSA/html/handbook/DTR/2/2>> at 28 November 2008.

⁶⁰ Financial Regulator (Ireland), *Market Abuse Rules* (March 2006) r 5.3.

⁶¹ *Markets in Financial Instruments Directive* (MiFID) (2004/39/EC as amended by 2006/31/EC and 2006/73/EC).

⁶² Irish Stock Exchange, ‘Markets in Financial Instruments Directive (MIFID)’ <<http://www.ise.ie/index.asp?locID=526&docID=-1>> at 8 December 2008.

⁶³ Irish Stock Exchange, ‘Market Abuse Regulations’ <<http://www.ise.ie/index.asp?locID=312&docID=-1>> at 8 December 2008.

⁶⁴ *Criminal Justice Act 1993* (UK) s 56(2).

⁶⁵ *Financial Services and Markets Act 2000* (UK) s 118(1), (2).

⁶⁶ *Ibid* s 118(10).

The FSA Handbook, which has been revised to incorporate the Transparency Directive as part of the listing rules, gives particular reference to a ‘reasonable investor’ test. In this context, the test is to be used as guidance for an issuer of securities in determining the likely price significance of the information.⁶⁷ In this situation the ‘reasonable investor’ test could play a more significant role as it is evaluating the likely materiality of information before it is made public, rather than valuing the price sensitivity of the information in hindsight after the insider trading. These instructions to the disclosing entity, offered in both the Irish Market Abuse Rules and the *FSA Handbook* in the UK, are based on the ‘reasonable investor’ test. It can be argued that this test is more appropriate in the context of disclosure of information than in the prohibition of insider trading. The simpler, market price variation ‘materiality’ test, applied retrospectively, as outlined by the Supreme Court in *Fyffes* and supported by the *Companies Act 1990* (IE) and the *Criminal Justice Act 1993* (UK), seems more efficient in the context of an alleged insider transaction.

C. The Next Chapter

The ISE has announced plans to establish a separate supervisory body to remove any perception that it is not independent in its supervision. It has also appointed a ‘career regulator’ who formerly led the market abuse investigation team at the FSA in the UK. At the time of the *Fyffes* case, the ISE investigated suspected instances of insider trading and, if required, forwarded the files to the DPP. Following adoption of the *Market Abuse Directive*, the Director of Corporate Enforcement has been given the responsibility of investigating insider trading cases.⁶⁸

In spite of the two long and detailed court hearings initiated by *Fyffes*, the Director of Corporate Enforcement in Ireland is dissatisfied with the outcome. He has been quoted as saying that matters heard during the High Court and Supreme Court proceeding between *Fyffes* and DCC were not ‘evidentially useful’⁶⁹ to the Office of Corporate Enforcement. The Director moved an application before the High Court for the appointment of inspectors to further investigate insider trading issues within DCC and the transfer and sale of shares in *Fyffes*.⁷⁰ The High Court agreed with the Director that a ‘thorough investigation’⁷¹ is in the public interest and has appointed Senior Counsel⁷² to provide an interim report to the court by the end of January 2009. Contrary to expectations, the boards of DCC and its related companies decided not to appeal to the Supreme Court on the appointment of an inspector by the Irish High Court.

V. IMPLICATIONS FOR AUSTRALIAN LAW

The Australian Treasury⁷³ has stated its aim of providing greater protection for investors against insider trading and the Australian Securities & Investments Commission (ASIC) has nominated among its priorities the monitoring and enforcing of laws relating to insider trading.⁷⁴ At July 2008, following referrals to ASIC from the Australian Securities

67 Financial Services Authority (UK), *FSA Handbook* Disclosure of inside information by issuer, DTR 2.2.4 Reasonable investor test (Article 1(2) 2003/124/EC).

68 Simon Carswell, ‘Stock Exchange Move on Insider Trading’, *The Irish Times* (Dublin), 18 July 2008.

69 Arthur Beesley, ‘Findings on *Fyffes* Deal Could Take a Year’, *The Irish Times* (Dublin), 29 May 2008.

70 Mary Carolan, ‘Circumstances Suggest Unlawfulness, Says Judge. Court Inspector to Investigate DCC’, *The Irish Times* (Dublin), 30 July 2008.

71 *Ibid.*

72 Arthur Beesley, ‘Shipsey a “Sound” and “Measured” Barrister’, *The Irish Times* (Dublin), 30 July 2008.

73 Commonwealth of Australia, *Insider Trading*, Position and Consultation Paper, Treasury (2007) 1-32 (Released by the Parliamentary Secretary to the Treasurer on 2 March 2007).

74 ‘Six priorities we will focus [on] over the next 12 months ... ASIC monitors and enforces laws relating to insider trading, continuous disclosure and market manipulation ... A special team (to be headed by a senior person) is being established to determine what additional actions ASIC (in cooperation with ASX) can take’: Tony D’Aloisio, Chairman, Australian Securities & Investments Commission, ‘Opening Statement on ASIC’s Priorities for the next 12 Months’ (Senate Standing Committee on Economics, 30 May 2007) 3-4.

Exchange (ASX)⁷⁵ of ‘suspicious market transactions’, there were 61 active investigations. Of these, 29 were instances of insider trading where the regulator must ‘prove a case up to the point that legal proceeding can be brought’.⁷⁶ Six insider trading matters are with the Commonwealth DPP.⁷⁷ There is always difficulty in providing the requisite proof to satisfy the criminal standard, and even that of a civil penalty proceeding. Part of this difficulty will be in ensuring that the ‘inside’ information at the core of the proceedings complies with the complexity of the ‘reasonable investor’ test in s 1042D:

[where] a reasonable person would be taken to expect information to have a *material effect* on the price or value of particular Division 3 financial products if (and only if) the information would, or would be likely to, influence persons who commonly acquire Division 3 financial products in deciding whether or not to acquire or dispose of the first-mentioned financial products.

Could insider trading regulation be more successfully enforced if it tested whether the alleged ‘insider’ ‘is in possession of information that is not generally available, but, if it were, would be likely materially to affect the price of those securities’? This is the simpler test of ‘materiality’ or price sensitivity of the *Companies Act 1990* (IE) and similar to that of the *Criminal Justice Act 1993* (UK). It is also the test applied in the Supreme Court of Ireland’s *Fyffes* decision to reject the ‘reasonable investor’ test.

⁷⁵ Australian Securities Exchange *Annual Report* 2008, 29. For the financial year to 30 June 2008, ASX reported referring 27 potential breaches of insider trading to ASIC, a decline of 21% on the preceding comparative period.

⁷⁶ Belinda Gibson, Commissioner, Australian Securities & Investments Commission, ‘Improving Confidence and Integrity in Australia’s Capital Markets’ (Presentation to the Committee for Economic Development of Australia, Sydney, 8 July 2008) 4.

⁷⁷ Australian Securities & Investments Commission, ‘ASIC Releases Guidance on Directors’ Share Trading’ (*ASIC Media Release* 08-139, 27 June 2008).

