CHAPTER 2. APPOINTMENT OF INSPECTOR:

2.1 The judgment and Order of Mr. Justice Kelly dated the 29th July 2008 are set out in Appendix C. The Order for my appointment recites that I was appointed as Inspector for the purposes of investigating and reporting on the affairs of the three companies in respect of:-

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

a. Early February 1995 to 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.*

2.2 In his judgment of 29th July 2008 Mr. Justice Kelly set out in detail the concerns of the Director in seeking the appointment, and the reasons why the companies and their directors opposed same.

The Director's Concerns

2.3 The basis for the Director's concern was contained in his grounding Affidavit running to some 106 paragraphs. Insofar as the events in 1995 were concerned, the Director stated his position as follows, at paragraph 74:

"*The circumstances suggest, with respect to the disposal by DCC and S&L to Lotus Green of the beneficial interest in the shares of Fyffes in August, 1995 that:-*

- *DCC and Lotus Green may have acted contrary to section 67 in failing to notify Fyffes of their disposal and acquisition of Fyffes shares in excess of the 5% treshold;*

- *Lotus Green and DCC may have acted contrary to section 91 in failing to notify Fyffes of the acquisition of Fyffes shares in excess of a 10% threshold;*

- *The planned and subsequent disposal by DCC and S&L to Lotus Green of a beneficial interest in the shares of Fyffes may have been information that was likely to be materially price sensitive;*

- *The suppression of this price sensitive information from the market may have constituted insider dealing;*

- *The three companies and Mr. Flavin may have acted contrary to section 108 in doing so;*

- *A number of other officers and senior managers in the DCC group may have facilitated the transactions which gave rise to the breaches of sections 67, 91 and 108 of the 1990 Act;*

- *A number of officers and senior managers in the DCC group may have been guilty of an offence under section 79 of the 1990 Act where, pursuant to section 241(1) of that Act, their company's failure to make a required disclosure was committed with the person's consent or connivance or to have been attributable to his or her neglect."*

2.4 His concerns about the 2000 transactions arose from the judgments of the Supreme Court in the **Fyffes -v- DCC and Others** litigation. He placed them in the context of what he described in his Affidavit as "consequential matters."

2.5 The Director concluded that, having regard to the facts contained in the judgment of Laffoy J. and the finding of the Supreme Court, the circumstances suggested that other senior persons in the DCC Group may have given support to the execution of the insider dealing transactions in 2000. He instanced the DCC board meeting of the 31st July, 1995, which approved of the disposal of the beneficial interest in the shares of Fyffes to Lotus Green and pointed out that five persons who comprised the board of DCC in early February, 2000, also comprised its board in July, 1995, when it originally disposed of its beneficial interest in the Fyffes' shares to Lotus Green. Three of them, including Jim Flavin, (at the stage that he swore his grounding affidavit in 2008) remained on the nine-member DCC board.

2.6 The Director went on to point out that two DCC board members (one being Mr. Flavin) were on the board of S&L in February 2000 and had been on it in August 1995 when it decided to dispose of its beneficial interest in the Fyffes' shares to Lotus Green. He referred to the fact that the Chief Financial Officer of DCC and the Compliance Officer/Secretary of DCC were the remaining two board members of S&L in February 2000, the former having served in 1995 as well. The Director stated his belief that both men played important roles in advising, planning and executing the Fyffes' share transactions in 1995 and 2000.

2.7 He also pointed out that, in early 2000, the board of Lotus Green comprised three Dutch and one Irish director (excluding the nominated alternate Irish director). That Irish director, Mr. Fergal O' Dwyer, was and is the Chief Financial Officer of DCC. When the board of Lotus Green made its decision to acquire the beneficial interest in Fyffes' shares on the 9th August, 1995, the board seemed to have been comprised of four senior DCC group executives, one of whom was the Compliance Officer/Secretary of that company. The Director concluded that there were circumstances suggesting that other senior persons in the DCC group may have given advice and support to the planning and execution of the insider dealing transaction in 2000.

Why a Further Investigation

2.8 The Director made it clear that his application to the Court was predicated on:-

a) The circumstances suggesting non-compliance with sections 67, 91 and 108 of the 1990 Act in relation to Lotus Green's acquisition from DCC and S&L of a beneficial interest in Fyffes' shares in 1995; and

b) The findings of the Supreme Court that Mr. Flavin acted contrary to section 108(1) of the Act in disposing of the companies' legal and beneficial interest in the ordinary shares of Fyffes in 2000.

2.9 He cited a number of reasons demonstrating the need for a further investigation. They were:-

a) The civil proceedings already dealt with by the Courts only addressed the issue of insider dealing in the context of a civil claim for damages. This related solely to the disposal by the Respondents of their shares in Fyffes on three dates in February, 2000. It did not address and determine the

other suggested circumstances of default which he identified in his grounding Affidavit.

b) The civil proceedings only required the Court to make a determination in respect of the Defendants in those proceedings. They did not address and determine the relevant contribution, responsibility and culpability of other persons who gave advice and support to the planning and execution of the insider dealing transactions in 2000 and to the other suggested circumstances of default identified in his Affidavit.

c) The High Court had relied upon statements of fact which appeared to have been agreed between the parties in those proceedings. In the absence of a formal investigation into those matters, he maintained that it was not possible to confirm that the summaries as provided constituted the full facts relating to the associated insider dealing transactions, never mind the other circumstances of potential default indicated by him.

d) The Court did not have the benefit of testimony from a number of persons whom he identified as important witnesses to the events relating to the associated insider dealing transaction. He identified these as a senior executive of Davy's, Mr. Kyran McLoughlin, the then Chairman of DCC, Mr. Alex Spain, another director of DCC (Mr. Patrick Gallagher) and two directors of Lotus Green (Mr. Roskam and Mr. Venneboer.) He stated that whilst the High Court declined to draw any inference from the failure to call these witnesses, their testimony would be important in establishing precisely what transpired in the execution of the insider dealing transactions in February, 2000.

e) Finally, he contended that all of the facts pertinent to the issues had not been conclusively established to date, given the following two matters in particular: firstly, the Supreme Court was only required to address one

issue on the appeal; and secondly, the DCC board had, notwithstanding the outcome of that appeal, been able to reaffirm its support for Mr. Flavin in public pronouncements.

2.10 The Director submitted that a thorough investigation of the events surrounding both the 1995 and 2000 transactions was necessary in the public interest. He said that the public interest would be served by:-

> "*establishing the facts, clarifying the prevailing uncertainties and attributing appropriate responsibility and culpability to the persons who contributed to these or to any other detected faults.*"

2.11 He maintained that it would be a matter of concern to him if any persons who actively participated in insider dealing and related transactions should be able to continue to discharge leading roles in Irish corporate affairs. This in turn would give rise to the belief that insider dealing involved minimal reputational risk and would encourage others to engage in similar practices, to the detriment of the functioning of a fair and transparent market in company securities, as well as in a manner contrary to the public interest.

The Companies' Opposition to the Application

2.12 The companies and their directors argued that the Court should not appoint inspectors on the basis that the Director's application was flawed for two principal reasons. Firstly, they argued that the Court had to be satisfied that there were circumstances suggesting that the affairs of the companies to be investigated are or have been conducted in an unlawful manner and that an investigation in relation thereto was warranted. Secondly, they submitted that the Director's purpose in seeking the appointment was not a legitimate one born of an insufficiency of knowledge. Rather, it was with a view to converting information already known into a form which made it admissible in evidence in any proceedings which might be taken with a view to obtaining disqualification orders against persons associated with the companies.

The Decision to Appoint

2.13 Before reaching his decision, Mr. Justice Kelly identified the statutory purpose of the appointment of an Inspector. He quoted from **Keane's Company Law [Fourth Edition]** where the former Chief Justice described the nature of a Companies Act investigation at paragraph 35.15 as follows:-

> *"As in the case of an investigation under the provisions of the replaced sections in the Principal Act, the functions of the Inspectors are to investigate and report. It is thus in essence a fact-finding exercise which does not of itself affect the legal rights and obligations of any individual concerned, although the publication of the report – and even the fact of an investigation having been ordered – may affect their reputations."*

2.14 Throughout the conduct of this investigation I have been mindful of this point, and of course of the fact that my findings may further affect the reputations of those involved over and above the way in which the decision to appoint me as Inspector has already affected their reputations.

2.15 My task in this investigation is to establish the facts, to clarify the prevailing uncertainties, and to attribute responsibility and if necessary culpability to persons who may have contributed to any wrongs or defaults. It is equally clear that where I find the concerns to be unfounded or misplaced that I should say so. The statement quoted by Mr. Justice Kelly from **Keane's Company Law (Fourth Edition)** is similar to the view expressed by Sachs L.J. in **In re Permagon Press Limited [1970] 3 All E R 535 at 540** where he said:-

> *"…the Inspector's function is in essence to conduct an investigation designed to discover whether there are facts which may result in others taking action."*

2.16 As Mr. Justice Kelly pointed out at page 22 of his judgment, this approach is also to be found in Canadian jurisprudence in **Saunders –v- Ecotemp International Inc [2007] ABB 136,** where Lee J. said:-

> *"The primary purpose of an investigation is to bring to light facts which might otherwise be inaccessible to shareholders and security holders. (Re First Investors [1988] A. J No 244."*

2.17 It is clear that what weighed heavily with Mr. Justice Kelly in deciding to appoint me as Inspector was a consideration of the public interest. He quoted, at page 25, what was said by Murray J. in **Dunnes Stores Ireland Company and Ors –v- Ryan [2002] 2 I.R. 60**:

> *"While the Companies Acts generally include provisions relating to the incorporation, registration and structure of companies, as well as such matters as duties to directors towards their members, they also govern fundamental aspects of the relationship between companies and the rest of society. The advantages of trading or conducting business through a corporate entity, such as a company with limited liability, are self evident. Companies have a legal personality separate and distinct from their individual members. Many aspects of how they conduct their affairs as distinct entities are regulated by law in the public interest. The Companies Acts are the primary source of that regulatory regime, even though there are other statutes which may regulate how a company or its directors conduct its affairs, such as the Competition Acts, certain provisions of the Finance Acts or the Central Bank Acts. Statutory provisions specifically directed at companies, in particular the Companies Acts, define, inter alia, obligations specific to companies and their directors with which they are bound to comply in the public interest …*
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> *I do not think the statutory duties and obligations imposed on companies and directors can be viewed simply as an end in themselves, since those duties have a*

function in preventing abuses of their corporate status which may lead to consequences which are not just breaches of the Companies Acts per se, but may have other far reaching consequences of public interest."

2.18 Although those comments of the Chief Justice were made in the context of the appointment of an authorised office, Mr. Justice Kelly was satisfied that they were also relevant to the Court's consideration in appointing an Inspector. He also quoted, at p. 26, the following statement from the same Judge in the same case:-

"The second respondent (the appointing Minister), must also be concerned with the damage which such breaches have on public confidence in how companies conduct their affairs, particularly where such breaches may be extensive and have a potential consequence of undermining confidence in corporate status and its governance."

2.19 Mr. Justice Kelly also referred, at page 27 of his judgment, to the requirement of proportionality in considering whether to appoint Inspectors. He said that the Court ought to take into account what was alluded to by Goldstone J. in **Sage Holdings Limited –v- Unisec Group Limited and Others [1982] 1 WLD 337** where he said:-

"*The company may be caused harm and damage and may be put to substantial expense. This is especially so in the case of a large public company where its reputation in the market may become tarnished by the very fact of an investigation being ordered. However, the potential harm and damage from this source is probably less substantial in the case of a non-trading company. This consideration, in my opinion, should temper the natural inclination the Court may have to protect members of the public from those whose control of large companies has become entrenched."*

2.20 In applying the principles relevant to the appointment of an Inspector to the facts of the case, Mr. Justice Kelly was satisfied on the basis of the evidence put before him

that there were circumstances "suggesting unlawfulness." The next point he had to address was whether, as suggested by the companies, no Inspector should be appointed because there was nothing to investigate. The companies contended that all of the material facts were known and, thus, there were no more facts which an Inspector could find. Mr. Justice Kelly said that:-

> *"There can be no doubt but that if the Court appoints an Inspector in the present case he will not be in the position of the conventional Inspector described by Sachs L.J. as 'starting very often with a blank sheet of knowledge.' (**In Re Permagon Press)**.*
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> *An Inspector in the present case, if appointed, has a great deal of knowledge available to him as a result of the earlier litigation and the Judgments thereon. But there is, in my view a flaw in the Respondent's argument. The earlier litigation was conducted inter partes in an adversarial way. The parties decided what witnesses would be called, highly skilled lawyers were employed on each side, they would have been called upon to decide as to what evidence to place before the Court and how to do so in the most favourable light, always, of course, subject to their obligations to the Court. Indeed such legal advice, sometimes called presentational advice, is privileged. (See **Ahern –v- Mahon and Others [2008] IEHC 119**)*
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> *Some witnesses, whom the Director believes may have evidence to give, were not called. Agreed statements of facts were relied upon by times, the earlier proceedings were concerned only with the civil law and did not have to address culpability or responsibility of persons who may have advised or planned the transactions.*
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> *Inspectors may well discover facts which might be pertinent to breaches of the Companies Acts which were not alluded to or disclosed in the earlier proceedings. Theirs is an inquisitorial role. They take their own course and*

have wide powers which are not available to a Court in inter-partes civil litigation. Thus, whilst I can accept that much factual information is already available having regard to the earlier litigation, it cannot in my view be described as the last word on the transactions. The Director also wishes to investigate the possible liability of persons who were not parties to the earlier litigation and whose responsibility, if any, was not the subject of any detailed enquiry."

2.21 The companies and their directors also objected to the appointment of Inspectors on the basis that the application was made by the Director for an improper purpose. Mr. Justice Kelly gave careful consideration to this point, and expressed some concern about the actions and statements of the Director, but concluded that he was not satisfied that the sole motivation of the Director in seeking the appointment of Inspectors was with a view to obtaining a report which would do more than appraise him of facts already known, but would do so in such a way so as to attract the evidential cloak provided for by Section 22 of the Companies Act, 1990.

2.22 Ultimately Mr. Justice Kelly, in deciding to appoint me as Inspector, was of the opinion that it was in the public interest that a thorough investigation be carried out as to how the companies and persons associated with them conducted their affairs in respect of the transactions in question. He was also of the view that it could not be considered disproportionate that Inspectors be appointed to investigate fully the matters the subject of the application.

2.23 I have quoted extensively from the judgment of Mr. Justice Kelly to show the course that was set for me; to place my appointment in context; to explain the concerns expressed by both parties to the appointment application; and to highlight the fact that this investigation under Section 8 of the Companies Act, 1990 was unlike all others that have taken place to date - in the aftermath of High Court litigation where all the transactions, and most of the matters, which I have been asked to investigate have been considered in considerable detail albeit through the prism of *inter partes* proceedings.