THE HIGH COURT

Record No: 2008/ COS

IN THE MATTER OF DCC PLC, S & L INVESTMENTS LIMITED and LOTUS GREEN LIMITED

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2006

AND

IN THE MATTER OF AN APPLICATION BY THE DIRECTOR OF CORPORATE ENFORCEMENT PURSUANT TO SECTION 8(1) OF THE COMPANIES ACT 1990

BETWEEN/

THE DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

-AND-

DCC PLC, S & L INVESTMENTS LIMITED and LOTUS GREEN LIMITED

RESPONDENTS

AFFIDAVIT OF PAUL APPLEBY

I, **PAUL APPLEBY,** of the Office of the Director of Corporate Enforcement, 16 Parnell Square, Dublin 1, aged eighteen years and upwards, **MAKE OATH** and say as follows: -

1. I am the Director of Corporate Enforcement and my Office is based at 16 Parnell Square, Dublin 1. I make this affidavit from facts within my own knowledge save where otherwise appears, and whereso appearing I believe the same to be true and accurate. I make this affidavit on my own behalf.

2. I make this affidavit for the purpose of grounding an application ("this Application") to appoint persons as Inspectors for the purpose of investigating the affairs of DCC plc, S & L Investments Limited and Lotus Green Limited ("the three Companies") and reporting thereon pursuant to the provisions of Part II of the Companies Act 1990 ("the 1990 Act").

The Three Companies

3. DCC plc ("DCC") is an Irish registered public limited company (CRO No. 54858) and has its registered office at DCC House, Brewery Road, Stillorgan, Co Dublin. It has a diversified portfolio of interests in manufacturing and other business sectors. It is listed on both the Irish and London Stock Exchanges. It was originally incorporated as Development Capital Corporation Limited in 1976. It floated as a public company in 1994.

4. S & L Investments Limited ("S&L") is an Irish registered company which was incorporated in 1969 (CRO No. 28688), and its registered office is also at DCC House, Stillorgan, Co Dublin. It is a wholly owned subsidiary of DCC.

5. Lotus Green Limited ("Lotus Green") is an Irish registered company which was incorporated in February 1995 (CRO No. 229218), and its registered office is at Fitzwilton House, Wilton Place, Dublin 2. It is a wholly owned subsidiary of DCC.

Fyffes plc

6. Although it is not the subject of this Application, Fyffes plc ("Fyffes") is relevant to it. Fyffes is a listed Irish registered public limited company (CRO No. 73342) which was originally incorporated as FII Limited in 1980. Its registered office is at 29 North Anne's Street, Dublin 7. Prior to a recent major restructuring, its main business was the procurement, importation, marketing and distribution of fresh produce internationally.

The Relevant Statutory Provisions in Summary

7. The statutory provisions in Part IV (Disclosure of Interests in Shares), Part V (Insider Dealing) and Part XII (General) of the 1990 Act which are relevant to, or are claimed to be relevant to, the events described in this Application are as follows:

- Sections 67 to 71 require in general that the transfer of an interest in a public limited company must be disclosed in writing within five days to the company by the transferor or acquirer of an interest of 5% of the company's relevant share capital;

- Section 72 which clarifies the notification requirements for family and corporate interests for the purpose of Sections 67 to 71 of the Act;

- Section 77(2) which generally interprets an interest in shares for the purposes of Sections 67 to 71 of the Act as "including an interest of any kind whatsoever in the shares";

- Section 78 which identifies the interests to be disregarded in considering disclosure for the purposes of Sections 67 to 71 of the Act;

- Section 91 which provides that, in addition to a disclosure obligation under Section 67, such transfers and acquisitions must be notified to the Irish Stock Exchange if the interest is in shares in a listed public limited company and represents 10% of the company's relevant share capital;

- Section 79(3) which provides inter alia that any person failing to fulfil, within the proper period, a notification obligation shall be precluded from enforcing any right or interest of any kind whatsoever by action or legal proceeding in respect of any shares in the company concerned;

- Section 79(7) which inter alia imposes criminal liability for a failure to disclose under Section 67 or 91;

- Section 108 which prohibits unlawful dealing in company securities by insiders;

- Section 109 which exposes an insider to a claim of civil liability in respect of any ensuing profit gained from the unlawful dealing;

- Section 111 which imposes criminal liability for unlawful dealing;

- Section 241(1) which provides inter alia that where a company commits an offence under Section 79, any director, manager, secretary or other officer of the company or any person purporting to act in that capacity is also guilty of the offence where it is proved to have been committed with the person's consent or connivance or to have been attributable to his or her neglect.

Part A – Background to this Application

Acquisition and Disposal of Fyffes's Shares

8. Fundamentally, this Application relates to certain events concerning the acquisition and disposal by the three Companies of certain interests in Fyffes's shares between February 1995 and April 2000 ("the Appropriate Period"). Without prejudice to the generality of the Appropriate Period, this Application primarily relates to events which took place between:-

(i) February 1995 to September 1995; and
(ii) November 1999 to April 2000.

9. In August 1995, DCC and S&L agreed to sell their combined 10.5% stake in the ordinary shares of Fyffes to Lotus Green which, although Irish-registered and a wholly owned subsidiary of DCC, was ostensibly resident in Holland. Although Lotus Green acquired the beneficial ownership of this stake, legal title was not transferred with the result that DCC and S&L remained the registered owners of the shares.

10. On 3, 8 and 14 February 2000, DCC, S&L and Lotus Green sold their entire holding of 31.2 million ordinary shares in Fyffes in three tranches. This disposal realised proceeds for the Group of some €106 million, a profit on cost of about €85 million and a profit on book value of some €76 million.

11. Mr James Flavin who had been a member of the board of Fyffes since 1981 resigned from the board with effect from 9 February 2000. At the time of his resignation, he served as a member of the Audit Committee of Fyffes and as the Chairman of its Compensation Committee. While serving as a board member of Fyffes prior to his resignation, he was the Deputy Chairman and Chief Executive of DCC and a director of S&L.

Aftermath of the Disposal of the Fyffes's Shares

12. Fyffes issued a statement to the Irish Stock Exchange on 20 March 2000 in which the following was indicated insofar as its fresh produce trading was concerned:

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

13. Following what was effectively a profit warning, the Fyffes's share price dropped in the following days, and concern grew that Mr Flavin was aware of Fyffes's poor trading before the DCC Group's shareholding was sold.

14. In early April 2000, both the London and Irish Stock Exchanges informed Fyffes that they were investigating certain dealings in its shares and in particular certain share disposals made by DCC and Lotus Green in early February 2000. Towards the end of 2001, the Irish Stock Exchange reported the matter to the Director of Public Prosecutions under its statutory powers contained in Part V of the 1990 Act. I understand that the Garda Bureau of Fraud Investigation conducted an investigation into the possible offence of insider dealing, a serious criminal offence under Section 111 of that Act. However, no prosecution was ever initiated by the Director of Public Prosecutions.

15. In 2002, Fyffes commenced civil proceedings against the three Companies and Mr Flavin under Section 109 of the 1990 Act ("Civil Proceedings"). In broad outline, Fyffes claimed that the disposal of its shares in February 2000 was unlawful because they were effected at a time when Mr Flavin was in possession of price-sensitive information by reason of his directorship of Fyffes.

The Subsequent High Court Civil Proceedings

16. The case between Fyffes ("the Plaintiff") and DCC, S&L, James Flavin and Lotus Green ("the Defendants") (High Court Record No 2002/1183P) was heard in the High Court over 87 days in 2004/2005.

17. On 21 December 2005, the High Court (Laffoy J.) delivered its Judgment in the matter, and I beg to refer to a copy of same when produced. The learned trial judge summarised her conclusions at the end of her Judgment as follows:

> *"Having regard to the manner in which I have construed the provisions of Part V of the Act of 1990, essentially the following three questions remain on the statutory claim:*
>
> *(1) Who dealt in the Share Sales and in what capacity?*
>
> *(2) Did Mr. Flavin have, by reason of his connection with Fyffes, price-sensitive information on the dates of the Share Sales?*

(3) What are the consequences of the answers to the first and second questions?

I have answered the three questions as follows:

(1) (a) Mr. Flavin dealt as agent of the DCC Group.

(b) DCC and S&L dealt as principals, so they cannot rely on s. 108(9).

(c) Lotus Green dealt as principal.

(2) Mr. Flavin was not in possession of price-sensitive information at the dates of the Share Sales.

(3) Therefore, the dealing was not unlawful under s. 108 and no civil liability to account arises under s. 109. However, I have concluded that, if the dealing was unlawful so as to give rise to a liability to account under s. 109, it would have been proper to treat the three corporate defendants, DCC, S&L and Lotus Green, as a single entity for the purposes of accounting for the profit accruing from dealing under s. 109. That conclusion is redundant because I have found that the dealing was not unlawful.

In relation to the non-statutory claim, I have found that the plaintiff has failed to establish a breach of fiduciary duty on the part of Mr. Flavin. The plaintiff is neither entitled to an account in equity nor damages or compensation at common law." (Conclusion of the Judgment)

The Subsequent Supreme Court Appeal

18. In 2006, Fyffes brought an appeal against the High Court Judgment (Supreme Court Record No 144/06). This appeal did not challenge any of the findings of fact but dealt solely with the manner in which the learned High Court judge had interpreted the statutory provision relating to insider dealing. In particular, Fyffes argued that the trial judge was in error in concluding that the information which was in the possession of Mr Flavin and which was not generally available would not be likely to materially affect the price of Fyffes's shares if that information were generally available.

19. On 27 July 2007, the Supreme Court delivered its Judgments in the appeal, and I beg to refer to a copy of same when produced. The Supreme Court unanimously allowed the appeal. It concluded that DCC, S&L, James Flavin and Lotus Green had engaged in insider dealing in February 2000 contrary to

Section 108(1) of the 1990 Act and that Fyffes was entitled to have an assessment of damages undertaken by the High Court in respect of its claim.

ODCE Intervention in the Civil Proceedings in the Supreme Court

20. I beg to refer to a booklet which contains the notices of motion, affidavits and related correspondence between my solicitor and the solicitors for the Defendants and the Plaintiff relating my intervention in the Civil Proceedings before the Supreme Court and High Court upon which marked with "**PA1**" I have signed my name prior to the swearing hereof.

21. Following the Supreme Court Judgments, I was advised that Section 160(2) of the 1990 Act provides inter alia that any court may of its own motion make a disqualification order in any proceedings against a person for such period as it sees fit where it is satisfied that certain matters are established.

22. Having reviewed the Judgments of the High Court and the Supreme Court, it appeared that no reference had been made to the ability of the Courts to make such a disqualification order. In circumstances where the High Court had made uncontested findings of fact, I believed that it would be particularly appropriate that the issue of whether grounds exist for disqualification be considered in the context of the Civil Proceedings. I also became concerned that any remission of the Proceedings to the High Court for the sole issue of determining the quantum of damages could subsequently be thought to restrict the ability of the High Court to consider the making of a disqualification order against any appropriate person of its own motion.

23. Following prior correspondence with the Solicitors acting for the Plaintiff and the Defendants in the Civil Proceedings, I issued a Notice of Motion returnable to the Supreme Court on 13 November 2007 for the purpose of seeking an Order joining the Director of Corporate Enforcement to the proceedings as a Notice Party for the purpose of adverting to the power both of the High Court and the Supreme Court of their own motion to make a disqualification order pursuant to Section 160(2). The application was grounded on an affidavit which I swore on 7 November 2007.

24. When my motion came on for hearing before the Supreme Court on 13 November 2007, the Court heard Counsel acting on my behalf and on behalf of the Plaintiff and the Defendants. Ms Justice Denham, speaking for the Court, said that they had considered the application and had determined that this was a matter for the High Court. In the circumstances, the Supreme Court dismissed the motion.

ODCE Intervention in the Civil Proceedings in the High Court

25. In the light of what occurred in the Supreme Court, I subsequently issued a Notice of Motion returnable to the High Court on 4 February 2008 for the purpose of seeking an Order joining the Director of Corporate Enforcement to the Civil Proceedings as a Notice Party for the purpose of adverting to the power of the High Court of its own motion to make a disqualification order against any appropriate person pursuant to Section 160(2). The application was grounded on an affidavit which I swore on 17 January 2008.

26. When the motion came on for hearing before McMenamin J on 6 March 2008, the Court heard Counsel acting on my behalf and on behalf of the Plaintiff and the Defendants. The Court noted the novel character of the application. Counsel on my behalf did not press the Court to make an order that day, and it did not do so.

27. On or about 14 April 2008, I became aware through media reports that the issue of damages as between the parties to the Civil Proceedings had been settled. The reports suggested that the sum to be paid to Fyffes by way of damages by the three Companies was of the order of €37.6 million (excluding legal costs). When the case settled, the High Court had not acted of its own motion to make a disqualification order under Section 160(2).

Investigations by the ODCE

28. On the commencement of the Civil Proceedings in the High Court in 2004 on the substantive issue of insider dealing, I asked one of my officers to monitor the proceedings with a view to identifying potential areas of other non-

compliance with the Companies Acts. The officer in question was Mr Adrian Brennan, one of my Legal Advisers.

29. On or about 12 December 2005, Mr Brennan presented a draft report to me ("First Report") into possible breaches of the Companies Acts that had been disclosed during the High Court proceedings. I beg to refer to a copy of the First Report upon which marked with "**PA2**" I have signed my name prior to the swearing hereof.

30. Having considered the First Report in conjunction with the subsequent High Court Judgment of 21 December 2005, I asked Mr Brennan in late January 2006 to pursue a number of legal enquiries. This entailed inter alia seeking the advice of Senior Counsel which I describe later in this Affidavit. This eventually led to my decision in August 2006 to delegate my powers under Sections 19 and 21 of the 1990 Act (as amended) to Mr Brennan in order that relevant books and documents of, and relating to, Lotus Green be acquired for examination.

31. On or about 15 June 2007, Mr Brennan presented a final draft report to me ("Second Report") into two possible breaches by DCC and Lotus Green of the disclosure requirements contained in Sections 67 and 91 of the 1990 Act arising from the acquisition by Lotus Green from DCC and S&L in August 1995 of a beneficial interest in the shares of Fyffes. I beg to refer to a copy of the Second Report upon which marked with "**PA3**" I have signed my name prior to the swearing hereof.

32. In July 2007, I sought the views of the Office of the Director of Public Prosecutions ("the DPP") on the Second Report and on the value of proceeding with a criminal investigation.

33. In October 2007, the DPP expressed the view that an indictable prosecution of either breach would not be warranted, a decision which I accepted.

34. Nevertheless, the transactions which were examined in the First and Second Reports remain relevant to the subsequent finding of insider dealing by the Supreme Court and are particularly relevant to this Application. Further details of the events surrounding these transactions are outlined in the succeeding paragraphs.

DCC Board Statement to the Irish Stock Exchange on 20 May 2008

35. The recent statement on corporate governance by the DCC board which discusses the outcome of the Civil Proceedings and which defends the board's continuing support for Mr Flavin in his role as Executive Chairman is relevant to this Application. I beg to refer to a copy of the statement upon which marked with "**PA4**" I have signed my name prior to the swearing hereof.

Part B – The Events of 1995

The Events giving rise to the Civil Proceedings

36. The background to the events which gave rise to the Civil Proceedings may be summarised from the following extracts from the High Court Judgment of 21 December 2005:

> "*The DCC Group's shareholding in Fyffes dated back to January, 1981, when Development Capital Corporation Limited acquired a 9.46% stake in that company, which was then known as Fruit Importers of Ireland Limited. On foot of that acquisition, Mr. Flavin joined the board of Fyffes in 1981 as a non-executive director. In 1981 a subsidiary of DCC sponsored the public flotation of Fyffes on the Dublin and London Stock Exchanges. Through the 1980s DCC and S&L made additional investments in Fyffes, as a result of which the DCC Group's stake increased to approximately 10.5%.*
>
> *Following the flotation of DCC in May 1994 its holding in the plaintiff, another public company, was perceived as being anomalous. Its strategy from 1996, and probably from 1995, was to exit from Fyffes when a suitable opportunity arose. With a view to mitigating its tax liability, in particular, liability for capital gains tax, on a future disposal of the holding, in August, 1995 DCC and S&L, which held part of the holding, agreed to sell the shares in Fyffes of which they were respectively the owners to Lotus Green. The agreed purchase price was paid by Lotus Green, but legal title was not transferred, so that DCC and S&L remained the registered owners of the shares. Just over a fortnight after the agreement, Lotus Green became resident for tax purposes in the*

Netherlands. The transactions and processes by which this happened will be considered in greater depth later. It was acknowledged by DCC in these proceedings that what happened was wholly tax driven." (Pages 4 and 5).

37. Later in dealing with these transactions in greater depth, the High Court Judgment states:

"*On 9th August, 1995, two share purchase agreements (the Agreements) were executed in favour of Lotus Green: one by DCC for the sale of the entirety of its holding of ordinary and preference shares in Fyffes at the price of IR£30,412,110.68; and the other by S&L for the entirety of its holding of ordinary shares in Fyffes at the price of IR£8,050,875.00*." (Page 174).

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

The Dutch resident Lotus Green inherited a situation in which, just over two weeks previously, it had become the beneficial owner of in excess of a 10% stake in Fyffes, which had not been notified to Fyffes in accordance with s. 67 of the Act of 1990. DCC obtained advice on the necessity to give notification under s. 67 from William Fry and the advice was contained in a letter of 21st July, 1995 from Mr. Alvin Price of that firm to Mr. Scholefield. The advice was that the Act of 1990 did not specifically address whether intra-group transfers of interests in shares were notifiable, but in the case under consideration, as the true owner was the DCC Group, and Fyffes and the public had already been very clearly notified of that fact in accordance with the requirements of the Act of 1990, the Act of 1990 should not be construed in a manner which would require a further notification of essentially the same information. It was stressed that, whether to notify or not, was strictly an issue for the DCC Group, and Fyffes had no input in the matter, which was similar to the view expressed by Fyffes' legal advisers, Arthur Cox, in a letter to Mr.

Scholefield of 19th July, 1995. The non-notification of the acquisition by Lotus Green of the beneficial ownership of the shares was characterised by the plaintiff as an example of the defendants viewing Lotus Green as having a legal personality that was interchangeable with that of DCC. Aside from that it was suggested that it was significant that the matter was not considered by the board of Lotus Green, given the ramifications for Lotus Green of non-compliance with s. 67: it would not be able to enforce any right or interest of any kind whatsoever in respect of the shares by action or legal proceedings (s. 79(3) of the Act of 1990).

The advice from William Fry addressed Lotus Green's duty of disclosure under s. 67 and must be seen as advice to Lotus Green as a company in the DCC Group. In not giving notification under s. 67, Lotus Green acted in accordance with the legal advice it had obtained. Whether that advice was right or wrong is immaterial. What is material is that its existence explains why Lotus Green did not give notification under s. 67. In my view, the fact that no notification was given does not bear on the issues in this case." (Pages 177 to 179).

Compatibility with Sections 67 and 91 of the 1990 Act

38. The concerns which led to my delegating Mr Brennan to act on my behalf under Sections 19 and 21 of the 1990 Act can be summarised as follows. Firstly, were a disclosure required to be made to Fyffes by Section 67, it would likely apply to Lotus Green (as the acquirer of the substantial beneficial interest in Fyffes) and to DCC (which was disposing of a beneficial interest in the shares of Fyffes), as both the acquisition and disposal were in excess of the 5% threshold. In contrast, S&L was unlikely to be subject to a disclosure obligation, because its disposal of a beneficial interest in the Fyffes's shares did not reach the 5% threshold.

39. Secondly were a disclosure required under Section 91, Lotus Green as the party acquiring a beneficial interest of more than 10% in the Fyffes's shares would be likely to be required to inform the Irish Stock Exchange of that fact. It is probable that DCC would also be regarded as having a similar disclosure obligation by virtue of the fact that the combined interest of itself and that of its wholly owned subsidiary, S&L, exceeded the 10% threshold.

40. The documents which Mr Brennan subsequently acquired confirm that these concerns had a real basis. Those documents numbered 135 to 160 which were associated with his Second Report record internal discussion among DCC's

and Fyffes's officers, senior managers and agents in relation to the need for formal disclosure to Fyffes under Section 67 in particular. Essentially, Fyffes disagreed with DCC that there was no requirement to formally alert Fyffes, although they ultimately recognised that the decision to notify or not was a matter for DCC. However, the circumstances suggest that the legal interpretation favouring non-disclosure which was espoused by DCC was regarded even among DCC and its agents as somewhat dubious. The following statement recorded by Mr Carl McCann of Fyffes in an internal memorandum dated 5 July 1995 (see document 150 of the Second Report) supports this:

> "*M. Meghan* (Arthur Cox, agents for Fyffes) *rang me today to say he had a phone call from Alvin Price* (William Fry, agents for the three Companies) *saying that technically he thought Mike's opinion was correct but commercially DCC will probably go ahead*."

41. In the event, Mr Price gave written advice to DCC dealing with the disclosure issue on 21 July 1995 (see document 156 of the Second Report). This stated inter alia:

> "*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."* …
>
> *"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 interest 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 of the relevant Sections of the 1990 Act are clearly to enable public limited companies and the public 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 Act should not be construed in the literal manner which would now require a further notification of essentially the same information. The wording of*

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."

42. As indicated earlier I secured advice in early August 2006 from Senior Counsel with respect to the validity of Mr Price's advice. Mr Eoghan Fitzsimons, S.C., was aware of the substance of that advice as it was quoted in the examination of Mr Price on day 58 of the Civil Proceedings on 20 April 2005. The conclusion of Mr Fitzsimons was that the transfer of Fyffes shares by DCC and S&L to Lotus Green in August 1995 should have been formally disclosed to Fyffes pursuant to Section 67 of the 1990 Act and to the Irish Stock Exchange pursuant to Section 91 of the 1990 Act.

43. It is noteworthy that when the Fyffes's shares were disposed of in February 2000, DCC and S&L notified Fyffes under Section 67 of the 1990 Act on their own behalf "*as registered holders, and on behalf of Lotus Green Limited, a subsidiary of DCC plc, as beneficial owner*" (see the DCC letters of 4 and 9 February 2000 and the S&L letter of 4 February 2000 which are associated with tab 7 of the Second Report). This approach in 2000 with respect to notification by and on behalf of the legal and beneficial owners offers a sharp contrast with 1995 when it was decided that a disclosure of Lotus Green's acquisition of a beneficial interest in Fyffes's shares was unnecessary.

Consideration of Section 108 of the 1990 Act within the DCC Group

44. It is also clear from the documents associated with Mr Brennan's Second Report that the internal DCC concerns extended beyond the disclosure issue to possible insider dealing. There were a number of memoranda prepared for Mr Flavin by the Compliance Officer of DCC, Mr Michael Scholefield, dealing with the issue (see the documents numbered 136, 138 and 139 attached to the Second Report).

45. The document numbered 160 is a typewritten version of a handwritten note which Mr Scholefield acknowledged in his evidence in the Civil Proceedings on 21 April 2005 was prepared by him on or about 14 June 1995 when the above memoranda were being finalised. Although in his evidence he could not recall the context in which the note was prepared, the document displays some vulnerability with respect to the compatibility of the proposed transactions with the insider dealing provisions of the 1990 Act. An extract from the document reads 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*
>
> *Not participation on equal*
>
> *1. Sell on market tell brokers/brokers need to tell prospective purchaser (if possible)*
>
> - *Off market transaction*
> - *Doesn't come within authorization*
> - *Locate specific buyer and advise them of conditions*."

46. In written advice to DCC dated 25 July 1995 (document 157 in the Second Report), Mr Price addressed the applicability of the insider dealing provisions in the 1990 Act to the proposed transactions. In that letter, Mr Price stated:

> "*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 to the 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."

47. The reference to the "letter of Friday last" above is to the advice given by Mr Price in his letter of 21 July 1995. I have already recorded the view of Mr Eoghan Fitzsimons, S.C., on that advice.

Consideration of Sections 67, 91 and 108 at Board Level in the DCC Group

48. An extract from the agenda for the following DCC board meeting on 31 July 1995 was also provided to Mr Brennan (document 158 in the Second Report). That extract states:

"***6. CHANGES IN 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 this 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."

49. An extract from the minutes of the DCC board meeting on 31 July 1995 is at document 159 in the Second Report. It reads as follows:

"***FYFFES PLC SHARES INTRA-GROUP TRANSFER OF BENEFICIAL OWNERSHIP:***
Mr. Flavin advised the Board that for corporate restructuring purposes it was proposed that the Company's beneficial interest in Fyffes plc be transferred to a new subsidiary within the Group.

The Directors concurred with the views expressed by Mr. Alvin Price of William Fry in his letters in relation to Companies Act provisions on the notification of interests and insider dealing which had been circulated.

The proposed transaction was approved and it was agreed that a committee of the Board, made up of Mr. Flavin, Mr. Crowe and Mr.

Gavagan (with a quorum of two), be appointed with full authority to do all such things as might seem to the committee to be necessary or expedient in connection with the proposed transfer by the Company of the Fyffes shares."

50. At its board meeting on 3 August 1995, S&L approved the disposal to Lotus Green of a beneficial interest in the shares of Fyffes. The minutes of that meeting (document 86 in the Second Report) record inter alia:

"*The Directors considered letters from Mr. Alvin Price of William Fry in relation to Companies Act provisions on the notification of interests and insider dealing*."

51. At its board meeting on 9 August 1995, Lotus Green approved of three agreements, two of which related to the purchase of the Fyffes's shares from DCC and S&L (document 93 in the Second Report). The minutes do not record that the written advices of Mr Price were considered at the meeting even though Mr Price was in attendance. As indicated earlier, the High Court discussed the apparent failure to have the matter addressed by the board meeting in the following terms:

"The non-notification of the acquisition by Lotus Green of the beneficial ownership of the shares was characterised by the plaintiff as an example of the defendants viewing Lotus Green as having a legal personality that was interchangeable with that of DCC. Aside from that it was suggested that it was significant that the matter was not considered by the board of Lotus Green, given the ramifications for Lotus Green of non-compliance with s. 67: it would not be able to enforce any right or interest of any kind whatsoever in respect of the shares by action or legal proceedings (s. 79(3) of the Act of 1990).

The advice from William Fry addressed Lotus Green's duty of disclosure under s. 67 and must be seen as advice to Lotus Green as a company in the DCC Group. In not giving notification under s. 67, Lotus Green acted in accordance with the legal advice it had obtained." (Pages 178 and 179).

Evaluation of Compliance with Section 108 of the 1990 Act

52. While I authorised Mr Brennan's examination of the books and documents of Lotus Green on the basis of the circumstances suggesting non-compliance with Sections 67 and 91 of the 1990 Act, the recurring references to insider dealing in the documents made available to this Office have caused an

evaluation to be undertaken of the extent to which the disposal by DCC and S&L to Lotus Green of a beneficial interest in the shares of Fyffes may also have involved a breach of Part V.

53. The fundamental question to be addressed in this context is: were the transactions in question price-sensitive in the sense that they would materially affect the share price of Fyffes? It is the case that on being informally advised of the planned disposal of beneficial interest in the shares of Fyffes by DCC and S&L to Lotus Green, Fyffes immediately recognised that a disclosure of the disposal could materially affect the price of its shares. The following extract from an internal memorandum of 23 May 1995 by Mr Carl McCann of Fyffes (document 140 of the Second Report) evinces this concern:

> "*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…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*."

54. It will also be recalled that the High Court stated in the extract from its Judgment above that:

> "*The reasons advanced by the defendants for the failure of Lotus Green to call for the legal title were that there would have been stamp duty exigible on the stock transfers, which is true, and, echoing rationalisation advanced for Mr. Flavin not referring Mr. McLaughlin to Lotus Green on 27th January, 2000, that the DCC Group would be putting a "for sale" sign on the shares, if Lotus Green's ownership became public*." (Page 177).

55. Having established that both the Plaintiff and the Defendants to the Civil Proceedings regarded these transactions as price-sensitive, it is appropriate to consider if they may have been contrary to Section 108. Section 108(1) provides as follows:

> "*(1) It shall not be lawful for a person who is, or at any time in the preceding 6 months has been, connected with a company to deal in any securities of that company if by reason of his so being, or having been, connected with that company he is in possession of information that is not*

generally available, but, if it were, would be likely materially to affect the price of those securities."

56. For the purpose of evaluating the scope of the subsection, let us take the example of Mr James Flavin who was a director of DCC, S&L and Fyffes in 1995. Mr Flavin would therefore seem to be connected with each of these companies within the meaning of Section 108(11)(a) of the 1990 Act. However, it would not seem to be the case that by reason of his being connected to Fyffes, he was in possession of price-sensitive information relating to the planned disposal by DCC and S&L to Lotus Green of a beneficial interest in the shares of Fyffes. Similarly, his connections to DCC and S&L would not appear to be relevant as only DCC was traded publicly and its securities were not being dealt in these planned transactions. Accordingly, the circumstances do not suggest that Mr Flavin was in breach of Section 108(1) in the circumstances of these transactions in 1995.

57. Section 108(2) provides as follows:

"*(2) It shall not be lawful for a person who is, or at any time in the preceding 6 months has been, connected with a company to deal in any securities of any other company if by reason of his so being, or having been, connected with the first-mentioned company he is in possession of information that—*

(a) is not generally available but, if it were, would be likely materially to affect the price of those securities, and

(b) relates to any transaction (actual or contemplated) involving both those companies or involving one of them and securities of the other, or to the fact that any such transaction is no longer contemplated."

58. Taking Mr Flavin as an example again, it would appear that by virtue of his connection with DCC, he would be prohibited from dealing in the Fyffes's shares if he was in possession of information which met the conditions in subparagraphs (a) and (b). It is the case that the planned disposal by DCC and S&L to Lotus Green of a beneficial interest in the shares of Fyffes was information which was not generally available (subparagraph (a), first part) and that it related to an actual or contemplated transaction involving DCC and S&L and the securities of Fyffes (subparagraph (b)). The outstanding question

is: would knowledge of the transactions, if generally available, be likely to materially affect the price of the Fyffes's shares? The absence of comparative circumstances to those associated with these transactions makes any evaluation of this matter problematical. What can be said is that the law prohibited Mr Flavin from dealing in the Fyffes's shares in circumstances where he was in possession of information that was likely to be materially price-sensitive.

59. There are therefore circumstances suggesting that Mr Flavin, by virtue of his connection to DCC, may have acted contrary to Section 108(2) in pursuing the disposal by DCC to Lotus Green of a beneficial interest in the shares of Fyffes. If one evaluates Mr Flavin's connection with S&L where he was also a director, there are also circumstances suggesting that Mr Flavin, by virtue of his connection to S&L, may have acted contrary to Section 108(2) in pursuing the disposal by S&L to Lotus Green of a beneficial interest in the shares of Fyffes.

60. A further question to be examined is: did DCC and S&L act contrary to Section 108? Section 108(6) provides as follows:

> "*(6) Without prejudice to subsection (3), but subject to subsections (7) and (8), it shall not be lawful for a company to deal in any securities at a time when any officer of that company is precluded by subsection (1), (2) or (3) from dealing in those securities.*"

61. Following the above analysis, there are circumstances suggesting that at face value, both DCC and S&L may have breached Section 108 in disposing of a beneficial interest in the shares of Fyffes to Lotus Green by virtue of Mr Flavin's connection with both DCC and S&L. However, Sections 108(7) and (8) must also be considered before any final conclusion can be drawn.

62. Section 108(7) states as follows:

> "*(7) Subsection (6) does not preclude a company from entering into a transaction at any time by reason only of information in the possession of an officer of that company if—*

(a) the decision to enter into the transaction was taken on its behalf by a person other than the officer;

(b) it had in operation at that time written arrangements to ensure that the information was not communicated to that person and that no advice relating to the transaction was given to him by a person in possession of the information; and

(c) the information was not so communicated and such advice was not so given."

63. This provision does not seem to provide relief from the above provisional conclusion on the basis that the circumstances suggest that the decision to deal in the shares of Fyffes may have been knowingly taken by the board of DCC on 31 July 1995.

64. Section 108(8) states as follows:

"*(8) Subsection (6) does not preclude a company from dealing in securities of another company at any time by reason only of information in the possession of an officer of the first-mentioned company, being information that was received by the officer in the course of the performance of his duties as an officer of the first-mentioned company and that consists only of the fact that the first-mentioned company proposes to deal in securities of that other company*."

65. It seems also clear that Section 108(8) may not set aside the provisional conclusion with respect to Section 108(6) above in the case of both DCC and S&L on the basis that the circumstances suggest that the planned disposal to Lotus Green of a beneficial interest in the shares of Fyffes may have been an active and deliberate strategy led by Mr Flavin and may not have simply involved the passive receipt of information by an officer of DCC or S&L in the course of the performance of his or her duties as is apparently contemplated by the subsection.

66. The next question to be considered is: did Lotus Green act contrary to Section 108? As indicated above, Section 108(6) would generally preclude Lotus Green from dealing in the shares of Fyffes "*when any officer of that company is precluded by subsection (1), (2) or (3) from dealing in those securities*". The directors of Lotus Green on its acquisition of the Fyffes's shares on 9

August 1995 were four senior employees of the DCC Group. Were any of these officers precluded from dealing in the Fyffes's shares? The earlier conclusion about the non-applicability of Section 108(1) would seem to apply here as well. In the context of Section 108(2), it is submitted that as directors, they were all connected with Lotus Green. It would also seem to be the case that by virtue of their employment relationship with DCC or with related companies in the DCC Group, they were connected to DCC within the meaning of Section 108(11)(c)(i). Moreover in their capacity as persons connected with Lotus Green and/or DCC, the circumstances suggest that they may have been in possession of information which was not generally available (subparagraph (a), first part), and which if it were, it would be likely materially to affect the price of the Fyffes's shares (subparagraph (a), second part) and which related to an actual or contemplated transaction involving DCC, Lotus Green and the securities of Fyffes (subparagraph (b)).

67. Insofar as the first exception permitted by Section 108(7) is concerned, the circumstances suggest that this may not apply because the two directors of Lotus Green who attended the board meeting on 9 August 1995 and decided to acquire the beneficial interest in the Fyffes's shares were both officers of Lotus Green who, by virtue of their employment relationship, may have been connected to DCC within the meaning of Section 108(11)(c)(i). Although it does not seem to affect the above provisional conclusion, it is unclear if they obtained the information passively in the performance of their duties as directors as seems to be contemplated by the subsection.

68. There is a further general exception contained in Section 108(9) which requires consideration. This reads:

> "*(9) This section does not preclude a person from dealing in securities, or rights or interests in securities, of a company if—*
>
> *(a) he enters into the transaction concerned as agent for another person pursuant to a specified instruction of that other person to effect that transaction; and*
>
> *(b) he has not given any advice to the other person in relation to dealing in securities, or rights or interests in securities, of that*

company that are included in the same class as the first-mentioned securities."

69. If it were the case that there was no qualitative difference in the involvement of DCC, S&L, Lotus Green and Mr Flavin in the acquisition and disposal of the Fyffes's shares in 1995 relative to 2000, the conclusion of the High Court that DCC, S&L and Lotus Green dealt as principals in 2000 would seem to operate as well with respect to 1995. As principals, the three Companies would be ineligible to avail of this exception. The High Court also concluded that in 2000 Mr Flavin dealt as agent of the DCC Group, and as such, could therefore potentially qualify under this exception. However, in the transactions in 1995 as well as in 2000, the circumstances suggest that Mr Flavin may have actively advised the DCC Group to acquire and dispose of the Fyffes's shares. If this were confirmed by investigation, he would not be eligible to avail of the exception permitted by Section 108(9).

70. While Mr Flavin is the only individual to have been considered to date in the context of the 1995 acquisition and disposal of the Fyffes's shares, there were other directors and senior managers in the DCC Group who seem to have actively participated in the planning and execution of the relevant transactions. Each of them would appear to be precluded from dealing on the basis of the information obtained by them either directly or indirectly under Section 108(2) or Section 108(3) respectively, and yet they seem to have permitted the three Companies to act unlawfully under Section 108(6). Moreover, Section 108(4) states that it is unlawful for any person to cause or procure any other person (in this case one or more of the three Companies) to deal in the Fyffes's shares.

71. Many of the parties to the acquisition and disposal of the Fyffes's shares appear to have had the benefit of legal advice from Mr Alvin Price of William Fry on 25 July 1995 which is outlined above on the insider dealing issue. The brevity of that advice makes it difficult to evaluate. Nonetheless, the documents in the Second Report seem to disclose an appreciation that the

transactions had legal risks under both Parts IV and V of the 1990 Act, but as indicated, decisions were made to proceed with them anyway.

72. Having regard to the difficulties which were discussed within the DCC Group, Section 108(10) would have provided a basis for proceeding with these transactions without legal risk. The provision states:

> "*(10) This section does not preclude a person from dealing in securities if, while not otherwise taking advantage of his possession of information referred to in subsection (1)—*
>
> *(a) he gives at least 21 days' notice to a relevant authority of the relevant stock exchange of his intention to deal, within the period referred to in paragraph (b), in the securities of the company concerned, and*
>
> *(b) the dealing takes place within a period beginning 7 days after the publication of the company's interim or final results, as the case may be and ending 14 days after such publication, and*
>
> *(c) the notice referred to in paragraph (a) is published by the exchange concerned immediately on its receipt*."

73. Clearly however, the circumstances suggest that disclosure in the manner contemplated by this subsection was not attractive to the DCC Group and was not accordingly availed of.

Conclusion with respect to the 1995 Events

74. In conclusion therefore, the circumstances suggest with respect to the disposal by DCC and S&L to Lotus Green of a 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's shares in excess of the 5% threshold;

- Lotus Green and DCC may have acted contrary to Section 91 in failing to notify Fyffes of their acquisition of Fyffes's shares in excess of the 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 be 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.

Part C – The Events of 2000

The Supreme Court Judgments

75. We have already seen in Part A above that it was the events leading up to the Fyffes's share sales in February 2000 which gave rise to the Civil Proceedings and the subsequent High Court Judgment which found that the dealing by the three Companies and Mr Flavin was not unlawful under Section 108 and that therefore no civil liability to account arose under Section 109 of the 1990 Act.

76. As indicated earlier, the sole issue which was appealed to the Supreme Court by the Plaintiff was the High Court's decision that the confidential information relating to Fyffes's trading in November/December 1999 would not be likely

materially to affect the price of those shares if it were generally available. Having regard to the Supreme Court's unanimous conclusion that the information in question was price-sensitive in a material way, it is appropriate to consider now a number of the contrary Supreme Court Judgments which overturned that High Court decision.

77. Denham J (Geoghegan J concurring) concluded that:

> *"For the reasons given, I would allow the appeal. I am satisfied that the November and December 1999 Trading Reports contained price-sensitive information. Consequently, the learned trial judge erred in concluding that the information in the possession of Mr Flavin, relating to the business of Fyffes, on three dates in February, 2000, when Mr Flavin dealt in the shares of Fyffes, was not price-sensitive vis-à-vis those shares."* (Final Page of the Judgment)

78. Fennelly J concluded that:

> *"I would find as a fact that the information contained in the November/December trading figures would, if it had been generally available on the dates of the share sales, have been likely materially to affect the price of Fyffes shares."* (Final Page of the Judgment)

79. Earlier in his Judgment, he reflected on the nature of insider dealing:

> *"It used not to be considered any sort of sin to profit financially from the use of secret, private or privileged information. That was how fortunes were made. Now things are different. To trade on the use of inside information is recognised for what it is. It is a fraud on the market. The insider who exploits his access to the special knowledge he enjoys for the purposes of the company in his capacity as executive or director of a company commits a crime. He may be made, additionally, to answer for the profits he has made."* (First Page of the Judgment)

80. Macken J stated:

> *"For the reasons set forth in the Judgment of Fennelly, J., on this issue, I concur fully with his findings. The conclusion of the learned High Court judge ought to have been that the information appearing in the November/December Trading Reports, had it been released at the relevant dates, would have materially affected the plaintiffs' share price, and that Section 108(1) of the Act of 1990 had been breached by the defendants, and I so find."* (Final Page of the Judgment)

81. Finnegan J concluded that:

> *"1. The "reasonable investor" concept is derived from the jurisprudence of the United States developed in relation to a quite different statutory regime with differently worded provisions. It is of no assistance in applying the statutory test. As shorthand for describing the test as objective it is unobjectionable. The statutory test is this: if available to the market would the non-disclosed information be likely materially to affect the price of the shares.*
>
> *2. The learned trial judge made clear findings of fact. However she rejected the post-disclosure events of 20th March 2000 and days following as having no evidential value. While expert evidence is of value, where, as here, there are serious conflicts in the same, the court may have to rely on common sense. In this regard post-disclosure market events, properly evaluated, constitute objective evidence. The greater the parity between the information coming into the market in advance of those events and the non-disclosed information and the greater concurrence between market conditions at the date of sale and the date of disclosure the more cogent and compelling that evidence will be. There is sufficient concurrence between the information contained in the November and December figures and the trading statement of 20th March 2000 to make the market reaction to the trading statement compelling evidence as to the manner in which the market would react to the information contained in the November and December figures. The learned trial judge found that the affectation of the share price was due to the disclosure contained in the trading statement. She was in error in excluding entirely from her consideration the market events on 20th March 2000 and days following. Had she availed of this evidence, having regard to her findings of fact. It is inevitable that she would have concluded that the non-disclosed information in the possession of the defendants, if available to the market, would have affected the share price and to a material extent: the actual affectation by the trading statement was of the order of 15% and the evidence was clear that affectation of the order of 10% is material.*
>
> *3. In these circumstances I would allow the appeal."* (Final Page of the Judgment)

Consequential Matters

82. Having regard to the facts contained in the High Court Judgment and the findings of the Supreme Court, the circumstances suggest that other senior persons in the DCC Group may have given support to the execution of the insider dealing transactions in 2000. For instance as indicated earlier, the DCC board meeting on 31 July 1995 approved of the disposal of the beneficial interest in the shares of Fyffes to Lotus Green. In respect of the board's

subsequent engagement with the issue, the High Court Judgment makes a number of findings, including the following:

> "*It is clear on the evidence that from 1996 onwards the board of DCC adopted a recommendation of Mr. Flavin that DCC's continued shareholding in Fyffes was no longer a correct strategic position and that the asset should be realised when the time was opportune*." (Page 183);
>
> "*There is no evidence that the board of DCC as an organ in a formalised manner expressly approved of the Share Sales or the manner in which they were effected in February, 2000. However, as I have stated in the context of the issue of whether Mr. Flavin dealt, I infer that the board tacitly approved of Mr. Flavin acting as agent of the DCC Group in the sale of the shares. I also consider that it is probable that he did so with the informal express approval of the members of the board. I do not think it reasonable to infer that the board of a public company would countenance the disposal of an asset worth over €100m in the manner suggested by the defendants in these proceedings.*" (Page 188).

83. It is noteworthy that the five persons who comprised the board of DCC in early February 2000 had also comprised its board in July 1995 when it originally disposed of its beneficial interest in the Fyffes's shares to Lotus Green. Three of them (including Mr Flavin) remain on the nine member DCC board today.

84. Two DCC board directors (one of whom was Mr Flavin) were on the board of S&L in February 2000, and they had also been on it in August 1995 when the original decision to dispose of its beneficial interest in the Fyffes's shares to Lotus Green had been made. 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. It seems clear from the findings of fact in the High Court Judgment in particular that both men played important roles in advising on, planning and executing the Fyffes's share transactions in 1995 and 2000.

85. In early 2000, the board of Lotus Green comprised three Dutch and one Irish director (excluding the nominated alternate Irish director). The Irish director was and is the Chief Financial Officer of DCC. When the board made its decision to acquire a beneficial interest in the Fyffes's shares on 9 August

1995, the board seems to have comprised four senior DCC Group executives, one of whom was Compliance Officer/Secretary of DCC.

86. As a result of the Supreme Court's finding that the confidential information relating to Fyffes's trading in November/December 1999 was price-sensitive, this has consequences for certain actions of the Plaintiff which led to trading in its own shares in January 2000. These include in particular:

- the Plaintiff's grant of share options in January 2000 following a recommendation by its Compensation Committee (of which, as indicated earlier, Mr Flavin was Chairman) at a time when Fyffes itself was in possession of confidential information which the Supreme Court concluded was materially price-sensitive;

- the Plaintiff's agreement in January 2000 to allow the sale of Fyffes's shares by one of its senior employees when it was in possession of confidential information which the Supreme Court has concluded was materially price-sensitive.

Conclusion with respect to the 2000 Events

87. In conclusion therefore, the Supreme Court held that:

- Mr Flavin was in possession of price-sensitive information on the three dates of the share sales in February 2000;

- the Defendants acted contrary to Section 108(1) of the 1990 Act at the relevant times and

- the Plaintiff was entitled to damages in respect of its claim which was subsequently settled for an amount of €37.6 million excluding legal costs.

88. There are also 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 transactions in 2000 and

- certain senior persons in Fyffes may have benefited from other insider dealing transactions in 2000 and may have been facilitated in so doing.

Part D – Options and Prospects for Further Investigation

Need for an Investigation of DCC, S&L and Lotus Green

89. This Application is predicated on:

- 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's shares in 1995;

- the finding of the Supreme Court that the three Companies and Mr Flavin acted contrary to Section 108(1) of the 1990 Act in disposing of the Companies' legal and beneficial interests in the ordinary shares of Fyffes in 2000.

90. At the outset, I propose to address the need for further investigation of the latter matter in the light of the findings by the High Court and Supreme Court in the recent Civil Proceedings. It is my belief that further investigation is necessary for various reasons, including the following:

- the Civil Proceedings only addressed the issue of insider dealing in the context of the civil claim for damages which related solely to the disposal by the three Companies of the ordinary shares of Fyffes on three dates in February 2000. It did not address and determine the other suggested circumstances of default which are identified in this Application;

- the Civil Proceedings only required the Court to make a determination in respect of the Defendants in those Proceedings. It did not address and determine the relative contribution, responsibility and culpability of the 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 which are identified in this Application;

- the High Court relied upon statements of fact which appear to have been agreed between the parties in the Civil Proceedings. In the absence of a formal investigation into these matters, it is not possible to confirm that the summaries as provided constitute the full facts relating to the associated insider dealing transactions, never mind the other circumstances of potential default indicated in this Application;

- the High Court did not have the benefit in the Civil Proceedings of testimony from a number of important witnesses to the events relating to the associated insider dealing transactions. These included a senior executive of Davy, the then Chairman of DCC, another director of DCC and two directors of Lotus Green. While the Court declined to draw any inference from the failure to call those witnesses, their testimony would be important in establishing precisely what transpired in the execution of the insider dealing transactions in February 2000;

- it is clear that all of the facts pertinent to the issues have not been conclusively established to date given two matters in particular. Firstly, the Supreme Court was only required to address one issue on appeal in the Civil Proceedings, and secondly, the DCC board has, notwithstanding the outcome of that appeal, been able to reaffirm its support for Mr Flavin in public pronouncements.

91. It is appropriate in this context that I also address the recent DCC board statement in support of Mr Flavin. A central argument in that statement is that Mr Flavin did not improperly use the inside information relating to Fyffes's trading which was in his possession in late January and early February 2000 when the transactions took place. The key fact is that the applicable Irish law prohibited the three Companies and Mr Flavin from dealing while he was in possession of information that was likely to be materially price-sensitive. It may therefore be unlawful and improper for him to have dealt in the Fyffes's shares and thereby to have secured for the DCC Group in 2000 an unlawful gain at the expense of other market participants which has now been quantified at €37.6 million. It is beside the point to argue, as the board seeks to do, that Mr Flavin's conduct can somehow be excused because this prohibition was more onerous than the associated Council Directive 89/592/EEC or because it is now more onerous that the current Irish legislation in this area.

92. I have already referred in the preceding paragraphs to the nature of the Civil Proceedings and the possibility that not all of the relevant evidence and information may have been before the High Court when it made its Judgement. It is also the case that only one finding of that Court was appealed, and appealed successfully, to the Supreme Court. The board's reliance on certain findings of the High Court in favour of Mr Flavin may not therefore be sound.

93. Having regard also to the circumstances suggesting breaches of Sections 67, 91 and 108 which may have occurred in 1995 and the linkage between those events and the transactions in 2000 which were found by the Supreme Court to have constituted insider dealing, it is respectfully submitted that a thorough investigation of the events surrounding both the 1995 and 2000 transactions is required. This will serve the public interest in establishing the facts, clarifying the prevailing uncertainties and attributing appropriate responsibility and culpability to the persons who contributed to these or any other detected defaults.

94. As Director of Corporate Enforcement, I am responsible for both encouraging compliance and enforcing suspected non-compliance with the provisions of the Companies Acts. In the former context, it would be a matter of concern to me 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 would give cause for belief that insider dealing involves 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 and in a manner contrary to the public interest. In the interests of proper accountability, I say and believe that it is important that the matters which are disclosed in this Application should be thoroughly investigated so that there is a clear connection between the actions of any persons who were found to have, or are suspected of having, caused, procured or actively participated in insider dealing and their being brought to account for those actions.

Manner of Investigation of DCC, S&L and Lotus Green

95. In my recent interventions before the Supreme Court and High Court, I adverted to the difficulties that would arise in my conducting a fresh investigation of the subject matter of the Civil Proceedings.

96. In the circumstances, I believe that a High Court inspection under Section 8 of the 1990 Act offers the best prospect at this stage of properly investigating the circumstances of default suggested in this Application and of establishing responsibility and culpability for any detected defaults. Inspectors have extensive legal powers to acquire relevant company documentation, to require the attendance before them of all officers and agents of companies and of other relevant persons, to receive all reasonable assistance in connection with their investigation and to examine the persons attending before them on oath if necessary. By comparison, my powers in a number of these areas are restricted.

97. Moreover under Section 11 of the 1990 Act, the High Court may order inter alia the publication of any inspectors' report. Publication of the results of an

inspection in the case of three Companies would be clearly desirable in the light of the ongoing public unease and controversy surrounding these issues.

98. In addition under Section 22 of the 1990 Act, an inspectors' report shall be admissible in any civil proceedings as evidence:

- of the facts set out therein without further proof unless the contrary is shown, and

- of the opinion of the inspectors in relation to any matter contained in the report.

99. Furthermore under Section 160 of the 1990 Act, the Court may inter alia order the disqualification of any person in consequence of an inspectors' report if, having considered the report, I, as Director, were to determine in due course that such an application would be warranted.

100. In conclusion, I say and believe that it is appropriate that in the absence of any other effective means of doing so, serious offences like insider dealing and related suspected defaults should be thoroughly investigated under the authority of the High Court. The amount of the settlement which concluded the Civil Proceedings emphasises the appropriateness of a High Court Inquiry.

Need for an Investigation of Fyffes

101. Reference was made earlier to the circumstances suggesting that certain senior persons in Fyffes benefited from insider dealing transactions in 2000 and were facilitated in so doing. I refer in particular to:

(a) the grant by Fyffes on 25 January 2000 of share options when Fyffes was in possession of information which the Supreme Court has concluded was materially price-sensitive, and

(b) the agreement by Fyffes to allow the sale on 26 January 2000 by one of its senior employees of 45,000 ordinary shares when Fyffes was in possession of information which the Supreme Court has concluded was materially price-sensitive.

102. The circumstances suggest that dealing occurred contrary to Section 108 of the 1990 Act in these cases. However on the basis of the information available to me and the small relative value of the dealings, I have decided that the circumstances do not warrant my petitioning the High Court for a formal investigation of Fyffes at this stage.

Part E – Legal Basis for High Court Inquiry of DCC, S&L and Lotus Green

The Legal Basis for this Application in respect of DCC

103. In summary, I am of the opinion that the High Court should appoint one or more inspectors to DCC under Section 8(1)(a) and (b) of the 1990 Act on the basis that there are circumstances suggesting that:

(a) its affairs have been conducted in an unlawful manner, by virtue of the breaches by the company of Sections 67, 91 and 108 of the 1990 Act in 1995 and Section 108 of the 1990 Act in 2000;

(b) persons connected with the governance and/or management of its affairs have in connection therewith been guilty of misconduct towards it, by virtue of the breaches by one or more of the company's officers of Sections 67, 91 and 108 of the 1990 Act in 1995 and Section 108 of the 1990 Act in 2000.

The Legal Basis for this Application in respect of S&L

104. I am also of the opinion that the High Court should appoint one or more inspectors to S&L under Section 8(1)(a) and (b) of the 1990 Act on the basis that there are circumstances suggesting that:

(a) its affairs have been conducted in an unlawful manner, by virtue of the breaches by the company of Section 108 of the 1990 Act in 1995 and 2000;

(b) persons connected with the governance and/or management of its affairs have in connection therewith been guilty of misconduct towards it, by virtue of the breaches by one or more of the company's officers of Section 108 of the 1990 Act in 1995 and 2000.

The Legal Basis for this Application in respect of Lotus Green

105. In addition, I am of the opinion that the High Court should appoint one or more inspectors to Lotus Green under Section 8(1)(a) and (b) of the 1990 Act on the basis that there are circumstances suggesting that:

(a) its affairs have been conducted in an unlawful manner, by virtue of the breaches by the company of Sections 67, 91 and 108 of the 1990 Act in 1995 and Section 108 of the 1990 Act in 2000;

(b) persons connected with the governance and/or management of its affairs have in connection therewith been guilty of misconduct towards it, by virtue of the breaches by one or more of the company's officers of Section 67, 91 and 108 of the 1990 Act in 1995 and Section 108 of the 1990 Act in 2000.

Prayer

106. I therefore pray this Honourable Court to grant the relief sought in the Notice of Motion herein.

SWORN by the said **PAUL APPLEBY**
this day of May 2008
at

in the County of the City of Dublin
before me a Commissioner for
Oaths/Practicing Solicitor and I know the
Deponent

_____

COMMISSIONER FOR OATHS/
PRACTISING SOLICITOR

This affidavit is filed on day of May 2008 by Ann Keating, Principal Solicitor, Office of the Director of Corporate Enforcement, 16 Parnell Square, Dublin 1.

THE HIGH COURT

Record No: 2008/ COS

**IN THE MATTER OF DCC PLC,
S & L INVESTMENTS LIMITED
and LOTUS GREEN LIMITED**

AND

**IN THE MATTER OF THE
COMPANIES ACTS 1963 TO 2006**

AND

**IN THE MATTER OF AN
APPLICATION BY THE
DIRECTOR OF CORPORATE
ENFORCEMENT PURSUANT TO
SECTION 8(1) OF THE
COMPANIES ACT 1990**

BETWEEN/

**THE DIRECTOR OF CORPORATE
ENFORCEMENT**

APPLICANT

-AND-

**DCC PLC,
S & L INVESTMENTS LIMITED
AND LOTUS GREEN LIMITED**

RESPONDENTS

AFFIDAVIT OF PAUL APPLEBY

**ANN KEATING
PRINCIPAL SOLICITOR
OFFICE OF THE DIRECTOR OF
CORPORATE ENFORCEMENT
16 PARNELL SQUARE
DUBLIN 1.**