

Goal 4 – Sanctioning Improper Conduct with respect to Insolvent Companies

Introduction

Company directors have a duty to ensure that they act responsibly with respect to the interests of other company stakeholders and especially to those who may suffer financial losses in the event of a future insolvent failure of the company. Directors who fail in their duty face restriction, disqualification or even criminal sanction. The Companies Acts contain a number of provisions by which such conduct can be brought to attention and addressed.

The ODCE's work in this area remained focused in 2006 on:

- insolvent companies in liquidation and
- unliquidated or dissolved insolvent companies.

Liquidation Trends

The following table shows the number of liquidations notified to the Companies Registration Office (CRO) in recent years.

Liquidations	2002	2003	2004	2005	2006
Creditors	378	346	321	300	323
Court	34	31	40	49	31
Members	720	941	827	868	930
Total	1,132	1,318	1,118	1,217	1,284

Previous ODCE Annual Reports have noted a welcome reduction in recent years in the number of insolvent companies going into liquidation, and the combined 2006 figure of 354 for Court and voluntary creditor liquidations is little changed on the outturn of 349 in 2005. The further rise to 930 in 2006 in the number of solvent companies being liquidated which was 7% up on 2005 was also positive. Clearly, company stakeholders continue to enjoy good conditions for the payment of their liabilities vis-à-vis companies placed in liquidation. The insolvency regime introduced in the Company Law Enforcement Act 2001 has obviously contributed to these reduced business risks. The ODCE remains anxious to help maintain this positive environment and will keep matters under regular review.

Insolvent Companies in Liquidation by Economic Sector

Appendix 4.1 gives a breakdown by economic sector of the insolvent companies in liquidation by reference to the first reports received from liquidators in 2006. The wholesale and retail, construction and manufacturing sectors continued to feature prominently in the companies in insolvent liquidation. There has been a 32% increase from 53 in 2005 to 70 in 2006 in the number of construction companies in insolvent liquidation while manufacturing numbers have reduced by 42% from 65 in 2005 to 38 in 2006. Technology and telecommunication insolvencies have significantly declined by 48% from 29 to 15. In contrast, there has been an increase in the number of security companies going into liquidation which may be due to the increased standards of regulation now being imposed by the new Private Security Authority.

Unliquidated/Dissolved Insolvent Companies

There are no authoritative figures identifying the entire population of unliquidated and dissolved insolvent companies. For instance, there may be at any one time several hundred insolvent companies on the Register of Companies that have ceased to trade and which have not been put into liquidation. However, many of these will come to be struck off the Register eventually.

CRO figures are available for the number of dissolved companies, but these comprise both solvent and insolvent companies. Bearing in mind these caveats, the following Table summarises the numbers of struck-off companies for the years 2002 to 2006. Given the variation in these figures over the five year period, no particular interpretation can be placed on the drop of over 4,000 companies in 2006.

Type of Dissolved Company	2002	2003	2004	2005	2006
'CRO Strike-off' ²⁶	-	14,836	1,401	9,514	5,255
'Revenue Strike-Off' ²⁷	2,766	-	1,599	794	444
'Voluntary Strike-Off' ²⁶	3,125	5,483	3,595	3,316	3,757
Total	5,891	20,319	6,595	13,624	9,456

²⁶ Section 311 of the Companies Act 1963 (as amended) and section 12 of the Companies (Amendment) Act 1982 (as amended).

²⁷ Section 882 of the Taxes Consolidation Act 1997.

Eurofood IFSC Limited (In Liquidation)

The ODCE's Annual Reports for 2004 and 2005 dealt with the case of Eurofood IFSC Limited (In Liquidation) ("Eurofood") and the importance for Irish and EU insolvency law of a number of issues which were referred by the Supreme Court to the European Court of Justice (ECJ). During 2006, both the European Court of Justice and the Supreme Court issued final decisions the effect of which is that the winding-up of Eurofood will continue to be dealt with by the liquidator under Irish law. The Director was a Notice Party to these proceedings and was awarded his costs for the Supreme Court hearing. Further details on these Court judgements are contained in the accompanying **Illustration 4.1**.

Notice Party Costs Order

In March 2006, the Director was notified of a Court Order joining him as a Notice Party to High Court proceedings in relation to Ribonwood Developments Limited (In Liquidation). The liquidator instituted the main proceedings seeking the restriction of a number of directors pursuant to section 150 of the Companies Act 1990 after the ODCE had not relieved the liquidator of his statutory obligation to apply to the High Court. The Court determined those proceedings by not imposing any restriction on the defendant directors. The Court then made an Order that the Director be joined to the proceedings as a Notice Party to determine the issue of costs.

Illustration 4.1: Eurofood IFSC Limited (In Liquidation)

Previous ODCE Annual Reports included information on the Director's involvement in litigation arising from the insolvency of Eurofood IFSC Limited – an Irish company which was a wholly-owned subsidiary of Parmalat SpA, an Italian company which was one of the lead members of the major multinational food group, Parmalat.

In May 2006 the Court of Justice of the European Communities (ECJ) gave its Judgment on certain questions of law, which had been referred to it in July 2004 by the Supreme Court²⁸. The ECJ's ruling was largely in accordance with the interpretation of the law for which a number of parties, including the ODCE, had contended. In particular, the ECJ confirmed that where a parent company and its subsidiary are incorporated in two different Member States of the European Union, the subsidiary's "*centre of main interests*" should be presumed to be located in the Member State in which the subsidiary is incorporated, unless there are factors "*which are both objective and ascertainable by third parties*" to clearly rebut that presumption. The ECJ further observed that "*the mere fact that a company's economic choices are or can be controlled by a parent company in another Member State is not enough to rebut that presumption*".

In July 2006, the Irish litigation (from which the ECJ proceedings in Luxembourg had emerged) concluded with the delivery by the Supreme Court of its final judgment²⁹. The Court accepted the arguments of parties including the ODCE that it was clear from the principles as enunciated by the ECJ that the appeal ought to be dismissed, thereby upholding the correctness of the decision of the Irish High Court (in March 2004) that the winding-up of Eurofood IFSC Limited should be carried out under Irish law, rather than under the law of Italy.

In the ODCE's view, the outcome of this litigation was satisfactory, and the Director was pleased to have been a participant in it. With more and more businesses operating across frontiers, both creditors and investors—as well as fiscal and regulatory authorities—need a clear legal framework from which to assess the consequences which will likely follow in the event of a company becoming insolvent. Ireland's creditor-friendly insolvency regime is one of the many factors that make lending to Irish companies, and other forms of investment in them, attractive. On the basis of Eurofood, it seems likely that Irish insolvency law, and the Irish regulatory and supervisory system, will remain the applicable framework in the majority of cases where Irish-registered companies trading elsewhere in the EU become insolvent.

Prior to this issue being listed, the Director had indicated his intention to resist the application and issued a motion to have the Court Order struck out. Following on from an exchange of correspondence between the ODCE and the

liquidator's legal advisors and an appearance in the High Court on behalf of the Director, the liquidator decided not to proceed with his motion for costs against the Director. The Director does not consider that it is appropriate to seek

28 A copy of the ECJ's judgment of 2 May 2006 is available on the Court Decisions section of www.odce.ie/en/court_insolvencies.aspx or at www.bailii.org/eu/cases/EUECJ/2006/C34104.html.

29 In the Matter of Eurofood IFSC Limited and in the Matter of the Companies Acts 1963 to 2001 [2006] IESC 41. A copy of Mr. Justice Fennelly's judgement of 3 July 2006 is available on the Court Decisions section of http://www.odce.ie/en/court_insolvencies.aspx or at www.bailii.org/ie/cases/IESC/2006/S41.html.

to join him to such applications and intends to oppose vigorously any and all such applications that may arise in the future.

Non-Party Disclosure Order

It is a statutory requirement that a High Court restriction application be instituted by a liquidator against the relevant directors of the company in insolvent liquidation once the ODCE has not relieved the liquidator of that obligation. In November 2006, the Director received notice that a respondent director facing restriction proceedings had issued a motion for non-party discovery against the Director seeking details and information in relation to a District Court summons issued by the Director against him in 2003. The respondent director assumed that the information sought would assist him in defending an aspect of the liquidator's High Court proceedings.

Prior to the matter being listed, the Director indicated his intention to vigorously resist such an application on confidentiality and legislative non-disclosure grounds. Following on from an exchange of correspondence between the ODCE and the respondent director's legal advisers, the motion for non-party discovery was struck out with no Order as to costs. The Director does not consider that it is appropriate for respondents to restriction proceedings to seek non-party discovery against the ODCE, and he intends to oppose vigorously any and all such applications that may arise in the future.

Sub-Goal 4.1: Supervising Liquidators in the Proper Discharge of their Duties

Liquidator Reporting under Section 56

The liquidator of a company in insolvent liquidation is required by law to report to the ODCE³⁰ on its demise and on the conduct of any person who was a director of the company during the 12 months preceding its liquidation. The liquidator must also proceed to apply to the High Court for the restriction of each of the directors, unless relieved of that obligation by the ODCE. The Office considers relief where the liquidator advances a coherent justification in support of a claim that the director has

acted honestly and responsibly in conducting the company's affairs.

The process of liquidator reporting and its scope is outlined in detail in two ODCE publications, Decision Notice D/2002/3 as supplemented by Decision Notice D/2003/1. These publications were prepared following public consultation processes and are available from our website at www.odce.ie/en/media_decision_notices.aspx.

Appendix 4.1.1 provides statistical information on the volume of liquidator reporting in 2006. 971 liquidator reports were received (1,009 in 2005). Of these, 316 were initial reports³¹ (327 in 2005) from 87 liquidators, while the balance of 655 (682 in 2005) constituted further³² or final³³ reports on company liquidations.

The compliance rate for the timely production by liquidators of their first reports marginally improved to 96% in 2006 from 95% in 2005. The Office also monitored the liquidators' submission of their further and final reports. In respect of all reports due in 2006, the Office had corresponded formally with liquidators on 167 occasions (64 in 2005) indicating that they were in default with regard to their statutory reporting obligations. The increase in correspondence arose primarily in relation to increased vigilance by this Office in seeking to ensure that liquidators filed overdue further reports expeditiously.

The Office also corresponded with liquidators on 44 occasions in 2006 (23 in 2005) in respect of their failure to advise it that restriction applications had been taken where relief was not granted. 13 liquidators (two in 2005) were issued with formal warnings during the year that legal proceedings would be initiated against them should they continue to fail to take the necessary restriction applications. In three cases, proceedings were commenced, and two of these cases remained outstanding at year-end.

The standard of liquidator reports received was again mostly satisfactory in 2006. This area is regularly monitored, in order to maintain the effectiveness of liquidator reporting.

Other Liquidator and Receiver Issues

As indicated earlier, seven reports were received in 2006 under section 299 of the Companies Act 1963 (as

³⁰ Section 56 of the Company Law Enforcement Act 2001.

³¹ An initial report is the first report received from a liquidator within six months of his appointment, and in the majority of cases, the decision to grant relief or not is made based on this report. In some cases, 'relief at this time' is granted to facilitate further investigations by the liquidator.

³² A further report is received from a liquidator usually after six months if 'relief at this time' was granted and after twelve months if a decision to grant or not to grant relief has been made. In this way, the ODCE monitors progress on an insolvent liquidation. As the principal decision on whether or not to relieve a liquidator of their obligation to take restriction proceedings will have been made based on the initial report, the majority of decisions for further reports will be 'relief'. The exception to this is when 'relief at this time' has previously been granted to facilitate further investigations by the liquidator.

³³ A final report is received from a liquidator four weeks prior to final meetings or final dissolution if the liquidation is a Court liquidation. This is a final monitoring exercise for the ODCE prior to the dissolution of an insolvent company.

amended). The seven reports related to seven companies and emanated from six liquidators. No receiver made any section 299 reports. Such reports, when made, indicate a view that a past or present officer or member may be guilty of an offence in relation to the company for which he/she is criminally liable.

The ODCE received no reports in 2006 from prescribed professional bodies in respect of suspected liquidator or receiver misconduct pursuant to section 58 of the 2001 Act.

The ODCE did not seek access to the books and documents of a liquidator³⁴ or receiver³⁵ in 2006.

Sub-Goal 4.2: Assessing Directors' Conduct in Insolvent Liquidation Situations

The ODCE issued decisions in 2006 in the case of 954 liquidator reports (942 in 2005) of which 319 (317 in 2005) constituted initial reports from liquidators and 635 (625 in 2005) were further or final reports. This shows a consistent throughput between 2005 and 2006.

ODCE Relief Decisions

Of the 319 initial reports determined, the relief decisions in 2006 (relative to 2005) were of the following character:

Decision Type	2005	%	2006	%
Full relief ³⁶	194	61%	190	60%
No relief ³⁷	49	16%	40	13%
Relief 'at this time' ³⁸	58	18%	78	24%
Partial relief ³⁹	13	4%	10	3%
Other decisions	3	1%	1	0%
Total	317	100%	319	100%

The indicated figures are similar to the outturns for 2005. The change in the proportion of 'no relief' or 'partial relief' cases (from 20% to 16%) between 2005 and 2006 respectively and 'full relief' cases (from 61% to 60%) are

balanced by the increase in 'relief at this time' decisions (from 18% to 24%). This is largely due to an increasing number of liquidator requests for additional time to complete their examinations of the companies' affairs and on some occasions a requirement for this Office to more fully explore certain issues with a liquidator.

In evaluating liquidator reports, the ODCE is particularly anxious to ensure that no unnecessary High Court hearing is imposed on persons who have clearly shown that they behaved honestly and responsibly in the conduct of the affairs of failed companies, even though losses may have ensued to others. At the same time, Office staff are anxious to receive assurance that liquidators have properly investigated the circumstances of the company's failure and in particular any suspected misconduct or irresponsibility on the part of the company's directors. As far as possible therefore, the Office is trying to ensure that an appropriate recommendation with respect to relief is made in each case.

Decisions of 'no relief' or 'partial relief' by the ODCE do not of course constitute a finding in relation to the honesty or responsibility of the directors concerned, and it would be improper for any such inference or imputation to be drawn. It is a matter for the High Court (having heard the liquidator's evidence and the explanations of company directors) to determine if a restriction declaration should be made in the case of any particular company director.

Complete lists of the companies in respect of which full relief and relief 'at this time' were granted in 2006 are available on our website in Information Notice No. I/2007/1 entitled "Section 56 Reports" at www.odce.ie/en/media_information_notices.aspx.

Tracking Court Decisions on the Restriction Applications

In 2006, the High Court determined 80 cases where no relief or partial relief had previously been decided by the ODCE, with the remaining cases either pending before the Court or having yet to be initiated. In respect of the cases heard, the High Court has restricted or disqualified one or more directors in 66 cases, representing 83% of the total. No restriction orders were made in respect of the remaining 14 cases or 17% of the total. These outcomes are broadly in line with the outcomes in 2005.

³⁴ Under section 57 of the Company Law Enforcement Act 2001.

³⁵ Under section 323A of the Companies Act 1963 (as inserted by section 53 of the 2001 Act).

³⁶ Full relief was granted in cases where the ODCE was satisfied, on the basis of information provided by the liquidator or otherwise, that all of the directors of the insolvent company had satisfactorily demonstrated that they had acted honestly and responsibly in the conduct of the company's affairs.

³⁷ Relief was not granted in cases where the ODCE was satisfied, on the basis of information provided by the liquidator or otherwise, that none of the directors of the insolvent company had satisfactorily demonstrated that they had acted honestly and responsibly in the conduct of the company's affairs.

³⁸ Relief 'at this time' was granted in cases where the ODCE was satisfied that the liquidator needed more time to investigate properly the circumstances giving rise to the company's demise. The ODCE requires such liquidators to submit a second report, after which a fresh relief decision is made.

³⁹ Partial relief was granted in circumstances where the ODCE was satisfied, on the basis of information provided by the liquidator or otherwise, that some but not all of the directors of the insolvent company had satisfactorily demonstrated that they had acted honestly and responsibly in the conduct of the company's affairs.

In terms of individual directors, there were 107 directors restricted,⁴⁰ seven directors disqualified⁴¹ and two directors both restricted and disqualified. This represents 77% of the 150 directors that were the subject of restriction or disqualification proceedings. Restrictions were not made in respect of the balance of 34 directors.

The Director welcomes the success of a number of liquidators in 2006 in bringing disqualification proceedings

against nine directors of insolvent companies (seven in 2005), because the nature of the indicated misconduct warranted, in their view, a more serious sanction than restriction. The Director hopes to see further disqualification cases taken in 2007 where the misconduct was particularly serious. The accompanying **Illustration 4.2.1** provides some information on the cases where liquidators secured disqualifications in 2006 on foot of section 56 proceedings.

Illustration 4.2.1: Insolvent Companies: Liquidator Disqualifications in 2006

A 15 year disqualification (reduced to 13 years) was imposed on Mr Daniel Jones, a director of Lee View Communications Limited. Mr Jones was engaged in a major UK VAT fraud using related companies. The recorded turnover exceeded Stg£197 million. Certain monies were diverted from the company to the benefit of 'unknown persons'. The term was reduced to 13 years, because he did not object to the disqualification application.

The High Court imposed a ten year disqualification on Mr Michael Kirrane, a director of Dillonbrook Estates Limited, who was found to have diverted the proceeds of asset disposals to himself via directors' loans over a prolonged period. This avoided disclosure of tax liabilities and breached provisions of the Taxes Acts and the Companies Acts. Once all assets had been disposed of, Mr Kirrane claimed an inability to repay the loans which exceeded €1.5 million, and the company was placed in liquidation. A second director was restricted for five years.

The High Court imposed a seven year disqualification on the former managing director of Irish Chrome Industries Limited, Mr Hugh Hannigan. He and a fellow director also received a five year restriction for his involvement in a related company, Status Hydraulics Limited. Restriction proceedings against a third non-Irish director were also outstanding at year-end. Evidence suggested that Mr Hannigan was primarily responsible for failing to maintain proper books and records and that there were irregular inter-company and inter-bank transactions undertaken under his close supervision and control. His accountancy firm also completed company audits in one financial period in breach of the independence requirements of the Companies Acts.

Three company directors consented to five year disqualifications in relation to the affairs of their residential homes construction company, Tom Driver & Son (Builders) Limited. No records had been maintained by the company to allow the identification of significant cheque transactions for €443,000 made out to 'cash', and there was no satisfactory explanation from the directors relating to these cheques.

Two directors of Nationwide Transport Limited, Mr Jason Larkin and Mr Gerard Whelan, were each disqualified for five years. There was evidence of repeated, intentional and substantial phoenix activity between this and earlier courier companies. A Revenue audit uncovered a tax liability of €273,000, and there was a failure to keep proper books of account and to file annual returns.

A two and a half year disqualification and a five year restriction were imposed on Mr Donal Harrington, a director of Beta Rose Limited, which operated a restaurant and licensed premises. He had created a second phoenix-type company to continue trading from the premises which was financed by a rent deposit and stock from the original company.

In addition to the 109 persons restricted as a result of proceedings pursuant to section 56, a further four persons were restricted by the High Court in unrelated proceedings. While a total of 113 new persons were restricted in 2006, the net increase in the CRO's Register of Restricted Persons

was only 85 due to earlier restricted persons completing their five year restriction periods. The following table indicates the net increase in the number of restricted persons since the end of 2002.

⁴⁰ Where an individual is restricted, s/he may only act as the director or secretary of a company for a period of five years thereafter if that company meets certain minimum capitalisation requirements. In the case of a private company, a minimum called up share capital of €63,487 is required. In the case of a public limited company, the corresponding figure is €317,435. Moreover, the called up share capital must be fully paid for in cash. Restriction permits individuals to continue to avail of the benefits of limited liability. However if a restricted person breaches the capitalisation conditions, s/he may potentially be convicted of an indictable offence, fined and disqualified for five years.

⁴¹ If disqualified by the High Court, a person is prohibited from being appointed or acting as an auditor, director or other officer, receiver, liquidator or examiner and from being in any way, whether directly or indirectly, concerned in or part of the promotion, formation or management of any company or any society registered under the Industrial and Provident Societies Acts. A disqualified person who breaches the Court order is liable to be convicted and disqualified for ten years.

Number of Directors standing restricted at end-2002 to end-2006 inclusive

End-2002	End-2003	End-2004	End-2005	End-2006
54	295	487	600	685

The Registrar of Companies maintains up-to-date registers of restricted and disqualified persons, and an on-line public search facility of these registers is available at www.cro.ie.

In relation to restriction proceedings that concluded before the High Court in 2006, **Appendix 4.2.1** to this Report outlines the outcome of the cases where restrictions were made and the identity of the persons in question.

Appendix 4.2.2 to this Report outlines the outcome of the cases in 2006 where disqualifications were obtained on the application of a liquidator arising from the section 56 process. The Appendix also identifies the persons in question.

Appendix 4.2.3 to this Report identifies the companies where the High Court concluded in 2006 that a restriction should not be made against any of their directors.

Relief from Restriction

A restricted director may apply to the High Court for relief, in whole or in part, from a restriction within a period of one year from the making of the restriction declaration. The High Court may, if it deems it just and equitable to do so, grant such relief on whatever terms and conditions it sees fit⁴².

In the first judgement of its kind for some time, the High Court granted partial relief to a former director of Xnet Information Systems Ltd.⁴³ who was restricted in 2004. The ODCE had opposed the relief application. In making its decision to reduce the company capitalisation requirement from €63,487 to €7,500, the Court attached a number of other conditions, including requiring the director to notify the ODCE of any new company to which he is appointed as director or secretary while subject to continuing restriction.

The Director will continue to monitor relief applications and will seek to intervene in appropriate cases in order to maintain the coherence of the present statutory restriction regime.

Tracking Directors not abiding by the Conditions of Restriction

As indicated earlier in this Report, ODCE investigations have confirmed that there are a number of restricted individuals acting in breach of the statutory requirements. The Office successfully pursued some of these cases in 2006 and secured a number of convictions and disqualifications as a result.

Deemed Disqualifications

The law⁴⁴ provides that where a person is convicted on indictment of any indictable offence in relation to a company, or involving fraud or dishonesty, s/he is deemed to be disqualified for a period of five years from the date of the conviction or for such other period as the court, on the application of the prosecutor, may order. More than 1,780 persons (1,000 at end 2005) are now listed on the Register of Disqualified persons with about 1,675 of these being deemed disqualified, 74 disqualified by Order of the High Court, 21 disqualified arising from their failure to notify their disqualification in another jurisdiction and 10 disqualified on the basis of having acted as a director while restricted.

Sub-Goal 4.3: Sanctioning Fraudulent or Abusive Behaviour

Introduction

As indicated in our 2005 Annual Report, the ODCE has no inherent difficulty with situations where directors restart a business following an orderly wind down of the previous enterprise (e.g., by placing the company into liquidation and perhaps purchasing some of the available company assets from the liquidator at the market rate). Rather, its focus is to address situations where directors restart a business in disregard both of their duties under company law and their financial and other obligations to one or more of the stakeholders in the failed company.

⁴² Section 152 of the Companies Act 1990.

⁴³ In the Matter of Xnet Information Systems Limited (In Voluntary Liquidation) and In the Matter of section 152 of the Companies Act 1990: Aidan Higgins v. James Stafford and the Director of Corporate Enforcement [2006] IEHC 289. A copy of Mr Justice O'Neill's judgment of 10 October 2006 is available on the Court Decisions section of www.odce.ie/en/court_restrictions.aspx or at www.bailii.org/ie/cases/IEHC/2006/H289.html.

⁴⁴ Section 160(1) of the Companies Act 1990.

Such 'phoenix' practices can result in:

- competition in the applicable business market being distorted, because the 'phoenix' enjoys lower-than-market costs and therefore has the potential to achieve an unfair competitive advantage in the marketplace;
- creditors suffering financial losses, some of whom may themselves fail in consequence, and
- directors either bearing no personal liability for the commercial losses or otherwise escaping accountability for the failure.

As seen earlier, some liquidators have been active in obtaining disqualifications against the directors of phoenix-type companies. The ODCE has continued to complement this work by targeting the category of potential abuse denoted by the phenomenon of insolvent 'struck-off' companies.

'Struck-off' Companies

This category refers to companies which are not in liquidation but which have been dissolved following their being struck off the Register of Companies for failing to file annual returns with the CRO. As a result of their failure to file annual returns, there is a lack of financial information available to the public, to creditors and to regulatory authorities concerning struck-off companies and their liabilities at the time of strike-off. Some of the directors in question would have established a 'phoenix' company in the same or a similar business to that of the abandoned company.

The directors of such struck-off companies are eligible to be disqualified from acting as company directors in accordance with section 160(2)(h) of the Companies Act 1990, and the ODCE may initiate these actions. However, the law precludes the High Court from disqualifying a person who shows to the Court that the company had no liabilities at the time of strike-off or that those liabilities were discharged before the initiation of the disqualification application⁴⁵. In considering the penalty to be imposed, the Court may, as an alternative to disqualification, make a restriction declaration against the directors.⁴⁶

During 2006, the Office secured the disqualification of nine directors, all for periods of five years and the restriction for five years of two further directors of struck-off companies. At the end of 2006, eight cases were before

the High Court including for the first time a number of proceedings relating to the directors of multiple struck-off companies. Many additional cases remain open at year-end, and it is anticipated that several more cases will be initiated before the Court in 2007. **Appendix 3.3** to this Report details the nine disqualifications and two restrictions achieved.

Court actions do not arise in respect of every struck-off company investigated by the Office. In some cases, the former directors are able to show to the ODCE that all liabilities had been settled at the time of strike-off or prior to the issue of any Court proceedings. This usually requires the preparation and submission of appropriate accounts, often stretching back several years, showing the company's trading since the last set of accounts were submitted to the CRO or since incorporation in cases where accounts were never submitted to the CRO. The former directors are also required to show that all creditors have been paid or settled and independent verification of this from individual creditors is frequently sought. In some cases following the intervention of the ODCE, former directors have discharged debts to creditors in order to avoid disqualification proceedings.

In a small number of cases investigated by the Office, the former directors have sought to regularise their position by formally restoring the struck-off company to the Companies Register. This procedure involves the preparation and submission of all outstanding annual returns to the CRO, the payment of all late filing fees to the CRO and the making of a formal application to the High Court for the restoration of the company.

In many cases, it was apparent that former directors used the involuntary strike-off process as a mechanism for terminating the corporate structure without recourse to other formal mechanisms of liquidation or voluntary strike-off. In some of these cases, the former directors alleged that they did so on the basis of professional advice received. The Director wishes to point out clearly that involuntary strike-off should not be seen as a replacement for more formal terminations of companies and that those resorting to such a route are now likely to be selected by the ODCE for disqualification proceedings and thus likely to incur disqualification or the expense of preparing accounts and declarations and defending their position before the High Court. Involuntary strike-off should not be seen as a mechanism for directors of insolvent companies to avoid

⁴⁵ Section 160(3A) of the Companies Act 1990.

⁴⁶ Section 160(9A) of the Companies Act 1990.

the scrutiny of their conduct that is applied to directors of insolvent companies in liquidation under the section 56 process described earlier.

Where companies are struck off the Companies Register, the assets of every company are vested in the Minister for Finance in accordance with the provisions of the State Property Acts. It is the policy of the Office to bring to the attention of the Department of Finance cases where a company held significant assets at the time of strike-off.

Conclusion

With a further 107 director restrictions and 18 director disqualifications known to be directly related to insolvent companies in 2006, the ODCE continues to make progress in collaboration with liquidators and the Courts in deterring irresponsible or unlawful conduct in this area in the overall interests of good order in the market.

Goal 5 – Providing Quality Services to Internal and External Customers

Introduction

The ODCE's aim of providing quality services for all its customers continued to be a priority in 2006. Customer service in this context includes the provision of services to the public and to Office staff by ensuring that the necessary infrastructure is in place to allow the functions of the Office to be carried out efficiently and effectively. The main features of our developing corporate services during 2006 is outlined below.

Sub-Goal 5.1: Securing and Managing ODCE Resources

Staffing

The ODCE's staffing level was slightly below its approved complement of 37 staff for much of 2006 due to a time lag in the replacement of departing staff. **Appendix 5.1.1** provides a breakdown of the Office's 34.8 full-time staff equivalents at year-end.

Some further contacts took place during the year with the Department of Enterprise Trade and Employment in relation to the ODCE's May 2005 submission for increased staffing resources. This included the production of an update document which was forwarded to the Department in August 2006. At year-end, a definitive decision on this submission was still awaited.

The Director wishes to acknowledge the valuable contributions made by Jim Clavin, Mary Farrell, Damien Kelly, Seán Melia, Geraldine Noone, Pauline Smith and Donal Sullivan to the work of the Office during their times here. All seven left the Office in 2006 to take on new challenges.

Financial Resources

The Office's administrative costs in 2006 were funded through Subhead A09 of Vote 34 (Minister for Enterprise Trade and Employment). A summary of the allocated and expended amounts for the main Pay and Non-Pay headings is provided in the following table. A more detailed breakdown of the 2006 figures is contained in **Appendix 5.1.2**.