

CHAPTER 1. INTRODUCTION:

1.1 On the evening of the 3rd February, 2000, a celebratory bottle of champagne was opened and shared between three prominent and respected Irish businessmen at the Dublin Airport Hotel marking the beginning of the end of a mutually beneficial and close business association between them and their companies which began in late 1979. The three businessmen were: Jim Flavin, Chief Executive and founder of industrial holding group DCC plc (“DCC”); Neil McCann, Chairman, and his son, David McCann, Chief Executive of the fresh produce group Fyffes plc (“Fyffes”).

1.2 Earlier that day, at around 4.40 pm, exactly half of the approximate 10.5% stake in Fyffes beneficially owned by Lotus Green Limited (“Lotus Green”), an Irish registered but Dutch resident subsidiary of DCC, was sold to institutional investors through the agency of Irish stock broking firms, Davy’s and Goodbody’s, Lotus Green had acquired the stake from DCC and another DCC subsidiary as part of a DCC Capital Gains Tax saving scheme in August 1995.

1.3 Within a further eleven days, the remainder of the ordinary shares beneficially owned by Lotus Green in Fyffes were sold to institutional investors in two separate tranches (on the 8th and 14th February) at a profit on ‘cost’ to DCC of some €85 million. On the 9th February 2000, Jim Flavin, by prior agreement, resigned as a Director of Fyffes, a position he had held continuously since 1981.

1.4 In February, 2000, the Fyffes’ share price (in common with the share prices of a large number of other companies in Ireland and around the globe) was ‘riding high’ principally on the strength of its ‘worldoffruit.com’ online fruit trading venture part of what was colloquially, if inelegantly, known as the ‘dotcom’ boom. The Fyffes’ share price peaked on the 18th February at €3.98

1.5 None of the three men at the hastily convened and cordial meeting in the north Co. Dublin hotel could have been thinking, or even imagining, that, within a period of six and a half weeks, a combination of investor disenchantment with ‘dotcom’ shares and a Fyffes profit warning issued on March 21st would send the Fyffes’ share price into a steep downward spiral from the heights it had attained a month earlier. The profit warning set in train a process which eventually saw the three men and their companies on opposing sides in a titanic, eighty-seven day, ‘insider dealing’ action in the High Court which ran from December 2004 to July 2005.

1.6 The outcome of the **Fyffes plc -v- DCC plc, S&L Investments Limited, Jim Flavin and Lotus Green Limited (hereafter “Fyffes -v- DCC and Others”)** proceedings, the first civil claim of ‘insider dealing’ in this jurisdiction, in DCC’s favour, and the subsequent successful ‘single issue’ appeal by Fyffes to the Supreme Court is legal history. In July 2007 all five judges of the Supreme Court found that the Fyffes trading information in the possession of Jim Flavin when he, and by extension DCC and S&L Investments Limited (“S&L”), ‘dealt’ in the Fyffes shares in February 2000 was ‘price-sensitive’ within the meaning of Section 108 of the Companies Act, 1990. Ironically, by the time the Supreme Court was hearing the Appeal in 2007, the provisions of the Companies Act, 1990, that applied in 2000 had been repealed and were replaced by a new statutory regime implementing the EU Market Abuse Directive of 2003.

1.7 The reversal of the High Court decision on the ‘price-sensitive’ information issue by the Supreme Court and the consequent finding of unlawful ‘insider dealing’ against Jim Flavin, DCC plc and S&L, cost the DCC Group including Lotus Green €42 million in damages (inclusive of the costs of the Court proceedings) and ultimately brought about the resignation of DCC’s founder Jim Flavin as Executive Chairman of DCC in May 2008.

1.8 Following the Supreme Court judgment and the findings of unlawful insider dealing against Jim Flavin, DCC and S&L, the Director of Corporate Enforcement (“the

Director”), who had been keeping a close eye on the proceedings decided to apply to appoint Inspectors.

1.9 In May 2008, the Director applied to the High Court for the appointment of Inspectors to investigate the two sets of ‘transactions’ whereby Lotus Green first acquired the beneficial ownership of the Fyffes shares from DCC and S&L in August 1995 and the subsequent sale of the Fyffes shares by all three companies in February 2000.

1.10 The companies and their directors strenuously opposed the application. After a hotly contested two day hearing before him in June 2008 (dealt with in detail in Chapter 2 below) Mr. Justice Kelly decided, on balance, that a thorough investigation of the affairs of the three companies in respect of the two sets of transactions in 1995 and 2000 by an Inspector was warranted in the public interest as requested by the Director. By his judgment and Order dated the 29th July 2008, I was appointed to carry out that investigation.

1.11 I have now completed the investigation and herewith present my Report.

1.12 The structure of the Report is as follows. In Chapter 2 I explain in detail: the reasons for my appointment; the concerns of the Director; and the arguments advanced by the companies and their directors and officers as to why no appointment was warranted. In Chapter 3 I summarise: the conduct of the investigation by me; the steps I took; the procedures I followed; and my interaction with the companies, their directors, officers and advisers, third parties, the Director and the Court. In Chapter 4 I set out: a brief factual summary of the two sets of transactions in 1995 and 2000. Chapter 5 describes each of the three companies and lists the names of the officers, directors, and advisers to each, the dates that they were appointed or acted and the dates upon which they resigned or ceased to act as the case may be. Chapter 6 summarises the High and Supreme Court judgments and the finding of a breach of the ‘insider dealing’ provisions of the Companies Act, 1990, which lead to the Director seeking my appointment. Chapter 7 summarises the relevant statutory provisions in Part IV and V of the

Companies Act, 1990 and those specific Sections which the Director believed that the officers, directors, and employees of the companies may have breached.

1.13 Chapter 8 and 9 are the most important and substantial chapters of my Report. In Chapter 8 I summarise all of the contemporaneous documents relevant to the two sets of transactions. Many of these were referred to in the High Court proceedings and/or were known to the Director prior to my appointment. Chapter 9 contains my summary of almost thirty days of interviews with the officers, directors and advisers to the companies and a number of other individuals. I have selected the extracts most relevant to the terms of my investigation. In my summary of the evidence from the interviews I have tried to present it in a readable fashion so as to give a clear idea of what the individual explained to me. Chapter 10 summarises a number of other documents requested by me and provided from the Compliance File maintained by the DCC Compliance Officer. There are additional documents produced in full in Appendix M which I was referred to in the course of the interviews. The combination of the documentary evidence and the evidence given on oath to me at interview forms the basis for my conclusions and findings in Chapter 11. Finally, in Chapter 12 I provide a brief summary of the main conclusions of my Report and acknowledge all those who assisted me in carrying it out.

1.14 In order to get a full understanding of my investigation and the basis for the conclusions and findings reached it is necessary to read Chapters 8 and 9 of the Report. I do not repeat or quote extensively from these Chapters in my findings and conclusions in Chapter 11.

