

CHAPTER 10. THE FURTHER DOCUMENTS:

During the course of the interviews, reference was made by Mr. Scholefield and Mr. Flavin in particular to a DCC 'Compliance File'. There was also reference made to other documents which DCC claimed would show that compliance matters were taken very seriously within the companies. Further to my request for additional documentation I was furnished with a substantial booklet of documents from the DCC 'Compliance File'. It included letters from the Irish Stock Exchange, letters from DCC to William Fry, letters from William Fry to DCC, internal memorandums, copies of letters from Jim Flavin to Neil McCann, extracts from DCC Minutes, extracts from the working notebook of Michael Scholefield and memorandums to the Compliance File from Michael Scholefield. In the following paragraphs I have set out a synopsis of some of these documents which, although they do not touch directly on the two sets of transactions with which I am concerned, show the extent to which DCC had regard to its company law compliance obligations in general, and was conscious and cognisant of Part IV and Part V of the Companies Act, 1990, in particular. I have not summarised all of the documents in the booklet nor have I included them in the Appendix.

10.1 A letter from the Stock Exchange to the Secretary of each publicly quoted company, including DCC, dated the 1st March 1991, sought to clarify when directors and others connected with the company may deal in the light of Part V of the Companies Act 1990.

10.2 An internal memorandum from Hugh Keelan, the then Company Secretary of DCC, on the 9th May, 1991, referred to the provisions of Part V of the Companies Act, 1990, explained that the legislation did not impose an obligation on the company's board to ensure that the statutory provisions were adhered to by its officers. However, having regard to the civil and criminal penalties which an officer might face if he breaches the legislation he advised that it would be desirable for the company to have clearance procedures which could be availed of by its officers. He also set out the Yellow Book and Model Code provisions and specified that a written record should be maintained of

the notification by the employee and of the clearance by the Chairman and that the employee should receive a copy of this clearance.

10.3 There was also included an extract of the minute of a meeting of DCC dated the 13th May, 1991, in which the following was minuted:

“Mr. Flavin noted that the valuation report did not include investment reviews in respect of quoted companies. He said that he believed it was right not to include such reviews in the light of the insider dealing legislation incorporated in the Companies Act 1990. The directors agreed with this practice.

10.3.1 In the same minute under a heading *“Insider Dealing”* Mr. Flavin is recorded as follows:-

“Mr. Flavin reported that executives do not deal in the shares of DCC investee companies but, in some cases non beneficial holdings are registered in an executive’s name.

Mr. Flavin proposed that if any non executive director was considering dealing in the shares of DCC investee companies they should speak with him before doing so in order to avoid any dealing at a sensitive time. The non-executive directors agreed to do so.

Mr. Flavin declared that some shares in Fyffes plc., Flogas plc, and Wardell Roberts plc which were previously held by his late father in law were now registered in his name as Executor and Trustee. He said that he had not dealt in these shares but that he would discuss any proposed dealing with Mr. Spain before proceeding. Mr. Flavin also declared that his sister had bought shares in some DCC investee companies and that he gives her investment advice. Mr. Spain declared that he had through Zeus

Pension Fund a small holding in Printec International plc, and Reflex Investments plc.”

10.4 On the 7th June, 1991, Mr. Brendan Heneghan of William Fry sent a long letter of advices to Mr. Rue concerning the entry of DCC into an underwriting agreement and as to whether same might be illegal under the provisions of Part V of the Companies Act, 1990.

10.5 On the 21st August, 1991, Mr. Flavin prepared a memorandum to Ken Rue and Hugh Keelan concerning a proposed disposal by members of the McCann family of certain shares in Fyffes. The memorandum is marked “Strictly Market Sensitive”. In the memorandum Mr. Flavin requests Mr. Keelan to review the insider dealing provisions of the Companies Act, 1990, and more particularly the guidelines laid down by the Investment Managers Association.

10.6 A further extract from the Minutes of DCC board Meeting of the 2nd September, 1991, under the heading “Compliance Officers” records Mr. Flavin as saying:-

“That he had appointed Ken Rue and Peter Fetherman (U.K.) as Compliance Officers as required by the Securities and Futures Authority. Mr. Flavin has asked Mr. Rue and Mr. Fetherman to regard their role as embracing internal policing of the applicability of all Stock Exchange regulations including Yellow Book, Green Book and Blue Book and Companies Acts legislation in Ireland and the UK to DCC and its subsidiaries and DCC’s professional role with related and other companies. Mr. Flavin said that he would report to the board quarterly on any compliance issues that should properly be brought to the board’s attention.”

10.7 On the 9th September, 1991, Mr. Ken Rue sent a memorandum to Jim Flavin in connection with a proposed Fyffes plc share transfer. In it Mr. Rue was responding to

Mr. Flavin's request to him as Compliance Officer to consider whether certain discussions between Fyffes plc and its advisers might affect the possible decision by another company in DCC to deal in Fyffes shares at the time. Mr. Rue set out the considerations and the information which he had obtained and based on the above expressed the opinion that the Fyffes' directors and DCC were not in possession of unpublished price sensitive information by virtue of their knowledge of the current state of certain transaction discussions.

10.8 On the 10th January, 1992, Mr. Alvin Price wrote to Fergal O' Dwyer in response to an enquiry as to the application of the insider dealing provisions under the Companies Act, 1990, to a transaction proposed to be entered into by DCC. Mr. Price expressed the view, in the context of that particular transaction, that DCC's pre-knowledge of the proposed transaction was not price sensitive information within the meaning of the Act as he believed that DCC were entitled to rely on the provisions of Section 108(8) of the Companies Act, 1990. Mr. Price stated as follows:

“On the basis of the facts outlined in our telephone conversation as detailed above I believe DCC is entitled to rely on that sub-section.”

10.9 The file also contains a detailed note prepared internally within DCC providing a summary of the legal and Stock Exchange regulations regarding dealing in shares by directors. It was dated March 1992.

10.10 A further letter from Brendan Heneghan of William Fry's dated the 24th March, 1992, contained advice to a request seeking further clarification on a point arising under Section 108(10) of the Companies Act, 1990.

10.11 The Minutes of a meeting DCC plc dated the 4th March, 1992, records the appointment of Mr. Hugh Keelan as Compliance Officer as follows:-

“The relationship of the Compliance Officer with the board was discussed and the board agreed that Mr. Keelan would make presentations to the board on an independent basis half yearly and at any other time that he thought necessary.”

10.12 On the 9th August, 1992, Hugh Keelan sent a memorandum to Jim Flavin in connection with the proposal to purchase further shares in Wardell Roberts plc.

10.13 On the 5th November, 1992, Jim Flavin wrote to Neil McCann in the following terms:

“We agreed at a board meeting some time back that DCC should prepare an updated set of guidelines for dealings in shares by directors. I enclose such an update for distribution to each director if you are happy with the contents.

With warm wishes,

*Yours sincerely,
James F Flavin”*

10.13.1 Attached to the letter was a detailed summary of the legal and Stock Exchange regulations regarding dealing in shares by directors similar to the one prepared internally for DCC in March 1992.

10.14 The DCC plc board Minutes of the 18th November, 1992, under “Matters Arising” dealt with compliance as follows:-

“A review of compliance activity covering the period May 1992 to November 1992 prepared by Hugh Keelan, DCC Compliance Officer was presented to the board.

Mr. Flavin informed the board that Hugh Keelan as Compliance Officer monitored and kept formal records of all monitoring of share dealings by the group. Mr. Flavin was satisfied that procedures in this area were adequate and effective. Mr. Spain raised the issue of compliance monitoring in a wider sense relating to all legislation and other regulations. He cited as examples the Competition Act, Pollution and Environmental Controls etc. Mr. Spain proposed and it was agreed that compliance reports should be broadened to evidence the group's existing and ongoing efforts to comply with all such legislation/regulations."

10.15 On the 30th November, 1992, Hugh Keelan sent a memorandum to Jim Flavin concerning the proposed purchase of shares in Fyffes. Having recited the then current trading and acquisitions update he concluded that, based on the above, he considered that the McCann family and DCC were free to deal in Fyffes' shares.

10.16 On the 1st December, 1992, Jim Flavin wrote to Neil McCann headed "Strictly Personal" in the following terms:

"Dear Neil,

Hugh Keelan is the DCC Board appointed independent Compliance Officer within DCC. When we engage in a share transaction in a quoted company or are any way involved in advising clients in relation thereto we seek his independent view on whether we are free to deal. I thought it might be helpful for you to have for your file a copy of Hugh's Memo to me clearing yesterday's purchase and sale.

*Kind regards,
James F. Flavin,
Chief Executive*

cc Carl McCann”

10.17 On the 16th February, 1993, Mr. Jim Flavin wrote to Carl McCann, Deputy Chairman of Fyffes, in connection with the grant of share options on the 12th February. The letter stated the following:-

“Dear Carl,

When I signed the Compensation Committee Minutes dated 12th February approving the grant of share options it escaped my mind to consider whether the insider dealing provisions in the 1990 Companies Act have any relevance at this time. I should be obliged if you would not take any further steps in relation to the grant of these options until this matter has been fully considered. In this regard I will welcome a copy of the draft Minutes of the last two board meetings and the exchange of correspondence with Goldman Sachs. In principal I am very supportive of the grant of these options but we do have to be satisfied that we are not precluded from granting options at this time under the insider dealing provisions.

Yours sincerely,

James F. Flavin,

Chief Executive”

10.18 On the 19th February, 1993, Mr. Hugh Keelan wrote to Mr. Alvin Price of William Fry with DCC guidelines on insider dealing in the following terms:-

“Dear Alvin,

In the light of the IAIM code of best practice on insider dealing I have prepared a brief set of guidelines for all DCC directors and employees summarising the restrictions which they should observe in quoted share dealings. The guidelines embrace the legislative provisions of the Companies Act 1990 but in some cases

go beyond the legal requirements. I would welcome any comments which you might have.

*Best Wishes,
Hugh Keelan”*

10.18.1 There was, attached to that document, a two page share dealing guideline for directors and employees of DCC dated February 1993.

10.19 On the 23rd February, 1993, Mr. Price replied to Mr. Keelan’s letter informing him that he did not have any additional comments on the draft guidelines “*given that they take full account of the provisions of the Companies Act, 1990, and also the IAIM Code of Practice and I therefore feel your draft guidelines can be adopted as they stand.*”

10.20 An extract from the DCC Minutes of the 3rd March, 1993, under “compliance” provided as follows:

“A review of compliance activity covering the period November 1992 to February 1993 presented by Hugh Keelan DCC Compliance Officer was presented to the board. Mr. Keelan reported under the following headings:-

DCC Share Dealings.

Share dealings by directors of investee companies.

Takeover offers for Wardell Roberts and Printec.

Broader compliance matters.

The board noted the report. Also in the same Minutes under the heading “Share dealing guidelines the Minutes recorded “DCC Limited Share dealing guidelines for directors and employees February 1993 were presented to the board. Mr. Flavin proposed and it was agreed that these guidelines be approved and that all directors and employees be required to

sign a copy as confirmation of their understanding of the contents the signed copies to be returned to Hugh Keelan DCC Compliance Officer.”

10.21 On the 21st April, 1994, Mr. Alvin Price wrote to Carl McCann of Fyffes in connection with the forthcoming DCC floatation and the arrangements entered into with Coopers & Lybrand in relation to relative to their proposed review and report on Fyffes plc as per their terms of reference for the “long-term” report in connection with the DCC floatation.

10.22 On the 8th May, 1992, the Minutes of the meeting of DCC plc recorded the continuing obligations of the directors of DCC under the rules of the Stock Exchange and further considered a memorandum received from William Fry on the potential criminal and civil liability associated with listing particulars. The directors indicated their understanding of the position. The same meeting also adopted, by board resolution, a code of dealings under Rule 16.18 of the Listing Rules of the Stock Exchange in terms “*no less exacting than those of the Model Code as set out in Chapter 16 of the Listing Rules and to take all proper and reasonable steps to secure compliance with same.*” The Minutes further recorded that the secretary was directed to ensure that the written records required to be maintained as to the Model Code should be so maintained by the company. Appended to the Minutes were the extracts from the Model Code.

10.23 On the 19th July, 1994, Fergal O’ Dwyer wrote to Jim Flavin and copied Daphne Tease and Hugh Keelan with details of a number of amendments which had been made to the Model Code arising from the coming into force of the insider dealing provisions of the UK Criminal Justice Act, 1993. He explained that the main changes to the code appeared to be the clarification of what does and does not constitute a ‘dealing’ for the purposes of the code.

10.24 On the 27th September, 1994, Mr. Hugh Keelan of DCC wrote to Ms. Geraldine Jones of the Stock Exchange to confirm the DCC understanding of the applicability of the Model Code to dealings in shares by the parent, sibling or adult child of a director of a

quoted company. He asked if the Stock Exchange would confirm that they were in agreement with this interpretation of the Model Code as set out in the letter.

10.25 On the 30th September, 1994, Ms. Jones replied confirming that the Stock Exchange interpretation of the Model Code was in agreement with the advice she had given to Brendan Heneghan of Fry's.

10.26 The Minutes of the DCC plc board meeting of the 21st November, 1994, recorded the following:-

“Mr. Flavin informed the directors that the ‘close period’ in which directors are prohibited under the Model Code from dealing in the company’s shares would commence on the 30th September 1994. The ‘close period’ is the period of two months immediately preceding the preliminary announcement of the company’s interim results or, if shorter, the period from 30th September 1994 up to and including the time of the announcement. It was agreed that the company secretary would in future advise the directors in writing prior to the commencement of a ‘close period’.”

10.27 On the 23rd November, 1994, Daphne Tease, Company Secretary, wrote to all head office employees of DCC excluding the directors attaching a copy of the Stock Exchange Model Code which governed dealings in shares in companies. The head office employees were informed that the board of directors of DCC plc had adopted the Model Code as a code of dealings applicable to dealings in shares of DCC plc by (1) the directors, (2) all head office employees, (3) any other employees of the group who may be in possession of unpublished price sensitive information in relation to the company. The letter exhorted the head office employees to read the Model Code carefully.

10.28 On the 8th December, 1994, Mr. Jim Flavin wrote to Mr. Neil McCann in connection with “board procedures”. In the memorandum he set out his comments on the Fyffes board procedures discussed at the board meeting the previous week. He said that

the comments focused principally on those areas “*where the procedures suggested are not in accordance with the Cadbury Code of Corporate Governance. The Cadbury Code has been endorsed by the Stock Exchange and the Irish Association of Investment Managers as representing best practice in the area of corporate governance and board procedures.*” The memorandum then set out five numbered paragraphs dealing with specific points.

10.29 In January 1995 DCC issued an updated share dealing guideline for directors and employees which included a listing of the five public companies in which DCC or one of its share subsidiaries had a shareholding, namely Flogas plc, Fyffes plc, Greenway Holdings plc, Heaton Holdings Plc and Reflex Group plc.

10.30 On the 12th May, 1995, Mr. Alvin Price of William Fry wrote to Daphne Tease referring to their telephone conversations in regard to the proposed issue of partly paid shares under the “partly paid share scheme”. She had raised with him the insider dealing provisions of the Companies Act, 1990, and the possible application of those provisions to the issue of partly paid shares. He explained that the first point to note was that the general prohibition on dealing while in possession of price sensitive information applied equally before and after the publication of results. He also explained that dealing includes subscribing for shares:

“As I understand it the proposed issue and subscription for partly paid shares is to take place some days after the announcement of the company’s final results and, therefore, in the absence of their being any price sensitive information not generally available, Part V of the Companies Act 1990 would not prohibit the issue of or subscription for the partly paid shares.”

10.31 The two page letter was similar in form to the letters which Mr. Price wrote in July 1995 concerning the notification obligations and insider dealing implications of the transfer of the beneficial ownership to Lotus Green.

10.32 On the 12th September, 1995, Mr. Michael Scholefield prepared a memorandum for Jim Flavin comparing the UK and Irish legislation on insider legislation. His conclusion in the memorandum was in the following terms:

“Because of the different drafting to the two pieces of legislation I will be extremely cautious about comparing the two in general terms and one would suggest that any specific situation be looked at separately under both pieces of legislation. Both pieces of legislation are quite general in nature so that it is not easy to apply them to a specific circumstance. Nowhere is there a definition of a “significant effect” (UK) or “a material affect” (Ireland) on the share price. The effect of the UK Act is probably easier to assess because:-

*The definitions are rather more detailed and precise, e.g. “inside information” (above); and
The UK Act talks about what a person actually has, knows or expects rather than the Irish Act where inferences may be made about what is reasonable; and
The UK Act offers specific defences based on actual knowledge or expectations whereas the Irish Act offers no defences.*

In view of the complexity of this area if there is any doubt whatsoever about a particular transaction I would suggest that we consult with our lawyers at an early stage.

Michael”

10.33 On the 12th October, 1995, Michael Scholefield wrote to David Gavigan drawing to his attention certain provisions of the Companies Acts and informing him that for a

period of six months after the date of cessation of his employment with DCC he was not permitted to deal in securities in DCC if, by reason of his connection with DCC, he was in possession of information that was not generally available but if it were would be likely materially to affect the price of those securities (“price sensitive information”).
Hw further set out:-

“Similar considerations may also apply to dealings in the securities of any other company where, by reason of your connection with DCC you are in possession of price sensitive information. For further information I will refer you to Part V of the Companies Act 1990. I would suggest that if you are in any doubt as to your obligations you should take appropriate legal advice.”

10.34 On the 15th January, 1996, Mr. Scholefield wrote to Mr. Flavin, in an internal memorandum, in connection with the proposed disposal of DCC’s shareholding in “Lettuce plc” a UK Company in which DCC had some 29.4% shareholding. The memorandum dealt with the insider dealing provisions of the Model Code in relation to notification of interests, resignation of a director and announcement by DCC issues.

10.35 On the 16th January, 1996, Mr. Scholefield prepared a detailed memorandum to file on the exercise of options and whether the exercise of an option constituted a “dealing” under the Irish Companies Act, 1990, and the Model Code of the Stock Exchange contained in the Listing Rules.

10.36 On the 18th April, 1996, Mr. Alvin Price sent to Mr. Flavin an article which appeared in the July 1993 edition of Plc Magazine headed *“In Line with Market Expectations? Analysts Briefings and Brokers Lunches.”*

10.37 On the 1st August, 1996, Mr. Scholefield wrote a memorandum to the Compliance File concerning a proposed private placement of US\$ unsecured notes on which Mr.

Flavin had asked him to confirm his view that knowledge of the above did not constitute a price sensitive matter. He stated:

“I was happy to do this on the basis that the funds are being raised for general corporate purposes rather than for any specific transaction. As such I do not believe knowledge of this transaction is likely to have any material impact on our share price. The market is already well aware of DCC’s strong financial capacity.”

10.38 On the 16th September, 1996, Michael Scholefield sent a memorandum to Jim Flavin after he had confirmed with Alvin Price that, where the board was acting as agent under the terms of DCC’s employee partly paid share scheme such a sale could take place during a “close period” provided that the executive ceasing to be employed was not himself an insider.

10.39 On the 27th September, 1996, Mr. Scholefield prepared another memorandum to the Compliance File in connection with the proposal by George Young to dispose of certain shares.

10.40 On the 17th April, 1998, Mr. Flavin wrote in a personal capacity to Mr. Philip Halpenny informing him that he (Mr. Flavin) was allotted 478 Fyffes’ plc ordinary shares under the Fyffes’ script dividend plan in respect of the final dividend for the year ended the 31st October, 1997. The letter also set out the total “non-beneficial interest” which he held in Fyffes’ ordinary shares.

10.41 On the 12th May, 1998, Mr. Alvin Price wrote to Mr. Flavin in connection with Fyffes’ insistence that he, Mr. Flavin would seek the Chairman’s permission to take up the script dividend. His advice was to the effect that Mr. Flavin did not need to seek the Chairman’s permission. The letter concluded as follows:

“Of course, dealings by DCC Plc may be precluded from time to time by virtue of the Company Law provisions to insider dealing but I know from our discussions that you are fully conscious of that point.”

10.42 On the 28th August, 1998, Mr. Michael Scholefield prepared a memorandum to the Compliance File re Fyffes plc:-

“This note records that Carl McCann of Fyffes discussed with Jim Flavin the proposition that Fyffes might purchase its own shares in the market today. He asked Jim if he was aware of any reason why Fyffes should not deal today. Jim said that there was no reason of which he was aware and asked me to confirm that I was not aware of any reason which, following consideration I duly did.

Michael Scholefield”

