CHAPTER 12. SUMMARY AND ACKNOWLEDGEMENTS:

12.1. Summary

12.1.1 The Director of Corporate Enforcement fulfils a vital role in ensuring and promoting the highest standards of corporate responsibility and compliance in Ireland. He is both a corporate 'policeman', ensuring compliance with the requirements of the Companies Acts, and the enforcer of good corporate behaviour and governance. The limited liability company, in its public and private form, is his bailiwick. The proper functioning of the Irish economy (conducted largely through the medium of the limited liability company) depends on 'obedience to the rule of law' by those who benefit from trading with the privilege of limited liability and those who govern companies on behalf of all stakeholders.

12.1.2 Since the establishment of the Office of the Director of Corporate Enforcement in November 2001, the primary responsibility for initiating the investigation of companies has fallen to the Director. To ensure the effectiveness of the Office, he has extensive powers of investigation, including the power to seek the appointment of a High Court Inspector.

12.1.3 In this matter, for the reasons stated in the affidavit grounding the application, the Director chose to avail of the High Court Inspector option. He was motivated to act from his concern following the Supreme Court decision in **Fyffes plc v DCC plc and Others** which held that Jim Flavin, CEO and Deputy Chairman of DCC (a major Irish public company), "dealt" in shares in Fyffes (another major Irish public company of which he was a Director) when he was in possession of 'price sensitive information' in relation to Fyffes.

12.1.4 Understandably, the Director came to the view that the *inter-partes* litigation between Fyffes and DCC left many questions unanswered. In the circumstances, and having regard in particular to the Supreme Court decision, this was not wholly

unreasonable. He took the view that the requirement of the DCC Group to repay a very substantial amount to Fyffes - in excess of €42 million - was not sufficient and that a thorough investigation by an Inspector was required. DCC and its subsidiaries opposed the application strenuously, arguing that it was brought by the Director for an improper purpose, and that the appointment of an Inspector was unnecessary and disproportionate. In July 2008 Mr. Justice Kelly gave a comprehensive judgment in the matter in which he agreed, on balance, with the Director that the appointment of an Inspector was in the public interest and was not disproportionate. For the benefit of those who may not read my full report, Mr. Justice Kelly made an Order that I be appointed as Inspector to the three companies DCC, S & L and Lotus Green to investigate –

(i) *The transactions which were related to the acquisition, maintenance, transfer and disposal of the beneficial and legal interests of the three companies in Fyffes plc between February 1995 and April 2000 with particular reference to the periods between:*

(a) Early February 1995 and end September 1995 and

(b) Early November 1999 to end April 2000,

limited to those transactions, and

(ii) *Whether Parts IV and V and any related provisions of the Companies Act, 1990 were breached by the three companies, their officers (including shadow directors), managers, employees, servants and agents at the relevant times and if so, to identify the circumstances in question, the provisions involved, the persons in default and all of the associated evidence in each case.*

12.1.5 I approached the task of carrying out this investigation with an open mind. I read the contemporaneous documents and records of the transactions carefully. I subsequently carried out detailed interviews (on oath) in a searching and probative manner, having regard to the fact that this was an inquisitorial as opposed to the more familiar (to me)

adversarial process. There was a temptation throughout my investigation to view it as an accident investigator coming across a corporate 'plane crash'. There was a natural and human tendency to try to find out why the 'dealing' which cost the DCC Group over €42 million in costs and damages happened and if, and how, it could have been prevented. A search for the corporate 'black box', as it were, which would reveal all and show who was responsible. However, what I discovered was in fact quite simple - a costly error in the judgment and appreciation by the founder and then Chief Executive of DCC as to the quality of the confidential Fyffes information he had in his possession.

12.1.6 I have attempted in this report to answer the unanswered questions and uncertainties to the best of my ability. I have carried it out without 'fear or favour' for any party. I have concluded that, contrary to the Director's understandable apprehension at the time of the application for my appointment, his concerns were largely unfounded and that:

- the companies took their corporate responsibilities very seriously.
- the directors, officers and employees, from the then Chief Executive down, placed a high value on legal and regulatory compliance;
- the companies had good and effective corporate governance procedures and controls at board level;
- the officers and executive directors of the companies were qualified, competent, and careful individuals;
- DCC attracted and retained highly experienced and quality non-executive directors; and,
- the companies took legal advice when it was appropriate to do so and followed such advice when it was proffered.

12.1.7 Secondly, I have concluded that the fact that the beneficial interest in the Fyffes shares was first transferred to, and then held by, Lotus Green, a Dutch-resident, wholly

owned subsidiary of DCC in 1995, before being sold in February 2000, did not contribute to the finding of 'insider dealing' or affect the outcome in any material way.

12.1.8 Thirdly, I have concluded that there are facts and circumstances which suggest that the decision of Lotus Green not to make the necessary notification in relation to Lotus Green's acquisition of a beneficial interest in slightly more than 10% of the relevant share capital of Fyffes in 1995 infringed Section 67 and Section 91 of the Companies Act, 1990. This decision not to notify was made, however, with the benefit of legal advice from the companies trusted and respected legal adviser and, in all the circumstances, it was not unreasonable for the directors of the companies to follow that advice. I have also concluded that the legal advice, which I believe to have been incorrect, was given in good faith and in the firm belief that it was correct. The fact that Lotus Green did not notify under either Section 67 or Section 91 was known and, indeed, admitted prior to my appointment.

12.1.9 Fourthly, I have concluded that the decision of DCC and S & L to transfer the beneficial interest in the Fyffes shares to Lotus Green, and Lotus Green's acquisition of that interest in 1995, does not give rise to facts or circumstances suggesting a breach of Section 108 of the Companies Act, 1990. In my opinion, the Director's apprehension in this regard was misconceived.

12.1.10 For the reasons set out in detail in the earlier Chapter on my 'Findings and Conclusions' I am of opinion that a shareholder's consideration to sell its shares in a publicly quoted company, divorced from any knowledge or awareness of price sensitive information about that publicly quoted company, does not itself infringe (the now repealed) Section 108 of the Companies Act, 1990. The fact that the sale by a shareholder of its shares in a publicly quoted company might affect price sentiment in relation to that company's shares could not, on its own, constitute 'insider dealing' within the meaning of Section 108. If it did, a shareholder in DCC's position could never sell its shares for fear of what effect the sale of the shares might have on the publicly quoted company's share price.

12.1.11 Even if I am wrong in my conclusion as to the proper interpretation of Section 108 of the Companies Act, 1990, as summarised in the preceding paragraph, I do not believe a transfer within the same group of companies could ever be described as a 'fraud on the market'. If the Fyffes share price had fallen appreciably as a result of the decision of DCC and S & L to sell their beneficial interest in the shares to Lotus Green (which it did not), it is difficult to see how Lotus Green's 'loss' could have been actionable against its ultimate parent, DCC, and its associated company, S & L. Within the DCC Group there would have been no net gain or loss.

12.1.12 The 'mischief' which Section 108 sought to outlaw was dealing whilst in possession of price sensitive information, in this case in relation to Fyffes, and not the contemplation or intention of corporate owners of those shares (with a Director on the Fyffes board) to transfer them to a wholly owned subsidiary for tax saving reasons.

12.1.13 There was full compliance by each of the three companies with Section 67 of the 1990 Act in February 2000. There was an admitted failure to serve a notice on the Stock Exchange specifying or referring to Section 91, but there were three detailed Stock Exchange announcements by and on behalf of the three companies on the 4th, 9th and 15th February, 2000 which fulfilled in substance, if not in form, the Section 91 notification requirement.

12.1.14 The failure to formally serve or comply with section 91 was inadvertent. That it was of little or no consequence is borne out by the fact that the Director did not refer to this technical breach when seeking the appointment of Inspectors.

12.1.15 I have concluded that Mr. Flavin did not communicate the Fyffes' price sensitive information in his possession to anyone in the companies other than to the DCC Group Compliance Officer, Michael Scholefield, as part of a compliance procedure and the companies' legal adviser, Alvin Price, for the purpose of seeking legal advice. Therefore, although several persons within DCC including Fergal O'Dwyer and Mairead O'Malley facilitated the 'dealing' in the shares in a technical sense, I am satisfied that no

one involved in effecting the share sales within DCC knew that Jim Flavin had any information of a price sensitive nature in his possession which could make the dealing unlawful.

12.1.16 I believe that the only effective method of avoiding the adverse consequences which have been visited on DCC and Mr. Flavin by the events which occurred in 2000 would have been to have had in place written arrangements of the type envisaged by Section 108(7) of the 1990 Act. Unfortunately for DCC and for Mr. Flavin this was not adverted to. Finally, I am satisfied that there are no related provisions which come into play apart from the principal provisions of Sections 67, 91 and 108 in Parts IV and V of the 1990 Act.

12.1.17 It is a truism of course that when embarking on any investigation one cannot know the outcome in advance. The Director, through his counsel at the outset of this process, fairly recognised the truth of this fact. The good news from the perspective of the Director, and corporate compliance in Ireland, is that the Court, the public and the market can be reassured and take comfort from the fact that one of Ireland's largest listed public companies had a well developed culture of compliance, maintained high corporate standards and was a good corporate citizen, notwithstanding the costly error of appreciation by its then Chief Executive. This should also be a source of considerable relief and reassurance for its seven thousand plus employees and shareholders.

12.1.18 The error was a costly one for DCC and its former Executive Chairman and founder. It was costly for DCC in terms of the money it was required to pay to Fyffes, but it was, arguably, more costly in terms of the reputational damage to both DCC and Jim Flavin. No finding of mine can repair the reputational damage inflicted in this matter. At least, however, the suggestion that the dealing was intentionally wrongful, or that it was evidence of dishonesty on the part of Jim Flavin and of a culture of disrespect for the companies code in DCC can be dispelled.

12.1.19 The actions of Jim Flavin were not undertaken recklessly or with an absence of care. He was ultimately found to have misjudged the information he had in his possession when he was approached by the stockbrokers with a view to buying the shares, but he did not 'deal' without considering whether he or DCC were free to sell the shares. With hindsight, he placed far too much reliance on the actions of Fyffes. His familiarity with such guidance as existed from the Stock Exchange in Ireland and the U.K. as to what constituted 'insider dealing' or 'price sensitive information', did not protect or assist him.

12.1.20 At a time however when 'Ireland Inc' is taking a beating internationally from a perception of low standards in high corporate places the message from this report is that the actions and behaviour of DCC, S&L and Lotus Green between 1995 and 2000 in connection with the transactions under investigation measured up to the standards required by law notwithstanding Mr. Flavin's error of judgment.

12.2 Acknowledgments:

12.2.1 I would like to express my thanks to the following for their assistance to me in carrying out the investigation.

- The members of staff of the Office of Director of Corporate Enforcement, and in particular, Mr. Sean Ward, Ms. Rose Carroll and Mr. Dermot Morahan, Solicitor.

- The legal advisers for the three companies, Mr. Owen O'Sullivan and Ms. Laura Murdock of William Fry Solicitors, Mr. Donal O'Donnell Senior Counsel, Mr. Michael Cush Senior Counsel, Mr. Jim O'Callaghan Senior Counsel and Mr. John McCarroll Barrister.

- My own legal advisers Andrew O'Rorke of Hayes Solicitors and John Breslin Barrister.

- My Secretary Martina Murray for her assistance and help throughout the investigation; Brenda Kerbey-Thornton for typing the Report; and Aisling Crowley B.L. and Rachel Murray for their assistance with proofreading.

- Gwen Malone and the Stenographers of Gwen Malone Stenography.

12.2.2 As I have already stated in my two Interim Reports, the directors, officers and advisers to the three companies co-operated fully with me in carrying out my Court assigned investigation.

12.2.3 In addition, I was fortunate to have had the benefit of the assistance of the former Executive Chairman of the Smurfit Business School, Mr. Laurence Crowley, who attended for interview at my request.

12.2.4 I also had the benefit of interviews with Mr. Kyran McLaughlin and Mr. Roy Barrett of Davy's and Goodbody's Stockbrokers, respectively, both of whom had an involvement as brokers on behalf of the institutional investors who purchased the Fyffes shares from DCC in February 2000.

12.2.5 The three interviews with Mr. Crowley, Mr. McLaughlin and Mr. Barrett were of assistance to me in coming to a better understanding of the 'corporate compliance culture' in Ireland from the mid 1990's up to 2000 in the case of Mr. Crowley, and an appreciation of the perspective of the stockbrokers for the purchasers of the shares in 2000 in the case of Mr. McLaughlin and Mr. Barrett.

Bill Shipsey S.C.
High Court Inspector
December 21st