

CHAPTER 4. THE TRANSACTIONS SUMMARISED:

4.1 The essential facts of the two sets of transactions in 1995 and 2000 which I have been ordered to investigate were described before in both the judgments of Ms. Justice Laffoy and Mr. Justice Kelly. They are summarised by me below.

4.2 The association between DCC (under its then name of 'Development Capital Corporation Limited') and Fyffes (under its then name of 'Fruit Importers of Ireland Limited') began in late 1979. DCC was the corporate finance adviser to Fyffes on its floatation in 1981 and took a stake of 9.46% in the company. By 1995 this stake had grown slightly to approximately 10.5% comprised of ordinary and preference shares and held as to approximately 70% by DCC and 30% by its wholly owned subsidiary S&L.

4.3 On the 9th August 1995 Lotus Green acquired the entire beneficial interest in all of the Fyffes shares from DCC and S&L for slightly less than IR£38.5 million. DCC and S&L remained the legal owners of the shares. On the 3rd, 8th and 14th February 2000 Lotus Green sold all the ordinary shares.

4.4 As will be explained in more detail in later Chapters, Lotus Green was used by DCC to effect a Capital Gains Tax saving scheme on the ultimate disposal of the Fyffes shares outside of the DCC Group. Lotus Green was incorporated in the State on 22nd February, 1995. It was a "shelf" company and was acquired by the DCC Group on 11th May, 1995.

4.5 On the 26th May, 1995, its two subscriber shares were transferred as follows:-

- (1) One ordinary share of IR£1 to a company called Marjove Ltd. (Marjove); and

(2) One ordinary share of IR£1 to another DCC company, DCC Nominees Ltd. (Nominees), which, by a declaration of trust dated 26th May, 1995, declared that it held that share in trust for Marjove.

4.6 On 10th August, 1995, the one ordinary share of IR£1 held by Marjove was transferred to DCC International Holdings BV (BV). At the same time, Nominees declared that it held the other ordinary share of IR£1 as nominee of, and in trust for, BV. In 1998, in order to comply with a new Dutch law on “formal foreign companies”, the issued share capital of Lotus Green was increased by NLG39,998 bringing the issued and paid-up capital above NLG40,000, the new limit for registration under the new regulation.

4.7 Lotus Green was, accordingly, a wholly-owned subsidiary of BV, which, in turn, was a wholly-owned subsidiary of DCC. BV, which had been incorporated in 1992, was the company within the DCC Group which owned and controlled the DCC Group’s assets in the United Kingdom and other concerns in continental Europe.

4.8 At an extraordinary general meeting of Lotus Green held on 25th August, 1995, it was resolved that the articles of association of Lotus Green be amended by the insertion of provisions to the following effect:-

- (a) that all general meetings of the company should be held in the Netherlands;
- (b) that all directors’ meetings should be held in the Netherlands;
- (c) that the company should have ‘A’ directors and ‘B’ directors;
- (d) that only persons residing in the Netherlands should be appointed ‘B’ directors;
- (e) that a majority in number of all directors should at all times be ‘B’ directors;
- (f) that no act, contract or transaction should be binding on the company unless approved or authorised by at least one ‘A’ director and one ‘B’

director acting together;

(g) that the seal of the company should include the words “The Netherlands” and should be kept and used only in the Netherlands;

(h) that the head office of the company should be situated in the Netherlands; and

(i) that all books and records of the company, except those required by law to be kept at the registered office of the company, should be kept at its head office.

4.9 From 25th August, 1995 up to April 2000, there were three ‘B’ directors of Lotus Green: Mr. Henry Roskam, Mr. Gerard Venneboer and Mr. Godfried Diepenhorst, all of whom were resident in the Netherlands. Throughout the same period Mr. Fergal O’Dwyer, the DCC Chief Financial Officer, was an ‘A’ director. During two successive periods between 25th August, 1995 and 4th May, 1998, there was an additional Irish ‘A’ director, Dr. George Young. However, he never attended a board meeting of Lotus Green.

4.10 On 25th August, 1995, a Dutch company, ING (Nederland) Trust, became the secretary of Lotus Green.

4.11 The tax planning scheme was designed so that Capital Gains Tax in this jurisdiction and in Holland would be avoided on the ultimate sale of the DCC Group shareholding in Fyffes. The scheme involved the following four companies:-

(1) Marjove, a company incorporated in the State, which was to have a share capital divided into 76 “A” ordinary shares and 24 “B” ordinary shares, the shares ranking *pari passu* in all respects, including voting rights, save that the “A” shares would be entitled to repayment only at par on a winding-up, leaving the other assets of the company available to the holders of the “B” shares on winding-up.

(2) An Irish company in the DCC Group, DCC Properties Limited (Properties), which was to acquire the “A” ordinary shares in Marjove.

(3) BV, a Dutch company, which was to acquire the “B” ordinary shares in Marjove.

(4) Lotus Green, which initially was resident in Ireland for tax purposes and was to be a wholly-owned subsidiary of Marjove.

4.12 The tax scheme required to be implemented in a certain sequence. The first objective was that Marjove and Lotus Green needed to be part of the DCC ‘tax group’ for the purposes of Capital Gains Tax in this jurisdiction, so that the sale of the shares in Fyffes by DCC and S&L to Lotus Green would not give rise to Capital Gains Tax liability in this jurisdiction.

4.13 The second objective was to get Lotus Green out of that ‘tax group’ without incurring Capital Gains Tax liability in this jurisdiction. This objective was to be achieved by the liquidation of Marjove, followed by a distribution *in specie* of its assets – IR£76 to Properties and the shares in Lotus Green to BV.

4.14 Based on the taxation advice from the companies tax advisers, under the then prevailing tax legislation, if a company ceased to be a member of a Capital Gains Taxation group as a consequence of the winding-up of another member of the group, no gain would crystallise for tax purposes.

4.15 The third objective was that Lotus Green would change its residence for tax purposes from Ireland to Holland. This event, so the advice went, would not give rise to a Capital Gains Tax liability in this jurisdiction as Lotus Green would have already left the DCC tax group for Capital Gains Tax purposes.

4.16 The final objective was that Lotus Green would qualify for what was called ‘participation exemption’ in the Netherlands, so that no capital gains liability would arise in the Netherlands on the eventual disposal of the DCC Group’s holding of Fyffes shares. Subsequently, in or about 2004, ‘participation exemption’ was introduced in Ireland such that the elaborate tax scheme put in place in 1995 would no longer be necessary.

4.17 The steps taken to achieve the foregoing objectives were as follows:-

(1) As a result of the series of meetings held on the 26th May 1995, Lotus Green became a wholly owned subsidiary of Marjove, and Properties and BV respectively acquired the “A” shares and the “B” shares in Marjove.

(2) On the 30th June, 1995, the Dutch tax authorities gave clearance for ‘participation exemption’ for Lotus Green in relation to its proposed shareholding in Fyffes.

(3) On the 9th August, 1995, two share purchase 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 at the price of IR£8,050,875.00.

(4) Marjove was voluntarily wound up on the 20th August, 1995, and its shareholding in Lotus Green was distributed *in specie* to BV.

(5) As has been stated earlier, on the 25th August, 1995, the Articles of Association of Lotus Green were amended to effect the transfer of its residence to Holland.

4.18 The manner in which the purchase by Lotus Green was financed was that on the

9th August, 1995 Lotus Green obtained an interest-free loan from Properties for the combined purchase prices provided for in the Agreements – IR£38,462,985.68. That sum was borrowed by Properties from Bank of Ireland. When Lotus Green paid the combined purchase price, which was equivalent to that sum, to DCC and S&L on foot of the Agreements, those companies then made an interest-free loan to Properties, which enabled Properties to discharge its indebtedness to Bank of Ireland. All of those transactions were effected on the 9th August, 1995.

4.19 The position, accordingly, was that on the 9th August, 1995, Lotus Green executed the Agreements for the acquisition of the shareholding of the DCC Group in Fyffes and paid the entire purchase money. However, it was indebted to Properties for the entire purchase money under the loan agreement of that day, which stipulated that:-

- (i) The term of the loan was fifteen years,
- (ii) The loan was interest-free for the first year of the term, with the parties to agree each subsequent year whether, and at what rate, interest would apply thereafter,
- (iii) The purpose of the loan was to finance the purchase of the shares, and
- (iv) The loan was repayable at the end of the term, or earlier in certain circumstances, including the disposal by Lotus Green of all its assets for cash.

4.20 The Loan Agreement also provided that the provisions as to repayment of the loan would be subordinate to the rights of all other creditors of Lotus Green (other than creditors with subordinated rights). By a supplemental agreement made on the 25th August, 1995, the loan was redenominated into Dutch guilders, in the principal amount of NLG100,138,382-20.

4.21 Lotus Green held the beneficial interest in all the shares in Fyffes from August 1995 onwards. The legal title remained in the names of DCC and S&L. The dividends over the period from August 1995 to 2000 were paid to DCC and S&L and then transferred by them to Lotus Green. There was a slight accretion in the number of shares held when a scrip dividend was exercised by DCC and S&L on behalf of Lotus Green in 1998. Lotus Green also contemplated selling the shares in mid-1998 following a (temporary) run up in the price of the Fyffes' shares. By the time Lotus Green's board came to consider selling in July 1998 the share price of Fyffes had fallen back.

4.22 At the beginning of February 2000 Lotus Green was the beneficial owner of 31,169,493 ordinary shares and 4,621,901 8.25% convertible cumulative preference shares in Fyffes comprising about 10.5% of Fyffes' shares in total. The legal title to the ordinary shares was registered in the names of DCC and S&L. All of the preference shares were registered in the name of DCC. As regards the ordinary shares, which comprised shares allotted on foot of an election made in 1998 under Fyffes Scrip Dividend Plan in addition to the shares agreed to be transferred by DCC and S&L to Lotus Green in 1995, S&L was the registered owner of 7,765,280 shares and DCC was the registered owner of the balance.

4.23 According to the Davy's contract note, which was to the 'account' of Lotus Green, the first sale of Fyffes' shares was executed at 16:43 on the 3rd February, 2000, when 17,895,697 shares were sold at a price of €3.20, the total consideration being €57,266,230.40. This sale was satisfied by the transfer of all of the shares registered in the name of S&L and 10,130,417 registered in the name of DCC. According to the contract note, this sale was executed by Davy dealing as 'agent'. Commission at the rate of 0.25% was charged on the transaction.

4.24 Although this transaction was recorded by Davy's on the Stock Exchange, there had been a prior agreement between Davy's and Goodbody's that the shares acquired would be split equally between them on a broker deal.

4.25 The second and third sales were 'with' Goodbody's. The second was effected on 8th February, 2000, when 8,000,000 ordinary shares registered in the name of DCC were sold at a price of €3.60 per share, the total consideration being €28,800,000. The third sale related to the balance of the ordinary shares registered in the name of DCC, being 5,273,796 shares. This sale was effected on the 14th February 2000 at a price of €3.90 per share, the total consideration being €20,567,804.40. Commission was charged on these transactions at the rate of 0.25%. The contract note indicated that Goodbody's dealt as principal, i.e. that Goodbody's took the shares on its own book.

4.26 Following the three sales, DCC remained the registered owner of the preference shares, which represented 1.3% of the share capital of Fyffes. These shares were disposed of some two years later in 2002.

