

ODCE Press Statement

Publication of the DCC Inspector's Report

“Inspector's Report clarifies the actions of DCC and Mr James Flavin” - Director of Corporate Enforcement

The Report by Mr Bill Shipsey, S.C., the Inspector appointed to investigate the acquisition and disposal by DCC plc and its subsidiaries, S&L Investments Ltd and Lotus Green Ltd, of their interests in the ordinary shares of Fyffes plc between 1995 and 2000, was published this morning by order of the High Court.

The Inspector concludes his Report by stating that:

“...the actions and behaviour of DCC, S&L and Lotus Green between 1995 and 2000 in connection with the transactions under investigation measured up to the standards required by law notwithstanding Mr. Flavin's error of judgment.”

The Director of Corporate Enforcement, Mr Paul Appleby, has made the following statement to coincide with the publication of the Report:

“Fyffes plc initiated a civil insider dealing claim against DCC, S&L Investments Ltd and Lotus Green Ltd in early 2002. This lengthy action culminated in a unanimous Supreme Court decision in 2007 to the effect that Mr James Flavin dealt in the shares of Fyffes in February 2000 when he was in possession of price-sensitive information in relation to that company by virtue of his membership of its board of directors at that time. The settlement of the civil claim in 2008 cost the DCC Group some €42 million (including legal costs).

After the civil action ended, I applied to the High Court for the appointment of an Inspector to DCC, S&L and Lotus Green in order to establish the facts relating to the relevant share transactions in both 1995 and 2000, to clarify the prevailing uncertainties and to attribute appropriate responsibility and culpability to any person who contributed to a detected default. The High Court agreed in 2008 that on balance, the appointment of an Inspector was in the public interest and was not disproportionate.

Following an 18 month investigation, the Inspector's findings are now available. His Report clarifies the actions of all parties in both 1995 and 2000. The Inspector concludes that any breaches of company law which occurred were not made intentionally. *I welcome the fact that the Inspector has*

included in his extensive Report the relevant evidence which underpins his conclusions. This will assist people in understanding the basis for those conclusions.

I am satisfied that the Report achieves the public interest purpose which led me to seek the Inspector's appointment in the first place. Having considered its content in recent weeks, I do not believe that any further action is warranted by our Office under the Companies Acts.

In conclusion, I would like to thank Mr Shipsey for the extensive work undertaken by him in discharging his mandate as Inspector. Many people supported him and cooperated with him in completing this Inquiry expeditiously, and I would like to acknowledge their contributions as well."

Office of the Director of Corporate Enforcement
19 January 2010

Editor's Note

The Inspector's Report and Conclusions

1. The main events preceding the initiation of this High Court Inquiry into certain matters in DCC plc, S&L Investments Ltd. and Lotus Green Ltd. are outlined in the **Appendix** to this Note. The Inspector's Report runs to 970 pages (not counting some 2,000 pages of Appendices).

2. Chapter 12 of the Report summarises his conclusions, and these include:

- *"...the companies took their corporate responsibilities very seriously." and "the directors, officers and employees, from the then Chief Executive down, placed a high value on legal and regulatory compliance..."* (paragraph 12.1.6)
- *"...the beneficial interest in the Fyffes shares which was first transferred to, and then held by, Lotus Green, a Dutch-resident, wholly owned subsidiary of DCC in 1995, before being sold in February 2000, did not contribute to the finding of 'insider dealing' or affect the outcome in any material way."* (paragraph 12.1.7)
- *"...there are facts and circumstances which suggest that the decision of Lotus Green not to make the necessary notification in relation to Lotus Green's acquisition of a beneficial interest in slightly more than 10% of the relevant share capital of Fyffes in 1995 infringed Section 67 and Section 91 of the Companies Act, 1990 [dealing with the obligations to notify Fyffes and the Irish Stock Exchange respectively]. This decision not to notify was made, however, with the benefit of legal advice from the companies trusted and respected legal adviser and, in all the circumstances, it was not unreasonable for the directors of the companies to follow that advice. I have also concluded that the legal advice, which I believe to have been incorrect, was given in good faith and in the firm belief that it was correct..."* (paragraph 12.1.8)
- *"...the decision of DCC and S&L to transfer the beneficial interest in the Fyffes shares to Lotus Green, and Lotus Green's acquisition of that interest in 1995, does not give rise to facts or circumstances suggesting a breach of Section 108 of the Companies Act, 1990 [dealing with insider dealing]..."* (paragraph 12.1.9)
- *"...[in 2000] Mr Flavin did not communicate the Fyffes' price sensitive information in his possession to anyone in the companies other than to the DCC Group Compliance Officer...as part of a compliance procedure and the companies' legal adviser...for the purpose of seeking legal advice. Therefore, although several persons within DCC...facilitated the 'dealing' in the shares in a technical sense, I am satisfied that no one involved in effecting the share sales within DCC knew that Jim Flavin had any information of a price sensitive nature in his possession which could make the dealing unlawful."* (paragraph 12.1.15)
- *"The error was a costly one for DCC and its former Executive Chairman and founder. It was costly for DCC in terms of the money it was required to pay to*

Fyffes, but it was, arguably, more costly in terms of the reputational damage to both DCC and Jim Flavin. No finding of mine can repair the reputational damage inflicted in this matter. At least, however, the suggestion that the dealing was intentionally wrongful, or that it was evidence of dishonesty on the part of Jim Flavin and of a culture of disrespect for the companies code in DCC can be dispelled.” (paragraph 12.1.18)

- *“The actions of Jim Flavin were not undertaken recklessly or with an absence of care. He was ultimately found to have misjudged the information he had in his possession when he was approached by the stockbrokers with a view to buying the shares, but he did not ‘deal’ without considering whether he or DCC were free to sell the shares. With hindsight, he placed far too much reliance on the actions of Fyffes. His familiarity with such guidance as existed from the Stock Exchange in Ireland and the U.K. as to what constituted ‘insider dealing’ or ‘price sensitive information’, did not protect or assist him.”* (paragraph 12.1.19)
- *“At a time however when ‘Ireland Inc’ is taking a beating internationally from a perception of low standards in high corporate places the message from this report is that the actions and behaviour of DCC, S&L and Lotus Green between 1995 and 2000 in connection with the transactions under investigation measured up to the standards required by law notwithstanding Mr. Flavin’s error of judgment.”* (paragraph 12.1.20).

High Court Order

3. Pursuant to today’s High Court Order dealing with the Report’s publication, copies of the Report have been forwarded to:

- the Irish Stock Exchange and
- the Revenue Commissioners.

Cost of the Inquiry

4. The final cost of the Inquiry is not yet available. The cost of the Inspector’s work is expected to amount to approximately €1.4 million including VAT. The High Court will determine in due course who should bear this cost.

Availability of the Inspector’s Report

5. Electronic copies are now available on the website of the ODCE (www.odce.ie). Printed copies of the Report will be on sale in about two weeks’ time at the Government Publications Sales Office (cost €30).

Press Queries

6. Contact Kevin Prendergast, ODCE Compliance Manager, at (01) 8585844. Alternatively Adrian Brennan, at (01) 8585840, or Dermot Morahan at (01) 8585824.

Office of the Director of Corporate Enforcement
19 January 2010

APPENDIX

Background to the High Court Inquiry

The main events preceding the initiation of this High Court Inquiry of certain matters in DCC plc, S&L Investments Ltd. and Lotus Green Ltd. were as follows:

- August 1995: DCC and S&L entered agreements to sell their combined 10.5% stake in the ordinary shares of Fyffes plc to Lotus Green;
- February 2000: DCC, S&L and Lotus Green sold their entire holding of 31.2 million ordinary shares in Fyffes in three tranches on 3, 8 and 14 February realising some €106 million for the Group. DCC's then Chief Executive, Mr James Flavin, resigned from the board of Fyffes with effect from 9 February;
- March 2000: Fyffes issued a profit warning to the Irish Stock Exchange on 20 March in respect of its trading performance for the financial year to date;
- Early 2002: Fyffes commenced civil insider dealing proceedings under the Companies Acts against DCC, S&L, Lotus Green and Mr Flavin. Fyffes claimed that the disposal of shares in February 2000 was effected at a time when Mr Flavin possessed price-sensitive information by reason of his directorship of Fyffes;
- 2004/2005: The Fyffes's claim was heard over 87 days in the High Court;
- December 2005: The High Court Judgment of 21 December rejected Fyffes's claim against the four defendants;
- July 2007: The Supreme Court Judgments on 27 July unanimously allowed the Fyffes's appeal. It concluded that insider dealing had occurred and that Fyffes was entitled to damages in respect of its claim. The Court subsequently decided that any disqualification would be a matter for the High Court;
- April 2008: The claim for damages was settled on the basis that some €42 million (including legal costs) was to be paid to Fyffes. The High Court did not address the issue of disqualification in noting the settlement;
- May 2008: The Director of Corporate Enforcement asked the High Court to appoint an Inspector to DCC, S&L and Lotus Green to examine the acquisition and disposal of the Fyffes's shares in 1995 and 2000;
- July 2008: The High Court appointed Mr Bill Shipsey, S.C., as Inspector to DCC, S&L and Lotus Green on 27 July 2008.