

Goal 3: Prosecuting Detected Breaches of the Companies Acts

Introduction

In 2007, the Office demonstrated that it was reorienting more of its enforcement activity towards the more difficult issue and case.

The existing disqualification proceedings arising from the Inspectors' Reports into Ansbacher (Cayman) Ltd. and National Irish Bank Ltd./National Irish Bank Financial Services Ltd. (NIB/NIBFS) continued to absorb a good proportion of the Office's prosecution resources in 2007. However, other novel case initiatives were successfully progressed (e.g. the intervention in the Fyffes plc v. DCC plc and Others civil insider dealing case and the emergence of new cases of abusive behaviour by the directors of unliquidated insolvent companies). In addition, the Office investigated a number of other significant issues and cases on which decisions with respect to possible legal action will be made in due course.

At the same time, the Office continued to prosecute individual offences which are regarded as important company law obligations and which, if left unchecked, could have a damaging effect on the business environment and on the quality of decision-making at company level.

Legal Proceedings

Overall, the Office was involved in 2007 in 64 separate legal proceedings of which 35 were in the Supreme Court or High Court and 29 were in the Circuit Court or District Court. An overview of the status and outcome of these proceedings is at **Appendix 3.1** from which it will be evident that in 2007 the Office was again substantially successful in the cases which it decided to pursue.

Appendix 3.2 gives a more detailed breakdown of the nature of the ODCE's proceedings in 2007 and a summary of the outcome of these case types.

Details of the parties who were held by the High Court and the District Court to have breached their duties and obligations under the Companies Acts, together with the relevant offences and penalties, are contained in **Appendix 3.3**. It is ODCE practice to post these details on its website at www.odce.ie after the conclusion of each case.

The table below summarises the nature of the Court decisions made in the successful proceedings and provides the equivalent detail in respect of 2006.

Number/Nature of Successful Enforcement Results	2006	2007
Charges on which convictions were secured	48	28
Charges taken into account on conviction	13	16
Charges thought proven (Probation of Offenders Act 1907)	36	5
Disqualifications	14	14
Orders made in compliance proceedings	2	2
Restrictions	2	—
Other Decisions	6	3
Total	121	68

While 39 case issues were concluded in 2007, a further 25 remain on hands at year-end. About two thirds of them are before the Supreme and High Courts which is a good indicator of the Office's current focus on the more difficult issue and case.

Civil Enforcement Actions

The ODCE secured a total of 14 disqualifications in 2007 (14 disqualifications and two restrictions in 2006), and 13 of these were the result of civil enforcement actions. In addition, the Office secured two orders arising from High Court compliance proceedings (two orders in 2006). Details of these proceedings were as follows:

- two persons were disqualified for three and five years respectively arising from the findings of the High Court Inspectors into Ansbacher (Cayman) Ltd. The Office's proceedings arising from this Report are now completed;
- one person was disqualified for nine years as a consequence of the findings of the High Court Inspectors into NIB/NIBFS, although the disqualification order was stayed on certain conditions following the person's appeal of the High Court judgment to the Supreme Court;
- ten disqualifications for periods ranging from two to twelve years were obtained in respect of directors whose companies had been struck off the Register of Companies as a result of outstanding annual return

defaults and who failed to show to the Court that the companies had no outstanding liabilities. Three of the disqualification terms of six, eight and twelve years arose from the ODCE proceeding for the first time against three directors of multiple struck-off companies. Twelve years is the longest disqualification term imposed by the High Court in any ODCE proceeding to date;

- the two sets of compliance proceedings were taken against liquidators who had repeatedly failed to report to the ODCE as required by law. Both actions secured the submission of the overdue reports, one following the making of a Court order. Costs were also awarded to the ODCE in both cases.

As indicated above, the ODCE was involved at year-end in many other Supreme Court and High Court proceedings. For instance, the Office appealed in 2007 two unsuccessful applications for disqualification orders to the Supreme Court. High Court judgment is awaited in two further ODCE cases taken as a consequence of the Inspectors' Report into NIB/NIBFS, and four other similar cases are awaiting hearing. The ODCE remains involved in disqualification proceedings taken against two directors of a construction and development company following the High Court's hearing in 2007 of a preliminary application made by the respondents on certain evidential issues. The Office also continues to be interested in a number of disqualification cases involving the directors of companies which were struck off the Register of Companies following a failure to file annual returns.

Criminal Enforcement Actions

In 2007, the ODCE secured 28 convictions against seven individuals and companies for various breaches of the Companies Acts (48 convictions in 2006). In all, some 53 charges were determined in nine cases (103 charges in 2006).

The successful proceedings were taken in respect of the following offences:

- acting as auditor while unqualified¹². This is a priority area for prosecution as company stakeholders may unwittingly be placing reliance on company accounting information which may have been 'audited' by unqualified persons to the possible disadvantage of the stakeholders in question. In 2007, the ODCE

prosecuted three of these cases which involved 38 charges and resulted in 23 convictions and the imposition of fines totalling almost €7,000;

- failing to keep proper books of account¹³. It is important that companies and directors maintain adequate accounting and other records in the interests of company stakeholders who depend on those records providing an accurate reflection of the company's financial standing. The ODCE prosecuted four of these cases in 2007, three of which were determined and resulted in four convictions and the imposition of over €2,000 in fines;
- acting as a director while restricted and in breach of the statutory conditions relating to company capitalisation¹⁴. In the interests of stakeholder protection and in order to underpin the integrity of the restriction regime, the Office monitors compliance by restricted persons with the requirements of law. In 2007, the Office prosecuted three cases in this category resulting, inter alia, in one conviction and a deemed disqualification for five years of one of the directors involved.

At end-2007, a further 30 charges in seven cases are awaiting Court determination (six charges at end-2006). The Director of Public Prosecutions is prosecuting one of these cases following the decision of a District Court judge to decline jurisdiction of the ODCE's prosecution of a case involving excessive directors' transactions¹⁵.

Other Proceedings

In addition to the above ODCE civil and criminal proceedings, the Office was also involved in nine other legal proceedings in 2007. For instance, the ODCE had been monitoring for some time the civil insider dealing case involving Fyffes plc, DCC plc and other parties. On 27 July 2007, the Supreme Court unanimously held that trading in price-sensitive information had occurred.¹⁶

Having taken legal advice, the Director resolved that he would intervene in the proceedings to advert to the entitlement of the Court under Section 160(2) of the Companies Act 1990 to disqualify any person or persons in any proceedings on its own motion. When the Director appeared before the Supreme Court in December 2007, the Supreme Court indicated that the question of any

¹² Contrary to Section 187 of the Companies Act 1990 (as amended).

¹³ In accordance with the requirements of Section 202 of the Companies Act 1990.

¹⁴ Contrary to Section 161 of the Companies Act 1990.

¹⁵ Contrary to Section 40 of the Companies Act 1990.

¹⁶ *Fyffes plc -v- DCC plc & ors* [2007] IESC 36 – see www.odce.ie.

disqualification was a matter for the High Court. The Supreme Court also referred the main proceedings to the High Court in order to assess the quantum of damages appropriate to the case.

Another significant case involved an application launched by two company directors against whom the ODCE have taken disqualification proceedings. The following **Illustration 3.1** briefly outlines the nature of the legal challenge and the present status of the application.

Illustration 3.1: High Court Proceedings by Michael and Thomas Bailey

In August 2006, the ODCE initiated disqualification proceedings in the High Court against the directors of Bovale Developments, Mr Michael Bailey and Mr Thomas Bailey. Prior to this application being heard, the Respondents commenced a legal challenge which was heard in the High Court over four days in June 2007. In essence, the Respondents challenged the admissibility of certain evidence on which the ODCE proposed to rely in the disqualification proceedings. The issues in the proceedings included the following:

- the validity of the means by which certain documents relating to Bovale Developments were acquired;
- the ODCE's reliance on documentation belonging to the auditor of Bovale Developments;
- the ODCE's reliance on certain information obtained from the Revenue Commissioners;
- the basis on which PricewaterhouseCoopers acted on behalf of the ODCE;
- the ODCE's reliance on the Flood Tribunal Reports.

As well as refuting the claims of the Respondents, the ODCE also contended that any challenge of admissibility should be heard within the proceedings.

Subsequently, the Court gave judgment on 1 November 2007¹⁷, a copy of which is available on the ODCE website at www.odce.ie. The Court considered that it was entitled to address as a preliminary matter the admissibility of evidence which was proposed to be heard in the proceedings. It also found in favour of the Respondents on some of the issues which formed part of the basis for their application, but it rejected others. In early 2008, the Respondents served notice of appeal of the High Court Judgment following which the ODCE cross-appealed aspects of the Judgment to the Supreme Court.

Enforcement Cases

Appendix 3.4 provides statistical information on the throughput of criminal cases in 2007. In addition to those that were the focus of criminal proceedings during the year, a further 45 cases were closed following investigation. Priority is now being given to the closure of other suitable cases which remain on hands at year-end.

A further 81 new cases were received for consideration of criminal enforcement action in 2007, and **Appendix 3.5** sets out the broad offence categories identified in these new cases. The pattern is broadly similar to previous years with two offence types dominating, namely a failure to keep proper books of account and restricted persons acting as company directors in breach of the relevant capitalisation and other criteria provided for in law.

Sub-Goal 3.1: Developing a Balanced Enforcement Policy

The ODCE's Annual Report for 2006 outlined how the focus of much of the Office's work was directed towards:

- helping the majority who want to comply to do so and
- discouraging misconduct by those who may be tempted not to comply.

The Report went on to describe the graduated approach which the ODCE takes to its regulatory responsibilities varying, among other options, from:

- securing rectification of a default, to
- taking direct ODCE enforcement action of some character, to
- the referral of an indictable offence case to the Director of Public Prosecutions for a decision as to whether the matter should be tried before a judge and jury.

The statistics in this and in earlier Annual Reports indicate that in accordance with this tiered regulatory approach, only a minority of cases result in formal legal action. The Director envisages that this broad approach will continue for the foreseeable future with such refinements as are necessary in response to case developments over time.

17 In re Bovale Developments Limited and the Companies Acts 1963 – 2005 – The Director of Corporate Enforcement v Michael Bailey and Thomas Bailey [2007] IEHC 365 – see www.odce.ie.

Sub-Goal 3.2: Upholding Disclosure Requirements

Persons benefiting from incorporation and the privilege of limited liability in company law are required to adhere to certain consequential duties and obligations. These include the requirements that:

- companies trading in the State be registered,
- certain company particulars, (e.g. location of registered office, identity of directors, etc.) be kept up to date and
- information on the company's financial and operating performance be maintained accurately and promptly.

An objective of these requirements is market transparency, so that by examining the filed information made available in the CRO, members, creditors and other stakeholders can make an informed decision on the risks of engaging with the entity.

As indicated earlier, the Office successfully prosecuted three companies for a failure to keep proper books of account in 2007, and one other similar case was awaiting determination at year-end.

In 2007 also, the ODCE secured two disqualifications in consequence of the findings of High Court Inspectors in their Report on Ansbacher (Cayman) Ltd. This company and a related Cayman Islands company (Hamilton Ross Company Limited) had never been registered under the Companies Acts and had secretly carried on an unlicensed banking business in the State over a combined period of some 20 years. The persons disqualified, Mr Sam Field-Corbett and Mr Jack Stakelum, were disqualified for three and five years respectively; and subsequently, they both appeared on lists of tax defaulters published by the Revenue Commissioners. The published tax settlements made by Mr Field-Corbett and Mr Stakelum were €1.15 million and €0.425 million respectively.

The following **Illustration 3.2.1** deals with the High Court Judgment of 31 July 2007¹⁸ with respect to the disqualification of Mr Stakelum.

Illustration 3.2.1: High Court Judgment with respect to Mr Jack Stakelum

In his Judgment on 31 July 2007, Mr Justice Brian McGovern noted the findings in the High Court Inspectors' Report into Ansbacher (Cayman) Ltd. that there was evidence tending to show that Mr Stakelum may have committed a number of criminal offences such as conspiracy to defraud, breaches of the Taxes Consolidation Act 1997 and breaches of the Central Bank Acts 1971 and 1989 in carrying out a banking business without the requisite licence. In particular, he accepted that Mr Stakelum operated a system of client services that was inexplicable on any normal basis and can only have been designed to hide funds from the Revenue Authorities.

In concluding his unapproved Judgment, Mr Justice McGovern said:

"In this case the respondent who is [a] Chartered Accountant engaged in activities which, on any objective view facilitated the evasion of tax. This activity was done in a calculated way and by means of [an] elaborate scheme to conceal monies from the Revenue Authorities. The respondent even went so far as to destroy all records when he retired in 1998. The court cannot ignore these facts... I am quite satisfied that in consequence of the report of the Inspectors appointed by the court there is evidence that the conduct of the respondent makes him unfit to be concerned in the management of a company and accordingly I make a disqualification order in respect of the respondent for a period of five years."

Sub-Goal 3.3: Sanctioning Parties Disregarding Company and Other Interests

For reasons of public protection, the Companies Acts contain a number of provisions which preclude unqualified or disqualified persons from acting as a company auditor, director or liquidator either generally or in certain defined circumstances.

As indicated earlier, the ODCE successfully prosecuted two offence types under this heading in respect of:

- persons acting in breach of the statutory conditions pertaining to their earlier restriction by the High Court, contrary to Section 161 of the Companies Act 1990, and
- persons acting as an auditor while not qualified to do so, contrary to Section 187 of the Companies Act 1990.

¹⁸ The Director of Corporate Enforcement -v- John J. (aka Jack) Stakelum – Unreported HC McGovern J, 31 July 2007 – see www.odce.ie.

The following **Illustration 3.3.1** discusses the circumstances associated with the conviction by the relevant District Court Judge of one of the latter cases.

Illustration 3.3.1: Acting as Auditor while not Qualified – Mr Patrick Monahan

A public complaint prompted the ODCE to investigate the conduct of Mr Patrick Monahan who was purported to be acting as an auditor without being qualified to do so. Subsequent enquiries revealed that this conduct was more extensive than that notified by the complainant. On completion of the investigation, it was resolved to prosecute Mr Monahan.

On 12 December 2007, the case came before Navan District Court. The 16 charges related to the audit reports of 11 companies which were signed by Mr Monahan over a period of four years.

The ODCE submitted to the Court that Section 187 was an indictable offence and an offence of strict liability. A special audit report is required to be submitted to the CRO in order:

- to validate a claim that a company is a small company (as defined in the Section 18(3) of the Companies (Amendment) Act 1986) and
- to obtain a legal concession that the company's annual return need only be accompanied by an abridged balance sheet.

In the circumstances of this case, Mr Monahan had signed audit reports contrary to Section 187 which, when filed in the CRO, misled the public as to his status and as to the consequential entitlement of each of the companies to obtain the stated legal concession.

The Judge accepted the ODCE's submissions and convicted Mr Monahan on all 16 charges. He fined Mr Monahan a total of €3,200 and awarded costs of €2,000 to the ODCE.

Sub-Goal 3.4: Acting against Parties Denying Accountability under the Law

In 2007, the ODCE continued its focus on directors who persistently engage in conduct which is contrary to law.

The practice of directors who abandon indebted companies, fail to comply with statutory obligations to file annual returns and thereby allow the companies to be struck off the Register of Companies pursuant to Section 12 of the Companies (Amendment) Act 1982 is dealt with in more detail in the following Goal 4 chapter of the Report. Specifically, **Illustration 4.3.1** in that chapter deals in detail with the circumstances which gave rise to the disqualification of two directors for twelve and eight years respectively arising from serial misconduct in this area.

Conclusion

It is clear that a number of important developments occurred with respect to company law enforcement in 2007. The 12 year disqualification of a company director for his persistent abuse of various stakeholders in unliquidated insolvent companies was a particular highlight. Another important set of cases which successfully concluded this year were those arising from the High Court Inspectors' Report into Ansbacher (Cayman) Ltd. The three disqualification actions which the ODCE initiated on foot of that Report and which concluded in 2006 and 2007 were all successful.

A number of other important cases progressed in 2007, but final Court judgments remain outstanding at the end of the year. The Director and his staff look forward to moving forward with these and other enforcement cases in 2008.