

CHAPTER 3. CONDUCT OF THE INVESTIGATION:

3.1 Following my appointment by Mr. Justice Kelly on the 29th July, 2008, I was contacted by the Office of the Director of Corporate Enforcement to notify me of same. I was informed that there was a stay on my appointment for 48 hours to allow the companies to decide whether they wished to appeal Mr. Justice Kelly's Order to the Supreme Court.

3.2 Subsequently, I was informed that the companies had decided not to appeal the High Court Order. I was then furnished with copies of the papers grounding the application for my appointment, the 'opposition' papers of the companies, copies of the transcripts of the two day hearing before Mr. Justice Kelly on the 20th and 21st June, 2008, Mr. Justice Kelly's judgment of the 29th July, 2008, and his Order of the same date. The said Order required, inter alia, that I present an interim progress report by January 28th, 2009.

3.3 Within a few days of my appointment I was contacted by William Fry, Solicitors for the companies, to inform me that they would be representing the companies and assuring me of their full co-operation. I suggested that I would meet with them in September once I had an opportunity to read into some of the background papers.

3.4 During the month of August, 2008, I requested, and was furnished with copies of the transcripts of the eighty seven days of the High Court hearing before Ms. Justice Laffoy in the matter of **Fyffes -v- DCC and Others**, her judgment in that case, and the judgments of the Supreme Court in the subsequent appeal.

3.5 On the 12th September, 2008, I wrote to William Fry suggesting a meeting to discuss my initial document requirements and to explain in outline, for the benefit of their clients, how I proposed to proceed with my investigation.

3.6 On the 16th September, 2008, William Fry wrote to me to confirm that they were also acting for all persons who were directors and officers of the companies during the relevant periods. By letter of the same date, I asked the Solicitors to furnish me with the names of all the directors, officers and advisers to the companies during the relevant periods. The said list was furnished to me by cover of letter dated the 18th September. I have set out in Chapter 5 the names of the directors, officers and advisers to the companies. Two of the named directors of Lotus Green were merely the Law Society company formation directors and had no involvement whatsoever with Lotus Green after it was acquired by DCC. I did not request or require any assistance from them.

3.7 On the 18th September, 2008, I met with Mr. Owen O' Sullivan, Solicitor of William Fry, and Mr. Donal O' Donnell S.C. at my offices and outlined to them the manner in which I intended to progress and carry out the investigation. I was again assured by the legal advisers to the companies of their fullest cooperation. Following the meeting on the 18th September I wrote to William Fry listing the categories of documents which I required the companies and the directors, officers and advisers to discover. I further requested that each of the Deponents in their Affidavits of Discovery would briefly explain their position in, or involvement with, the companies. Finally, I provisionally fixed the date for the commencement of the interviews with the directors, officers and advisers for the 17th November, 2008.

3.8 During the months of September and October I continued to read myself into the matter principally through the eighty seven days of transcripts of the High Court proceedings in the **Fyffes -v- DCC and Others** litigation and the judgment of Ms. Justice Laffoy in that case. I also familiarised myself with the provisions of Parts IV and V of the Companies Act, 1990 which I have summarised in Chapter 7.

3.9 On the 17th October, 2008, the companies delivered their Affidavits of Discovery. On the 31st October, 2008, the Affidavits of Discovery on behalf of the directors, officers and advisers were delivered. All of the documents listed in the affidavits were provided

in hard copy and electronic format. Both sets of affidavits were delivered within the time limits originally set by me.

3.10 In total, four large bankers boxes of documents were furnished to me relating to both the 1995 and 2000 transactions. I inspected and read all of these documents. Following upon my inspection of the discovered documents, I requested the creation of two booklets of ‘core documents’ of the 1995 and 2000 transactions from the larger body of documents discovered. These booklets of ‘core documents’ for 1995 and 2000, which were utilised by me in the course of the interviews with the directors, officers, employees and advisers, are included in full in Appendices A and B to this Report. I have summarised the contents of these documents in Chapter 8 of this Report.

3.11 Having regard to the discrete and distinct nature of the two sets of transactions I decided that I would deal separately with the 1995 and 2000 transactions in the interviews with the individual directors, officers, employees and advisers.

3.12 On the 17th November, 2008, I commenced the interviews with the officers, directors and advisers of the companies in respect of the 1995 transaction. By the time the interviews started, William Fry had confirmed to me that they acted for all of the proposed interviewees, with the exception of PWC in Holland.

3.13 The interviews in respect of the 1995 transactions continued over fifteen separate days until the 6th December, 2008. I have set out in Appendix G a list of all the persons interviewed both in respect of the 1995 and the 2000 transactions and the dates of the said interviews. The only director whom it was not possible to interview was Mr. Henry Roskam, a Dutch-resident director of Lotus Green Limited. I was informed by the companies’ legal advisers, and subsequently on oath by his friend and fellow Dutch director Mr. Venneboer, that Mr. Roskam suffered from an Alzheimer’s related medical condition such that he was not able to provide any assistance to me in my investigation. I accepted this information.

3.14 The interviews of the Irish directors, employees and advisers in respect of the 1995 transactions took place at my offices in Arran Square in Dublin. I travelled to Holland on the 9th December, 2008, for interviews with the Dutch directors and PWC adviser on the 10th and 11th December. The Dutch interviews took place in the offices of Orangefield Trust the successor to ING Trust as corporate secretary to Lotus Green.

3.15 Each of the officers, directors and advisers were examined on oath and a full transcript was obtained. All of the individuals interviewed were accompanied by Solicitor and Counsel. A copy of the booklet of the 1995 core documents and the Minutes of the meetings of the companies was available to each of the witnesses. I explained to each of the interviewees that their assistance to me was pursuant to the provisions of Section 10 of the Companies Act, 1990. I also explained to them the procedure which I proposed to adopt, namely to question them on their individual involvement in the 1995 transactions and to refer them to documents from the booklet of core documents.

3.16 I have summarised these interviews (and the interviews in respect of the 2000 transactions) in Chapter 9 of this Report. Each of the individuals interviewed has signed the transcript of their evidence.

3.17 On the 28th January, 2009, I presented my 1st Interim Report to the High Court. The said Interim Report is included in Appendix J of this Report.

3.18 Following the completion of the interviews with the directors, officers and advisers in respect of the 1995 transactions, I carefully reviewed the transcripts and entered into correspondence with the Solicitors for the companies arising from the interviews. I requested further assistance from the companies by providing me with (i) the Section 67 and 91 notices served in respect of the Fyffes' shares prior to 1995; (ii) a copy of the Compliance File maintained by DCC; and, (iii) a reconstruction of the advices given by Mr. Price of William Fry in 1994 to DCC in respect of the notification

obligations for a separate transaction involving the DCC stake in Flogas plc – the original advices having long since been destroyed.

3.19 All of the further requests for assistance were complied with and the documents requested were furnished. The Compliance File, which is referred to and summarised later in Chapter 10 of this Report, is a substantial file. The Section 67 and 91 notices in respect of Fyffes are included in Appendix F and the reconstruction of the 1994 advices of William Fry is included in Appendix I. For completeness Appendix M contains all of the additional documents I requested during the course of the investigation over and above those furnished to me with the original Affidavits of Discovery.

3.20 One of the matters that concerned me in carrying out my inquiry was to try to get an objective and independent view on the ‘compliance culture’ as it existed in corporate Ireland between 1995 and 2000. Having consulted with the companies legal advisers and having satisfied myself that he had no connection with the companies, I decided that I would seek assistance from Mr. Laurence Crowley, former Executive Chairman at the Smurfit Business School at U.C.D. Mr. Crowley attended at my request to be interviewed on the 5th February, 2009. His interview is summarised later in the Report.

3.21 The preparation for the interviews in respect of the 2000 transactions was more complicated than for the 1995 transactions. The primary reason for this was that the 2000 transactions were forensically examined in minute detail during the course of the **Fyffes - v- DCC and Others** litigation. Although the doctrine of ‘res judicata’ does not apply to my fact finding function, I was anxious, if at all possible, to try to avoid any ‘conflicts’ between my findings of fact and those of Ms. Justice Laffoy (having regard to the comprehensive Judgment of the learned High Court Judge) unless the evidence available to me and not available to her clearly warranted a finding which was not in accordance with her conclusion. The legal determinations in the said proceedings on the liability of the companies and Mr. Flavin under Sections 108 and 109 are, of course, binding on me.

3.22 The interviews in respect of the 2000 transactions commenced on the 2nd March, 2009, and ran over 11 separate days ending on the 28th May, 2009. During that period, in

addition to interviewing most, but not all, of the individuals interviewed in respect of the 1995 transactions, I interviewed Ms. Mairead O'Malley, who worked with Mr. Fergal O'Dwyer in DCC, Mr. Michael Buckley, the current Chairman of DCC, Mr. Roy Barrett, Managing Director of Goodbody Stockbrokers, and Mr. Kyran McLaughlin, Chairman of Davy Stockbrokers. As with the 1995 interviews, I interviewed the Irish based individuals in my offices in Dublin and travelled to Holland to interview the Dutch directors and Dutch PWC adviser on the 6th and 7th May, 2009. The same procedure was followed as with the 1995 interviews. Although I have included Mairead O'Malley as an 'officer', she was not an 'officer' in the strict sense that Mr. Flavin, Mr. O'Dwyer and Mr. Scholefield were officers. More accurately, Ms. O'Malley should be described as an 'executive' or 'employee' of DCC.

3.23 On the 20th May, 2009, I wrote to the legal advisers for the Director and the companies seeking their assistance concerning the import of the second part of the Order of my appointment, under which I was required to report on whether "*Parts IV and V and any related provisions of the Companies Act, 1990 were breached by the three Respondent companies, their officers (including shadow directors), managers, employees, servants and agents*". I heard submissions from the Director of Corporate Enforcement and the companies on this matter on the 10th June, 2009.

3.24 The hearing was attended by Solicitors and Senior Counsel for the Director and the companies. There was broad agreement among the legal advisers as to the approach which I proposed to adopt in relation to this aspect of the Order. In short, rather than reaching what might appear to be a legal determination that an individual breached a particular section I agreed that if this arose I would say 'there is evidence tending to suggest' or 'there are circumstances suggesting' a breach of a given Section.

3.25 During the course of the hearing on the 10th June, 2009, I also suggested to the parties that, subject to their views and the permission of the High Court, I was minded to include some general recommendations on 'corporate compliance' in my final Report, informed by the investigation which I was in the process of concluding. Both parties

agreed to revert to me on the matter, which they did on the 24th June. Subject to certain reservations which they expressed, neither party was vehemently opposed to my seeking leave to do so.

3.26 On the 14th July, 2009, I heard submissions from Counsel for the companies on the oral evidence that had been taken in the course of the interviews.

3.27 I delivered my 2nd Interim Report to the High Court on the 28th July, 2009. In that Report I indicated, inter alia, that I hoped to complete by investigation and to be in a position to finalise my Report by the 21st December, 2009, within the 18 month period that I had originally estimated. I also sought, and obtained, liberty of the High Court to include recommendations of a general nature in my final Report.

3.28 Since that time I have had cause to revisit the wisdom of including such general recommendations, even if they were included in a separate section, and I have decided that it would delay the completion of my final Report and it would also distract from the findings of my Report and, accordingly, it would not be in the interests of the companies or the public for me to do so. I have therefore not included any general recommendations in my final Report.

3.29 On the 14th September, 2009, having completed the investigation phase and having reviewed all of the documentation furnished to me along with the transcripts of the interviews conducted by me, I wrote to the legal advisers to the companies, their officers, directors and advisers with a summary of my preliminary findings insofar as they might be regarded as being adverse to their interests. I requested that they would respond to my preliminary findings on or before the 9th October, 2009.

3.30 On the 9th October, 2009, a detailed (90 page) written submission was delivered in response to my preliminary findings. The Solicitors for the companies also requested an opportunity to make oral submissions to me on the preliminary findings.

3.31 I held a hearing on Friday, 18th October, to hear oral submissions on behalf of the companies, their officers, directors and advisers.

3.32 Having completed the investigative phase of my inquiry, having delivered my preliminary findings, and having heard the companies, their officers, directors and advisers in response thereto, I set about to write my Report which I have now completed.

3.33 In the interests of openness, and transparency I am setting out the total amount paid to me to date in carrying out my investigation. I wish to point out that prior to the hearing of the application by the Director for the appointment of Inspectors, I was contacted by the Director's office and asked if I would be interested in being considered for the position. I was informed that a number of candidates were also being considered and that it was not clear whether one or more Inspectors would be appointed or sought if the High Court acceded to the application. I was also asked to submit a fee proposal together with an indication of the office and other facilities I could provide in carrying out the investigation. I submitted a fee proposal as requested and informed the Director of the facilities I could provide in carrying out the investigation. I also complied with a further follow on request for clarification.

3.34 The total amount paid from the date of my appointment on the 29th July 2008 to the 30th November, 2009 was €929,824.17 (excluding VAT and withholding tax). This figure includes the cost of the stenography service for the interviews, overnight transcripts, my legal advisers, travel and accommodation in Holland on two separate occasions, and the cost to date of typing and proofing my Report. There were no additional costs incurred for office accommodation or secretarial/administrative support since all of the Irish interviews were conducted in my offices and my Secretary provided all the ongoing secretarial/administrative support which I required. The Dutch interviews took place in the offices of Orangefield Trust for which there was no charge.

3.35 I estimate that the costs to completion (including the cost of my legal team for the forthcoming Court applications, typing, final proofing and printing of the Report) will be approximately €130,000 plus VAT.

3.36 In the acknowledgements section, at the end of Chapter 12 of the Report, I have set out the names of those who helped and assisted me in the conduct of my investigation.

