

ODCE PRESS STATEMENT

Fyffes plc v. DCC plc and Others – Supreme Court, 13 November 2007

Today's Supreme Court application was "fully justified"

– Director of Corporate Enforcement

Mr Paul Appleby, the Director of Corporate Enforcement, has issued the following statement today (13 November 2007) in relation to his intervention in the civil insider dealing proceedings between Fyffes plc and DCC plc, S & L Investments Limited, James Flavin and Lotus Green Limited:

"I made an application to the Supreme Court this morning to be joined as a Notice Party to the Fyffes plc v. DCC plc and Others civil proceedings 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 (if merited) pursuant to Section 160(2) of the Companies Act 1990.

While this was an unusual application, I believe that it was fully justified for the reasons set out in my Affidavit to the Supreme Court. As was indicated by my Senior Counsel in Court, I stand over its contents notwithstanding the criticisms made of it in the replying Affidavit filed by Mr Michael Buckley on behalf of the Board of DCC plc.

The Supreme Court, in dismissing my application, said that it was a matter for the High Court. As the issue of a potential disqualification in these proceedings is now open, I have therefore achieved my primary objective in taking this application.

As I anticipate that the High Court will now consider the appropriateness of making one or more disqualification orders of its own motion, I will not be making any further comment."

ENDS/

Editor's Note

1. The Affidavit of Mr Paul Appleby, the Director of Corporate Enforcement, to the Supreme Court today (13 November 2007) is reproduced at **Appendix 1** to this Note. The exhibits are not included in the Appendix.
2. The scope of Section 160(2) of the Companies Act 1990 (as amended) is at **Appendix 2** to this Note. While an application for disqualification would normally be the subject of a specific application, the law does allow any court to make a Disqualification Order of its own motion in any proceedings. The relevant parts of the subsection are underlined in the Appendix.
3. The effect of a Disqualification Order is outlined in Section 159 of the Companies Act 1990, a copy of which is at **Appendix 3**.

Office of the Director of Corporate Enforcement

13 November 2007

THE SUPREME COURT

Record No: 144/06

BETWEEN/

FYFFES PLC

PLAINTIFF/APPELLANT

-AND-

DCC PLC, S & L INVESTMENTS LIMITED,

JAMES FLAVIN

AND

LOTUS GREEN LIMITED

DEFENDANTS/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 say that 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 to seek to ensure that any Order which may be made by this Honourable Court in these proceedings may address the issue of making a Disqualification Order (if merited) pursuant to the provisions of Section 160(2) of the Companies Act, 1990 (“the Act of 1990”).

The background to the application

3. In accordance with the functions designated to me under Section 12 of the Company Law Enforcement Act, 2001, my Office has monitored these proceedings, both in the High Court and the Supreme Court.
4. The proceedings involve misconduct under the Companies Acts primarily in the form of insider dealing, the detailed facts of which are apparent from the

pleadings in the case, the transcripts and the judgments delivered by the courts.

5. On the 21 December 2005 the High Court (Laffoy J.) delivered her judgment in the matter, and I beg to refer to a copy of same when produced.
6. On the 27 July 2007 this Court delivered its judgments in the appeal, and I beg to refer to a copy of same when produced. The said judgments allowed the appeal.
7. I understand that the appeal stands adjourned before this Court so that, on a date to be fixed, the Court can consider the making of any Orders consequent on the Judgments it has delivered. It is in this context that the within application is made.

Facts and Findings

8. In the proceedings in this Court, neither the Plaintiff nor the Defendants challenged any of the key findings of fact of the High Court. In summary, these included the findings that:
 - the Defendants had ‘dealt’ in the shares within the meaning of Part V of the Act of 1990;
 - the Third Named Defendant had caused and procured the dealing which resulted in the share sales;
 - it was appropriate to treat the First, Second and Fourth Named Defendants as a single entity if the Plaintiff was entitled to its statutory remedy under the Act of 1990.
9. On appeal by the Plaintiff, this Court overturned the High Court conclusion that the Third Named Defendant was not in possession of price-sensitive information on the three dates of the share sales in February 2000. This Court accordingly concluded that the Defendants engaged in insider dealing at the relevant times and that the Plaintiff was entitled to damages in respect of its claim.
10. Having regard to the facts and the judgements of this Court, there are a number of consequential issues which may need to be considered. The High Court judgement makes reference in particular to:
 - the support which other senior persons in the DCC Group gave to the execution of the insider dealing transactions;
 - the Plaintiff’s grant of share options to a number of individuals in January 2000 at a time when it was in possession of information which this Court has concluded was price-sensitive;

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

The issue

11. I am advised that Section 160(2) of the Companies Act, 1990 provides inter alia that any court may, of its own motion, make a disqualification order against a person for such period as it seems fit in circumstances where it is satisfied in any proceedings that certain matters are established.
12. I am advised that Section 160(2) has a very wide breadth and that either this Court or the High Court may in any proceedings disqualify any person of its own motion.
13. Having reviewed the judgments of the High Court and this Court, it appears to your deponent that no reference has been made to the ability of either Court to make such a disqualification order.
14. In circumstances where the High Court has made uncontested findings of fact, I believe that it would be particularly appropriate that the issue of whether grounds exist for disqualification be considered in the context of the within proceedings.
15. I am concerned that were it necessary to bring separate proceedings to address any question of disqualification that might arise, assuming that such were possible, this would lead to unnecessary time, complexity, evidential difficulties and cost. In the judgments of this Court, critical reference has already been made to the length of the proceedings to date notwithstanding the brevity of the statutory provisions at issue. I therefore believe that having regard in particular to the clear findings in these proceedings, it would be more appropriate, more efficient and in the public interest that this Court or the High Court determine whether the established facts and conduct merit disqualification.
16. Insider dealing is an abuse of the market in company securities, one which rightly attracts heavy financial and other penalties under the law. It can be reasonably said, I believe, that the profitable exploitation of inside information to the detriment of other investors which has been disclosed in these proceedings has been a matter of some public concern. 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 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 timely accountability, I say and believe that it is important that any issue of disqualification is dealt with in the present proceedings so that there is a clear connection between the actions of any persons who were found to have caused, procured or actively participated in insider dealing and their being brought to account for those actions.

17. In the absence of reference being made in these proceedings to date to the power of the Court under Section 160(2), I am concerned that the proceedings may be remitted to the High Court for the sole issue of determining the quantum of damages. Such an outcome 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.
18. While I accept entirely that this is a matter which lies solely within the Court's discretion, I nevertheless respectfully make this application to this Court to ensure that it has had its attention expressly drawn both to its powers and the High Court's powers pursuant to Section 160(2). It is entirely a matter for the Court to determine:
 - to what extent it will act on its own motion under this Section;
 - if, in remitting these proceedings to the High Court, it will require the High Court to address the question of the disqualification of one or more persons, and/or
 - if, in remitting these proceedings to the High Court, it will not exclude the possibility that the High Court might exercise its power under Section 160(2) of its own motion.

Correspondence

19. By letter dated the **18 October 2007** my Office wrote to the Solicitors acting for the Plaintiff/Appellant and the Defendants/Respondents herein. I beg to refer to a true copy of this letter upon which marked with "**PA 1**" I have signed my name prior to the swearing hereof. In this letter, the parties' attention was drawn to my intention to make the within application, and they were invited to indicate whether or not they consented to same. The letter asked them to revert within ten days and indicated that if they did not consent, I would proceed to make the application.
20. My Office has since received two replies. By letter dated the 26 October 2007, William Fry on behalf of the Defendants/Respondents suggested that my proposed application was unnecessary because the jurisdiction conferred by Section 160(2) was unaffected by the scope of any expected direction of the Supreme Court to the High Court. I beg to refer to a true copy of this letter upon which marked with "**PA 2**" I have signed my name prior to the swearing hereof. By letter dated 1 November 2007, Arthur Cox, Solicitors, on behalf of the Plaintiff/Appellant made a similar argument to that made by William Fry.

Arthur Cox also questioned my entitlement to intervene in civil proceedings in the manner suggested. I beg to refer to a true copy of this letter upon which marked with “**PA 3**” I have signed my name prior to the swearing hereof. As indicated in paragraph 17 above, I am concerned that, notwithstanding the circumstances outlined, the proceedings may be remitted to the High Court for the sole issue of determining the quantum of damages. For the reasons outlined in paragraphs 8 to 18 above, it remains my belief that the within application should be made.

Prayer

21. I therefore pray this Honourable Court for the relief sought herein.

SWORN by the said **PAUL APPLEBY**
this 2nd day of November 2007
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 the 2nd day of November 2007 by Ann Keating, Principal Solicitor, Office of the Director of Corporate Enforcement, 16 Parnell Square, Dublin 1.

THE SUPREME COURT

2006 RECORD NO. 144

BETWEEN/

FYFFES PLC

Plaintiff/Appellant

-AND -

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

Defendants/Respondents

AFFIDAVIT OF PAUL APPLEBY

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

REF: 40/08/16/DIS/DBM/DMcE

Text of Section 160(2) (as amended) of the Companies Act 1990

“(2) Where the court is satisfied in any proceedings or as a result of an application under this section that—

- (a) a person has been guilty, while a promoter, officer, auditor, receiver, liquidator or examiner of a company, of any fraud in relation to the company, its members or creditors; or
- (b) a person has been guilty, while a promoter, officer, auditor, receiver, liquidator or examiner of a company, of any breach of his duty as such promoter, officer, auditor, receiver, liquidator or examiner; or
- (c) a declaration has been granted under section 297A of the Principal Act (inserted by section 138 of this Act) in respect of a person; or
- (d) the conduct of any person as promoter, officer, auditor, receiver, liquidator or examiner of a company, makes him unfit to be concerned in the management of a company; or
- (e) in consequence of a report of inspectors appointed by the court or the Minister under the Companies Acts, the conduct of any person makes him unfit to be concerned in the management of a company; or
- (f) a person has been persistently in default in relation to the relevant requirements; or
- (g) a person has been guilty of 2 or more offences under section 202(10); or
- (h) a person was a director of a company at the time of the sending, after the commencement of section 42 of the Company Law Enforcement Act, 2001, of a letter under subsection (1) of section 12 of the Companies (Amendment) Act, 1982, to the company and the name of which, following the taking of the other steps under that section consequent on the sending of that letter, was struck off the register under subsection (3) of that section; or
- (i) a person is disqualified under the law of another state (whether pursuant to an order of a judge or a tribunal or otherwise) from being appointed or acting as a director or secretary of a body corporate or an undertaking and the court is satisfied that, if the conduct of person or the circumstances otherwise affecting him that gave rise to the said order being made against him had occurred or arisen in the State, it would have been proper to make a disqualification order otherwise under this subsection against him;

the court may, of its own motion, or as a result of the application, make a disqualification order against such a person for such period as it sees fit.” **(Emphasis underlined)**

Extract from Text of Section 159 of the Companies Act 1990

“ ‘Disqualification Order’ means—

an order under this Part that the person against whom the order is made shall not be appointed or act as an auditor, director or other officer, receiver, liquidator or examiner or be in any way, whether directly or indirectly, concerned or take part in the promotion, formation or management of any company, or any society registered under the Industrial and Provident Societies Acts, 1893 to 1978 ...”