Neutral Citation Number: [2008] IEHC 260

THE HIGH COURT

2008 No. 189 COS

IN THE MATTER OF DCC PLC, S&L INVESTMENTS LIMITED AND LOTUS GREEN LIMITED AND IN THE MATTER OF THE COMPANIES ACTS 1963 – 2006 AND IN THE MATTER OF AN APPLICATION BY THE DIRECTOR OF CORPORATE ENFORCEMENT PURSUANT TO SECTION 8(1) OF THE COMPANIES ACT 1990

BETWEEN

DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND

DCC PLC, S&L INVESTMENTS LIMITED AND LOTUS GREEN LIMITED

RESPONDENTS

Judgment of Mr. Justice Kelly delivered the 29th day of July, 2008

Introduction

1. The applicant (the Director) seeks an order pursuant to s. 8 of the Companies Act 1990 (the Act) for the appointment of inspectors for the purpose of investigating the affairs of the respondents.

2. The application is opposed by the respondents and also by their directors, all of whom were named as notice parties to this application.

The Director

3. The Director was created by the provisions of the Company Law Enforcement Act 2001. His principal functions are to enforce the Companies Acts and to encourage compliance with that legislation. He is also empowered to investigate instances of suspected offences under that code.

The Respondents

4. The first respondent (DCC) is a public limited company registered in Ireland. It has a portfolio of interests in manufacturing and other business sectors.

5. The second respondent (S&L) is also registered in Ireland and is a wholly owned subsidiary of DCC.

6. The third respondent (Lotus Green) is also registered in Ireland and is a wholly owned subsidiary of DCC.

Background

7. This application relates to events concerning the acquisition and disposal by the respondents of interests in another public company called Fyffes Plc (Fyffes). It is also an Irish registered company involved in the importation and distribution of fruit.

8. The events in question took place over two periods. The first was in 1995 and the second between November, 1999 and April, 2000.

9. In August, 1995 DCC and S&L agreed to sell their combined 10.5% stake in the ordinary shares of Fyffes to Lotus Green. Although that was an Irish registered and wholly owned subsidiary of DCC it was ostensibly resident in Holland. Lotus Green acquired the beneficial ownership of that shareholding but legal title was not transferred to it. Thus DCC and S&L remained the registered owner of the shares.

10. On 3rd, 8th and 14th February, 2000 DCC, S&L and Lotus Green sold their entire shareholding of 31.2 million ordinary shares in Fyffes in three tranches. That disposal realised proceeds of some €106m, a profit on cost of about €85m and a profit on book value of some €76m.

11. Mr. James Flavin had been a member of the Board of Fyffes since 1981. He resigned from that position with effect from 9th February, 2000. At the time of his resignation he served as a member of the audit committee of Fyffes and as chairman of its compensation committee. While serving as a board member of Fyffes he was also deputy chairman and chief executive of DCC and a Director of S&L.

12. On 20th March, 2000 Fyffes issued a statement to the Irish Stock Exchange which was in effect a profit warning. Fyffes share price dropped in the following days. Concern grew that Mr. Flavin was aware of Fyffes poor trading before the DCC group's shareholding was sold.

13. In early April, 2000 both the London and Irish Stock Exchanges informed Fyffes that they were investigating certain dealings in its shares and in particular the share disposals made by DCC and Lotus Green in early February, 2000. At the end of 2001 the Irish Stock Exchange reported the matter to the Director of Public Prosecutions. The Garda Bureau of Fraud Investigation carried out an investigation into possible insider dealing but no prosecution was initiated by the DPP.

14. In 2002 Fyffes commenced civil proceedings against the respondents and Mr. Flavin in which is was claimed that the disposal of the shares in February, 2000 was unlawful because it was effected at a time when Mr. Flavin was in possession of price sensitive information by reason of his directorship of Fyffes.

15. Those High Court proceedings went to trial before Laffoy J. over a period of 87 days in 2004 and 2005.

16. In December, 2005 that judge delivered a comprehensive judgment running to some 368 pages. She summarised her conclusions as follows:-

> "Having regard to the manner in which I have construed the provisions of Part IV of the Act of 1990, essentially the following three questions remain on the statutory claim:
>
> 1. Who dealt in the share sales and in what capacity?
>
> 2. Did Mr. Flavin have, by reason of his connection with Fyffes, price sensitive information on the dates of the share

sales?

3. What are the consequences of the answers to the first and second questions?

I have answered the three questions as follows:-

1. (a) Mr. Flavin dealt as agent of the DCC Group

(b) DCC and S&L dealt as principals so they cannot rely on section 108(9)

(c) Lotus Green dealt as principal

2. Mr Flavin was not in possession of price sensitive information at the date of the share sales.

3. Therefore, the dealing was not unlawful under section 108 and no civil liability to account arises under section 109.

However, I have concluded that, if the dealing was unlawful so as to give rise to a liability to account under section 109, it would have been proper to treat the three corporate defendants, DCC, S&L and Lotus Green, as a single entity for the purposes of accounting for the profit accruing from dealing under section 109. That conclusion is redundant because I have found that the dealing was not unlawful.

In relation to the non-statutory claim, I have found that the plaintiff has failed to establish a breach of fiduciary duty on the part of Mr. Flavin. The plaintiff is neither entitled to an account in equity nor damages or compensation at common law."

17. Fyffes appealed this judgment to the Supreme Court. It did not challenge any of the findings of fact made by the trial judge. The appeal dealt solely with the manner in which the judge had interpreted the statutory provisions relating to insider dealing. Fyffes made the case that the judge was in error in concluding that the information which was in the possession of Mr. Flavin and which was not generally available would not be likely to materially affect the price of Fyffes shares if that information were generally available.

18. In July, 2007 the Supreme Court allowed the appeal. It concluded that all three respondents to this application and James Flavin had engaged in insider dealing in February, 2000 contrary to s. 108(1) of the Act and that Fyffes was entitled to have an assessment of damages undertaken by the High Court in respect of its claim. That assessment of damages was remitted to the High Court. In the event it never proceeded to trial and the matter was settled.

The Director's Involvement

19. The Director took a keen interest in the litigation as it was proceeding through the High Court and Supreme Court.

20. The Director made application to the Supreme Court subsequent to its judgment seeking to be joined for the purpose of adverting to the power conferred under s. 160(2) of the Act which permits a court of its own motion to make a disqualification order in any proceedings against a person, provided that it is satisfied that certain matters are established. The Supreme Court determined that such an application fell to be dealt with by the High Court.

21. Subsequently the Director applied to be joined at the hearing of the assessment of damages against the respondents in the High Court. The purpose of that application was again to advert to the power of the court of its own motion to make a disqualification order. That motion was heard by McMenamin J. on 6th March, 2008 but no order was made.

22. On 14th April, 2008 it became apparent that the damages claim had been settled, with Fyffes being paid in excess of €37m by the respondents. When the case settled, the High Court had not acted *ex proprio motu* to make a disqualification order under s. 160(2).

Mr. Adrian Brennan

23. The Director's interest in the earlier litigation was not confined to a mere attendance in court or perusal of the transcripts of each day's evidence. At the commencement of that litigation in 2004 he asked one of his officers Mr. Adrian Brennan to monitor the proceedings with a view to identifying potential areas of non-compliance with the Companies Acts.

24. In December, 2005 Mr. Brennan presented the Director with a draft report into such possible breaches. That report, along with the judgment of Laffoy J. of 21st December, 2005 were considered by the Director and the advice of Senior Counsel was sought in respect of them.

25. In August, 2006 the Director delegated powers under ss. 19 and 21 of the Act to Mr. Brennan so as to enable books and documents of Lotus Green to be examined. That was done.

26. In June, 2007 Mr. Brennan presented a final draft report into two possible breaches by DCC and Lotus Green of the disclosure requirements contained in ss. 67 and 91 of the Act.

27. In July, 2007 the Director sought the views of the Director of Public Prosecutions on this second report but in October of that year the DPP indicated that a prosecution would not be warranted.

The Director's Concern

28. The principal affidavit grounding this application was sworn by the Director and runs to some 106 paragraphs. It rehearses all that I have already recited in this judgment and a great deal more.

29. In dealing with the events of 1995 he quotes extensively from the judgment of Laffoy J. and also from the documents inspected by Mr. Brennan. He then analyses these by reference to the relevant statutory provisions and reaches conclusions.

30. Insofar as the events in 1995 are concerned the Director concludes as follows, at para. 74:-

"The circumstances suggest with respect to the disposal by DCC and S&L to Lotus Green of the beneficial interests in the

shares of Fyffes in August, 1995 that:

· DCC and Lotus Green may have acted contrary to section 67 in failing to notify Fyffes of their disposal and acquisition of Fyffes shares in excess of the 5% threshold;

· Lotus Green and DCC may have acted contrary to section 91 in failing to notify Fyffes of the acquisition of Fyffes shares in excess of a 10% threshold;

· The planned and subsequent disposal by DCC and S&L to Lotus Green of a beneficial interest in the shares of Fyffes may have been information that was likely to be materially price sensitive;

· The suppression of this price sensitive information from the market may have constituted insider dealing;

· The three companies and Mr. Flavin may have acted contrary to section 108 in doing so;

· A number of other officers and senior managers in the DCC Group may have facilitated the transactions which gave rise to the breaches of sections 67, 91 and 108 of the 1990 Act;

· A number of officers and senior managers in the DCC Group may be guilty of an offence under section 79 of the 1990 Act where, pursuant to section 241(1) of that Act their company's failure to make a required disclosure was committed with the person's consent or connivance or to have been attributable to his or her neglect."

31. Insofar as the events of 2000 are concerned the Director's affidavit quotes extensively from the judgments of the Supreme Court and places them in the context of what are described in the affidavit as "consequential matters". The Director concludes that having regard to the facts contained in the judgment of Laffoy J. and the findings of the Supreme Court the circumstances suggest that other senior persons (in addition to Mr. Flavin) in the DCC group may have given support to the execution of the insider dealing transactions in 2000. He instances the DCC board meeting of 31st July, 1995 which approved of the disposal of the beneficial interest in the shares of Fyffes to Lotus Green. He views that in the context of the following observations of Laffoy J. in her judgment. She said:-

"It is clear on the evidence that, from 1996 onwards, the board of DCC adopted a recommendation of Mr. Flavin that DCC's continued shareholding in Fyffes was no longer a correct strategic position and that the asset should be realised when the time was opportune." (See p. 183 of her judgment)

"There is no evidence that the board of DCC as an organ in a formalised manner expressly approved of the share sales or the manner in which they were effected in February, 2000. However, as I have stated in the context of the issue of whether Mr. Flavin dealt, I infer that the board tacitly approved of Mr. Flavin acting as agent of the DCC Group in the sale of the shares. I also consider that it is probable that he did so with the informal express approval of the members of the board. I do not think it reasonable to infer that the board of a public company would countenance the disposal of an asset worth over €100m in the manner suggested by the defendants in these proceedings." (See p. 188 of the judgment)

32. The Director points out that five persons who comprised the board of DCC in early February, 2000 also comprised its board in July, 1995 when it originally disposed of its beneficial interest in the Fyffes shares to Lotus Green. Three of them (including Mr. Flavin) remain on the nine member DCC board today.

33. The Director goes on to point out that two DCC board members (one being Mr. Flavin) were on the board of S&L in February, 2000 and had been on it in August, 1995 when it decided to dispose of its beneficial interest in the Fyffes shares to Lotus Green. The chief financial officer of DCC and the compliance officer/secretary of DCC were the remaining two board members of S&L in February, 2000, the former having served in 1995 as well. The Director believes that both men played important roles in advising on planning and executing the Fyffes shares transactions in 1995 and 2000.

34. He also points out that in early 2000 the board of Lotus Green comprised three Dutch and one Irish director (excluding the nominated alternate Irish director). The Irish director was and is the chief financial officer of DCC. When the board made its decision to acquire a beneficial interest in Fyffes shares on 9th August, 1995 the board seemed to have comprised four senior DCC Group executives, one of whom was the compliance officer/secretary of that company.

35. The Director concludes that there are circumstances suggesting that other senior persons in the DCC Group may have given advice and support to the planning and execution of the insider dealing transactions in 2000.

Why a Further Investigation?

36. The Director makes it clear that his application to the court is predicated on:-

(a) the circumstances suggesting non-compliance with ss. 67, 91 and 108 of the Act in relation to Lotus Green's acquisition from DCC and S&L of a beneficial interest in Fyffes shares in 1995; and

(b) the finding of the Supreme Court that the three companies and Mr. Flavin acted contrary to s. 108(1) of the Act in disposing of the Company's legal and beneficial interest in the ordinary shares of Fyffes in 2000.

37. He says that there is a need for a further investigation for a number of reasons. They are:-

(a) The civil proceedings already dealt with by the courts only addressed the issue of insider dealing in the context of a civil claim for damages. This related solely to the disposal by the respondents of their shares in Fyffes on three dates in February, 2000. It did not address and determine the other suggested circumstances of default which he identifies in his grounding affidavit.

(b) The civil proceedings only required the court to make a determination in respect of the defendants in those proceedings. They did not address and determine the relative contribution, responsibility and culpability of other persons who gave advice and support to the planning and execution of the insider dealing transactions in 2000 and to the other suggested circumstances of default identified in his affidavit.

(c) The court relied upon statements of fact which appeared to have been agreed between the parties in those

proceedings. In the absence of a formal investigation into those matters he says that it is not possible to confirm that the summaries as provided constitute the full facts relating to the associated insider dealing transactions, never mind the other circumstances of potential default indicated by him.

(d) The court did not have the benefit of testimony from a number of persons whom he identifies as important witnesses to the events relating to the associated insider dealing transactions. He identifies these as a senior executive of Davy's, the then chairman of DCC, another director of DCC and two directors of Lotus Green. He says that whilst the High Court declined to draw any inference from the failure to call these witnesses, their testimony would be important in establishing precisely what transpired in the execution of the insider dealing transactions in February, 2000.

(e) He contends that all of the facts pertinent to the issues have not been conclusively established to date given the following two matters in particular. First, the Supreme Court was only required to address one issue on the appeal. Second, the DCC board has, notwithstanding the outcome of that appeal, been able to reaffirm its support for Mr. Flavin in public pronouncements.

38. The Director submits that a thorough investigation of the events surrounding both the 1995 and 2000 transactions is required in the public interest. He says the public interest will be served by:-

> "establishing the facts, clarifying the prevailing uncertainties and attributing appropriate responsibility and culpability to the persons who contributed to these or to any other detected faults."

39. He furthermore says that it is a matter of concern to him if any persons who actively participated in insider dealing and related transactions should be able to continue to discharge leading roles in Irish corporate affairs. That, he says, would give cause for belief that insider dealing involves minimal reputational risk and would encourage others to engage in similar practices to the detriment of the functioning of a fair and transparent market in company securities and in a manner contrary to the public interest.

40. It is in these circumstances that he seeks the appointment of inspectors.

The Respondent's Case
41. The respondents contend that the court ought not to appoint inspectors pursuant to s. 8 because the Director's application is flawed for two principal reasons.

42. First, it is submitted that before inspectors can be appointed the court must be satisfied that there are circumstances suggesting that the affairs of the companies to be investigated are or have been conducted in an unlawful manner and that an investigation in relation thereto is warranted. Both of these conditions must be satisfied before an inspector's appointment is justified.

43. Secondly, it is submitted that in this case the Director's purpose in seeking the appointment is not a legitimate one born of an insufficiency of knowledge. Rather it is with the view to converting information already known into a form which makes it admissible in evidence in any proceedings which may be taken with a view to obtaining disqualification orders against persons associated with the respondents.

44. I will consider each of these contentions in due course.

45. Before doing so I ought to point out that a replying affidavit was sworn by Michael Buckley who is the chairman of DCC. It is short and acknowledges that there are no significant factual disputes between what is deposed to by the Director in his affidavit and the respondents' view of the matter. The affidavit does, however, contain certain additional information which I will consider in due course.

46. Before embarking upon that examination it is appropriate that I consider the statutory provisions under which I am asked to make the appointment.

Section 8
47. Section 8 is contained in part II of the Act. That part is headed "Investigations".

48. Section 7, which is in the same part of the Act, permits the court to appoint one or more competent inspectors to investigate the affairs of a company in order to enquire into matters specified by the court and to report thereon as the court directs. It is to be noted that unlike s. 8, this section does not describe the circumstances in which the court is empowered to make such an appointment. The court is at large to exercise its discretion in determining whether there are circumstances which warrant investigation. The application has to be supported by such evidence as the court may require including such evidence as may be prescribed. No regulations have been made prescribing such evidence.

49. It is clear that the jurisdiction conferred on the court by s. 7 is wider than that which is given under s. 8. The present application is unequivocally made in reliance on section 8.

50. Section 8, insofar as it is relevant reads:-

> "(1) Without prejudice to its powers under section 7, the court may on the application of the Director appoint one or more competent inspectors (who may be or include an officer or officers of the Director) to investigate the affairs of a company and to report thereon in such manner as the court shall direct, if the court is satisfied that there are circumstances suggesting:-
>
> (a) that its affairs are being or have been conducted with intent to defraud its creditors or the creditors of any other person or otherwise for a fraudulent or unlawful purpose or in an unlawful manner or in a manner which is unfairly prejudicial to some part of its members, or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial, or that it was formed for any fraudulent or unlawful purpose; or
>
> (b) that persons connected with its formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members; or
>
> (c) that its members have not been given all the information relating to its affairs which they might reasonably

expect."

51. It is clear from the wording I have just quoted that the respondents are correct in arguing that before the court appoints an inspector it must be satisfied that there are circumstances suggesting that the affairs of the companies are being or have been conducted in an unlawful manner. In the absence of such circumstances no question of an appointment can arise at all. But the presence of such evidence does not give rise to an automatic entitlement to have inspectors appointed. That is because the section is framed in such a way as to confer a discretion on the court. The court "may" appoint inspectors; it is not bound to do so. Regardless of what evidence of wrongdoing might be adduced the court would not be justified in appointing inspectors unless the purpose of such appointment had a reasonable prospect of being achieved. That raises the question as to what is the purpose of the appointment of inspectors.

Inspector's Statutory Purpose
52. In Keane's *Company Law* (4th Edition) Keane C.J. described the nature of a Companies Act investigation at para. 35.15 as follows:-

> "As in the case of an investigation under the provisions of the replaced sections in the principal Act, the functions of the inspectors are to investigate and report. It is thus in essence a fact finding exercise which does not of itself affect the legal rights and obligations of any individual concerned, although the publication of the report – and even the fact of an investigation having been ordered – may affect their reputations."

53. That statement mirrors the views expressed by Sachs L.J. in In *Re Pergamon Press Limited* [1970] 3 All E.R. 535 at 540 where he said:-

> "…the inspectors function is in essence to conduct an investigation designed to discover whether there are facts which may result in others taking action."

54. This approach is also to be found in Canadian jurisprudence. In *Saunders v. Eco Temp International Inc* [2007] ABB 136, Lee J. said:-

> "The primary purpose of an investigation is to 'bring to light facts which otherwise might be inaccessible to shareholder and security holders. (*Re First Investors* [1988] A.J. No. 244)."

55. Statutory powers can only be exercised for the purposes for which they have been granted. The statutory discretionary power given to this court by s. 8 of the Act should only be exercised in circumstances where the statutory preconditions are satisfied and where the exercise of the discretion is likely to achieve the purpose of uncovering facts not already known. Thus, for example, there could be no justification for the appointment of inspectors if the sole purpose was to provide the Director with a procedural or evidential advantage in the pursuit of disqualification proceedings against persons associated with the companies. This is a topic to which I will return later.

56. Fortification for these views is to be found from observations made by members of the Supreme Court in the case of *Dunnes Stores Ireland Company & Ors v. Ryan* [2002] 2 I.R. 60. In that case the Minister appointed an authorised officer to examine the books and documents of the applicant companies, the affairs of which had previously been the subject of inquiries carried out by both McCracken J. and Judge Buchanan. Reasons were given for that appointment. The applicants were dissatisfied with those reasons and sought to quash the appointment of the authorised officer. Butler J. held in favour of the applicants on the grounds that there was no evidence that it was necessary to examine the books and documents of the applicant company. An appeal from his decision was allowed by the Supreme Court.

57. In the course of his judgment Keane C.J. said that the exercise by the Minister of the powers conferred on the section can:-

> "be set aside when the reasons given for invoking the section make it clear that they are being used for a purpose not contemplated by the Oireachtas. It is also clear that they can be set aside where, as indicated by this court in the *State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642, the relevant authority has sought to operate them in a patently irrational fashion."

58. Thus it follows that before an inspector can be appointed by this court it must be satisfied as to the existence of circumstances suggesting that one or other of the states of affairs described in s. 8(1)(a), (b) or (c) exists. It must also be satisfied that the appointment of an inspector would be likely to achieve its' purpose namely to enable facts not already known to be found.

59. Even if these two conditions are fulfilled there still remains vested in the court a discretion as to whether or not an appointment should be made.

Discretion
60. It would be unwise to attempt to set out an exhaustive list of the factors which the court would be justified in taking into account in exercising the discretion conferred upon it by s. 8. It is not possible to anticipate particular facts or circumstances which may present themselves in future cases. However I am of the view that the following matters are appropriate to be taken into account in the exercise of the courts discretion. Needless to say these only arise for consideration in circumstances where the two conditions identified in the immediately preceding part of this judgment have been met.

61. Among the issues appropriate for consideration are the following.

(a) Public Interest
62. The court is entitled to have consideration for the public interest in deciding whether or not to appoint inspectors. As was said by Murray J. in *Dunnes Stores Ireland Company v. Ryan* [2002] 2 I.R. 60,

> "While the Companies Acts generally include provisions relating to the incorporation, registration and structure of companies, as well as such matters as duties of directors towards their members, they also govern fundamental aspects of the relationship between companies and the rest of society. The advantages of trading or conducting business through a corporate entity, such as a company with limited liability, are self-evident. Companies have a legal personality separate and distinct from their individual members. Many aspects of how they conduct their affairs as distinct entities are regulated by law in the public interest. The Companies Acts are the primary source of that regulatory regime, even though there are other statutes which may regulate how a company or its directors conduct its affairs, such as the Competition

> Acts, certain provisions of the Finance Acts or the Central Bank Acts. Statutory measures specifically directed at companies, in particular the Companies Acts, define, *inter alia*, obligations specific to companies and their directors with which they are bound to comply in the public interest…
>
> I do not think the statutory duties and obligations imposed on companies and directors can be viewed simply as an end in themselves for their benefit, since those duties have a function in preventing abuses of their corporate status which may lead to consequences which are not just breaches of the Companies Acts per se, but may have other far reaching consequences of public interest."

63. Those comments were made in the context of powers of appointment of an authorised officer but they are relevant to the courts consideration in appointing an inspector as is the following statement from the same judge in the same case:-

> "The second respondent (the appointing Minister) must also be concerned with the damage which such breaches have on public confidence in how companies conduct their affairs, particularly where such breaches may be extensive and have a potential consequence of undermining confidence in corporate status and its governance."

(b) Proportionality

64. The court is entitled to consider whether the appointment of inspectors would be disproportionate having regard to the information put before it.

65. The court ought to take into account what is alluded to by Goldstone J. in *Sage Holdings Ltd v. Unisec Group Ltd & Ors* [1982] 1 WLD 337 where he said:-

> "The company may be caused harm and damage and be put to substantial expense. This is especially so in the case of a large public company where its reputation in the market may become tarnished by the very fact of an investigation being ordered. However, the potential harm and damage from this source is probably less substantial in the case of a non-trading company. This consideration, in my opinion, should temper the natural inclination the court may have to protect members of the public from those whose control of large companies has become entrenched."

66. The appointment of inspectors is a serious matter and such a sledgehammer should not be used to crack a nut.

67. I reiterate that this is not an exhaustive exposition of the matters which the court is entitled to take into account on an application of this sort.

Application of the Principles

68. I now turn to the application of these principles to the facts of this case.

69. The demonstration of circumstances suggesting unlawfulness is the first hurdle which has to be surmounted by the Director, if he is to succeed on this application.

70. I am satisfied on the basis of the evidence put before me that there are circumstances identified which fall within the provisions of s. 8(1) of the Act. Indeed the respondents concede that there is evidence suggesting a breach of the statutory provisions concerning the notification requirements in 1995. No similar concession is made concerning a possible breach of s. 108 of the Act in respect of the events of 1995. Neither is it conceded that there is any circumstance suggesting unlawfulness in respect of the events of 2000.

71. Whilst a detailed analysis of the statutory provisions in the light of the evidence given and the facts found in the earlier litigation was conducted before me, I intend no discourtesy by not considering these matters in detail. The reason for this will become apparent when I consider the next ground which has to be satisfied by the Director.

Achievement of Inspectors' Purpose

72. The respondents argue that even in the case of the 1995 events where they concede the existence of evidence suggesting a breach of the statutory notification provisions, inspectors ought not to be appointed. The reason for this is because they argue there is nothing to investigate. All of the material facts are at this stage known and thus there are no more facts which an inspector can find. There has been a most exhaustive examination of all of the dealings in question by the High Court and by the Supreme Court. Thus no more information can be gleaned by the appointment of inspectors, the respondents argue.

73. Extensive reference was made to the findings made by Laffoy J., which it is said, in effect, constitute the last word on the wrongdoing alluded to by the Director. The respondents also make the case that the Director must have been satisfied that there was sufficient evidence to warrant a consideration of disqualification orders being made when he applied both the Supreme Court and the High Court inviting the judges to consider making such order *ex motu proprio*. In these circumstances what further facts can the Director seek to elicit by the appointment of an inspector?

74. There can be no doubt but that if the court appoints an inspector in the present case he will not be in the position of the conventional inspector described by Sachs L.J. as "starting very often with a blank sheet of knowledge" (in *Re Pergamon Press* [1971] 1 Ch. 388)

75. An inspector in the present case, if appointed, has a great deal of knowledge available to him as a result of the earlier litigation and the judgments thereon. But there is, in my view, a flaw in the respondents' argument.

76. The earlier litigation was conducted *inter partes* in an adversarial way. The parties decided upon what witnesses would be called. Highly skilled lawyers were employed on each side. They would have been called upon to advise as to what evidence to place before the court and how to do so in the most favourable light, always of course subject to their obligations to the court. Indeed such legal advice, sometimes called presentational advice, is privileged (See *Ahern v. Mahon & Ors* [2008] IEHC 119).

77. Some witnesses whom the Director believes may have evidence to give were not called. Agreed statements of facts were relied on by times. The earlier proceedings were concerned only with the civil law and did not have to address culpability or responsibility of persons who may have advised or planned the transactions.

78. Inspectors may well discover facts which might be pertinent to questions of breaches of the Companies Acts which were not

alluded to or disclosed in the earlier proceedings. Theirs is an inquisitorial role. They take their own course and have wide powers which are not available to a court in *inter partes* civil litigation.

79. Thus, whilst I can accept that much factual information is already available having regard to the earlier litigation, it cannot in my view be regarded as the last word on the transactions.

80. The Director also wishes to investigate the possible liability of persons who were not parties to the earlier litigation and whose responsibility, if any, was not the subject of detailed inquiry.

Inappropriate Purpose

81. The respondents contend that the real purpose of this application is not with a view to ascertaining new facts but rather to have the inspector find facts already known, incorporate them in a report and thus enable the Director to avail himself of the provisions of s. 22 of the Act. That section provides that an inspector's report shall be admissible in any civil proceedings as evidence (a) of the facts set out therein without further proof unless the contrary is shown and (b) of the opinion of the inspector in relation to any matter contained in the report.

82. The principal basis for this allegation is contained in the affidavit of Mr. Buckley. Mr. Buckley exhibits a number of press releases and interviews to the press given by the Director. In particular my attention is called to an embargoed press release of 28th May, 2008 which appears to have been carefully timed so as to coincide with the launch of the Director's annual report for 2007.

83. It is not clear to me what part of the Director's statutory functions were being discharged by the issue of a press release such as this.

84. In my view, it is undesirable for an officer with statutory functions such as the Director to engage in this sort of activity. It was certainly unwise in the present case since what he had to say in the briefing has now, quite properly, been turned against him.

85. I now set out the terms of this press statement. It was issued on the headed paper of the Director's office and reads as follows:-

> "For release no earlier than 10.30 on Wednesday, 28th May, 2008.
>
> ODCE Press Statement
>
> Director applies for the appointment of High Court inspectors to investigate a discrete issue relating to the affairs of DCC Plc and to associated companies.
>
> At the launch of his office's annual report for 2007 today, Mr. Paul Appleby, the Director of Corporate Enforcement, announced that he has now applied to the High Court to appoint inspectors to DCC Plc, S&L Investments Ltd and Lotus Green Ltd. The primary purpose of his application is to examine the discrete issue of the disposal and acquisition by the three companies of legal and beneficial interest in the shares of Fyffes Plc between February, 1995 and April, 2000.
>
> During his press briefing, Mr. Appleby said:-
>
> > It is a matter of public record that my office monitored the civil insider dealing proceedings in 2004 and 2005 between Fyffes Plc and DCC Plc, S&L Investments Ltd, Mr. James Flavin and Lotus Green Ltd.
>
> After the Supreme Court ruled in July, 2007 that the defendants had engaged in insider dealing in February, 2000, I took the unprecedented step of making submissions to both the Supreme Court and the High Court adverting to their power to make a disqualification order against any person in any proceedings once certain matters had been established. However, neither court chose, as was their right, to exercise the legal option available to them in the insider dealing proceedings.
>
> While a very substantial amount of evidence was considered by the High Court in the course of those proceedings, the rules of evidence places considerable constraints on the circumstances in which that evidence may be used for other purposes. It is my considered view that in any further investigations, my office would also face substantial difficulties in acquiring a standard of evidence sufficient to ground any future enforcement proceedings.
>
> Against this background, I have decided recently that a High Court inspection offers the best prospect at this stage of properly investigating the issues which require attention. This has been used successfully in the past, and I am optimistic that such a course of action, if sanctioned by the court, would satisfactorily address all of the matters of concern.
>
> Following significant preparatory work, I applied to the High Court yesterday for the appointment of inspectors to investigate the affairs of DCC Plc, S&L Investment Ltd and Lotus Green Ltd with particular reference to the disposal and acquisition of legal and beneficial interest in the shares of Fyffes between February, 1995 and April, 2000. I expect that the court will hear this application shortly.
>
> If inspectors come to be appointed by the High Court, they will report back to the court in due course. On receipt of a final report, I will determine if there are sufficient grounds to justify taking action against anyone who may be criticised in it.
>
> As the matter is now sub judice, I will not be making any further comment in advance of the court determining the merit of the application. This means that I will also be avoiding comment on last weeks developments with respect of the statements issued by the board of DCC and the Irish Association of Investment Managers. To the extent that comment is necessary and appropriate, I will be addressing the High Court on the relevant issues at the appropriate time."

86. There is a good deal of public relations 'spin' in this statement. On two occasions it refers to the Director having applied to the High Court to appoint inspectors. No such application had been made. All that had happened was that the papers in the case had been lodged in the Central Office of this court. The statement seems to wish to create an appearance of more activity than had actually taken place.

87. More to the point concerning this application however, is the underscoring of the evidential difficulties which the Director has in respect of the facts already known to him. His reference to the rules of evidence placing considerable constraints on the

circumstances in which the evidence given in the earlier litigation might be used for other purposes fortifies the respondent's contention that the real object of this application is to obtain the evidential advantages which pertain to an inspector's report, having regard to the provisions of s. 22 of the Act. The press statement makes no mention of an absence of facts or a deficit in the Director's knowledge. It refers exclusively to the evidential difficulties which he would encounter in attempting to rely upon evidence given in the earlier litigation. This is repeated again in the press interview published by the Irish Times where he is quoted as saying that matters heard during the High Court and Supreme Court proceedings were not "evidentially useful" to him and that "there's no way we can use that evidence". He went on:-

> "It is my considered view that in any further investigations, my office would also face substantial difficulties in acquiring a standard of evidence sufficient to ground any future enforcement proceedings."

88. If I were convinced that the sole motivation of the Director in seeking the appointment of inspectors was the obtaining of the s.22 advantages I would have no hesitation in dismissing this application. On a reading of the press statement of 28th May, 2008 in isolation, one could conclude that that is indeed the sole motivation of the Director.

89. I would be justified in dismissing this application since the appointment of inspectors was being sought for an improper motive. Lee J. in *Saunders v. Eco Temp* [2007] ABB 136 said "the appointment of an inspector should not be used as a tool in a civil action". I agree.

90. However, I have to have regard to the sworn evidence put before me by the Director in which he avers to a much broader basis for seeking the appointment. I have set that out earlier in this judgment. He was not cross examined on this affidavit and so I must accept at face value what he says.

91. In these circumstances I am not satisfied that the sole motivation of the Director in seeking the appointment of inspectors is with a view to obtaining a report which will do no more than apprise him of facts already known but will do so in such a way as to attract the special evidential cloak provided for by s. 22 of the Act.

Other Discretionary Elements

(a) Public Interest
92. Given the results of the earlier litigation, the observations of the Supreme Court in *Dunnes Stores Ireland Company v. Ryan* [2002] 2 I.R. 60 which I have already quoted, are relevant. I am of opinion that it is in the public interest that a thorough investigation be carried out as to how the respondents and persons associated with them conducted their affairs in respect of the transactions in question.

93. The Director also criticises the statement made by the board of DCC in support of Mr. Flavin of 20th May, 2008. He says:-

> "A central argument in that statement is that Mr. Flavin did not improperly use the inside information relating to Fyffes trading which was in his possession in late January and early February, 2000 when the transactions took place. The key fact is that the applicable Irish law prohibited the three companies and Mr. Flavin from dealing while he was in possession of information that was likely to be materially price sensitive. It may therefore be unlawful and improper for him to have dealt in the Fyffes shares and thereby to have secured for the DCC group in 2000 an unlawful gain at the expense of other market participants which has now being quantified at €37.6m. It is beside the point to argue, as the board seeks to do, that Mr. Flavin's conduct can somehow be excused because this prohibition was more onerous than the associated Council Directive 89/592/EEC or because it is now more onerous than the current Irish legislation in this area."

94. The Director may or may not be justified in this criticism of the stance taken by the board. In my view it is in the public interest that the issues be fully investigated by an inspector with inquisitorial powers.

(b) Proportionality
95. I am very conscious of the evidence put before the court by Mr. Buckley at para. 13 of his affidavit. He points out that DCC is a public company listed on the Irish and London Stock Exchanges with approximately 3,500 shareholders. They include international and domestic institutional investors and pension funds as well as individual investors. DCC and its subsidiaries employ over 7,000 people in 16 countries and have a wide range of customers, suppliers and banking relationships. I acknowledge that the appointment of inspectors has a potential to impinge on the management and development of the DCC group and to affect the interests of a wide range of stakeholders.

96. Whilst all this may be so, I have to bear in mind that the activities in question gave rise to the findings of High and Supreme Court in the earlier litigation and ultimately resulted in DCC paying a sum in excess of €37m to Fyffes. In such circumstances I am of the view that it could not be considered disproportionate that inspectors be appointed to investigate fully the matters referred to at para. 2(i) and (ii) of the notice of motion grounding this application.

Disposal
97. For the above reasons I will make the appointment sought by the Director and will discuss with counsel the precise terms of the appointment.