

transactions. From a company law perspective, it is difficult to see how that can ever be advantageous.

...it does seem desirable to us that if the Order is being retained, it should be amended to remove any direct or indirect inducements therein which may lead companies to cause their primary books and records (including invoices) to be kept on any form of artificial basis.”

International Association of Insolvency Regulators

As a member of the International Association of Insolvency Regulators (IAIR), the ODCE continued to contribute to the development of the Association as a forum for international research and co-operation in insolvency matters. In 2005, the ODCE contributed inter alia to the preparation of a Report on Assetless Insolvencies¹¹. The Report is a useful survey of the alternative approaches adopted in various jurisdictions to the need in the public interest to investigate and curb the development of insolvency situations constituting potential misconduct.

The IAIR Annual Conference in Helsinki which was attended by the Director and a staff member agreed a number of further research topics for the 2005/2006 period, and the ODCE contributed in late 2005 to that dealing with the treatment of student loans in personal insolvency situations. These reports will be considered at the IAIR's Annual Conference in 2006.

GRECO Review of Ireland's Capacity to Combat Corruption

The ODCE participated in two international peer reviews of Ireland's administrative and legal systems in 2005. One was undertaken by an evaluation team from GRECO (Groupe d'États contre la Corruption), a group of 40 Member States from the Council of Europe which is committed to improving its Members' capacity to combat corruption. One of the themes of the recent evaluation was legal persons and corruption. The subsequent Report on Ireland was adopted by GRECO in December 2005¹².

In the company law field, the Report notes inter alia the respective roles of the ODCE and the Companies Registration Office (CRO), the requirement on auditors to report suspected indictable company law offences to the ODCE for investigation and the latter's success in prosecuting offences relating to accounts and other documentary irregularities. The Report also compliments the legal provisions which serve to restrict and disqualify persons from acting in leading positions in companies arising from findings of misconduct in court proceedings. It does however urge the Irish Authorities to consider:

- strengthening the material checking function of the Companies Registration Office with regard to confirming the accuracy of filed information, in particular with regard to the identity of persons behind a company;
- increasing the penal sanctions for accounts offences in order to ensure that the available sanctions are effective, proportionate and dissuasive.

Review of Ireland's Compliance with FATF Recommendations

The ODCE also participated in a peer review which was undertaken by the OECD's Financial Action Task Force (FATF). This review focused on compliance by Ireland with the FATF's 40 Recommendations and its nine Special Recommendations combating money laundering and terrorist financing respectively. Recommendation 33 urges access by competent authorities to adequate, accurate and timely information on beneficial ownership and control in respect of legal persons such as companies. The subsequent FATF Report on Ireland was adopted in February 2006¹³.

Having outlined the relevant provisions in Irish company law and elsewhere, the FATF Report states inter alia that the information on the directors and members of companies which is filed in the CRO is taken at face value and that no verification is carried out. It also notes that nominee directors and corporate/

trustee members are permitted so that the CRO Register will not necessarily disclose the true beneficial ownership and control of a company. While acknowledging that the Garda and the ODCE have certain legal powers at their disposal to investigate beneficial ownership and control and that these powers have been successfully employed in the past, the Report only rates Ireland as 'partially compliant' with Recommendation 33. It accordingly recommends that the Irish Authorities take measures to improve transparency in the area by providing for the recording of the requisite information, so that it can be made available to competent authorities on request.

Other International Visitors

The Office also briefed a number of foreign visitors on the role and activity of the ODCE. These included:

- a delegation from the Iraqi Government whose visit was facilitated by the Government at the request of the World Bank and
- a delegation from the Ukraine examining corporate governance structures which was also sponsored by the World Bank.

Conclusion

As evidenced by the market research undertaken by the ODCE in late 2005, the work of the Office in promoting compliance has helped to improve corporate governance standards and in particular compliance with the legal requirements of the Companies Acts. The following sections of this Report indicate however that there is still substantial work to be done before compliance with the law and duty can be said to be more or less universal.

Goal 2 - Uncovering Suspected Breaches of Company Law

Introduction

The Office continued in 2005 to receive a large number of reports and complaints of suspected corporate misconduct. Once again, those received from auditors, professional bodies and many State and regulatory authorities were quite specific in identifying the suspected company law offence(s). Unsurprisingly, those complaints made by the public tended to be less well defined in identifying the relevance of the alleged misconduct to the Companies Acts. In addition, ODCE staff themselves detected company law issues requiring attention. These included targeted enquiries in a number of areas (e.g., restricted directors acting in breach of the terms of their restriction and directors disqualified in other jurisdictions acting in the State in the absence of the registration of their disqualification) and the assessment of information in the public domain, such as media reports and filings in the Companies Registration Office. (See footnotes 54 and 55 in a later section of the Report for explanations of the terms restriction and disqualification respectively.)

Sub-Goal 2.1: Developing Detection and Reporting Arrangements for Suspected Breaches of the Companies Acts

Number/Sources of Suspected Breaches

Some 2,373 reports and complaints were received in 2005, a 21% increase on the equivalent result for 2004. As usual, the majority (1,965) were from auditors, although the general public continued to be the source of a significant minority. A breakdown of the reports by source is outlined in **Appendix 2.1.1**.

¹¹A copy of the Assetless Insolvencies Report is at <http://www.insolvencyreg.org>

¹²A copy of the GRECO Report is available at <http://www.greco.coe.int>

¹³The FATF Report is expected to be published in the first half of 2006.

Cooperation between Regulatory Authorities

Like other regulators, the ODCE is required by law to keep confidential commercially sensitive information which it receives as part of its work. However, the law also permits such regulators to share information where it is of relevance to the remit of another. The cooperation arrangements in place with the Financial Regulator, the Irish Stock Exchange and the Revenue Commissioners in particular were used frequently in 2005.

The Irish Stock Exchange submitted 13 reports of suspected breaches of the Companies Acts to the ODCE in 2005. Many of the reports which have been submitted by the Exchange to date relate to missed notification deadlines involving share purchases or disposals by the directors of listed companies. In most cases, the size of the transaction was small and/or the notification was only marginally late, and in such situations, the ODCE has taken the view that enforcement action was not warranted. However, the area is being kept under review, and if a material default arises in any case, enforcement action will be considered.

The cooperative relationship between the ODCE and the Revenue Commissioners was further developed during 2005. Reference was made earlier to the successful programme of presentations given by the ODCE to Revenue staff, and this resulted in some 12 reports being received on their initiative from Revenue by year-end.

A small number of cases also gave rise to contact with the Financial Regulator in 2005, and ODCE enquiries into a number of these were ongoing at year-end.

Separately, the ODCE sought and received cooperation in relation to its examination of a number of issues, particularly those relating to insolvent companies where Revenue would be a significant creditor. The arrangements have also enabled the Office to pass on relevant information to the Revenue, including the wider corporate interests of persons known to be of interest to Revenue.

A useful two-way flow of information also occurred in 2005 between the Garda members of the Office and their colleagues in the Garda Bureau of Fraud Investigation and in other areas of the force. Some 350 company and related enquiries were made.

The staff of the Companies Registration Office (CRO) also continued to be of substantial assistance, not only in keeping the Register of Companies up to date but also in retrieving and certifying filed original documentation for use by the ODCE in Court proceedings.

A small number of contacts on individual cases also took place with the Department of Social and Family Affairs, the Pensions Ombudsman and the Employment Rights Section of the Department of Enterprise Trade and Employment.

Sub-Goal 2.2: Identifying Suspected Breaches of the Companies Acts

The nature of the matters reported in 2005 was quite similar to previous years in respect of both mandatory and voluntary reporting.

Nature of Issues identified in Mandatory Reports

The 1,992 mandatory reports received in 2005 disclosed some 15 suspected offences under the Companies Acts. **Appendix 2.2.1** to this Report outlines the nature of the offences reported to the Office in any meaningful numbers in 2005 relative to the previous year's outturn.

The following five offences represented almost 98% of those reports:

- almost 2,000 offences (or slightly more than 80% of the total number of suspected offences reported in mandatory reports) involved the suspected failure to file on time annual returns with the Registrar of Companies. As reported earlier, the obligation to report such offences ceased¹⁴ in September 2005, and accordingly, the volume of such reports should decline dramatically in the future. Helped by prior ODCE notifications to auditors, the incidence of these reports did diminish significantly in the last four months of 2005, although the ODCE still received over 150 such reports in that period;
- 342 instances (or some 14% of the total) involved the reported excessive use of company assets for

the personal purposes of directors and connected persons. The associated sums amounted to over €80 million;

- over 60 instances of suspected failure to keep proper books of account in companies were received (about 2.5% of the total). This obligation is fundamental to the maintenance of a sound individual and collective structure for corporate affairs, and accordingly, the question of enforcement action is seriously considered in each such case;
- some 16 cases (or almost 0.6% of the total number of reported offences) were notified in respect of the alleged failure of companies and their directors to hold an extraordinary general meeting (EGM) where the company's assets/liabilities ratio was reduced to 50% or less. The incidence of these reports continues a downward trend evident from 2003 when there were 92 such reports. The welcome improvement suggests that the relevant companies may now be acting by way of an EGM to consider their weak capital positions;
- a further 16 reports dealt with the reported offence of there being no Irish-resident director. It is ODCE practice to refer these cases to the CRO for attention.

Nature of Issues identified in Voluntary and Other Reports

Many public complaints regularly report some general suspicion of misconduct on the part of a company or its directors. The ODCE assessment of these complaints is focused on the identification of a company law dimension. Where it is clear that the default arises under other legislation, it is ODCE practice to advise the complainant to refer the matter to the relevant authority for their attention. Likewise, the ODCE will almost invariably urge the complainant to contact his/her professional advisers for advice as to whether and/or how they should seek to avail of their private law remedies, where it appears that their concerns do not disclose any significant breach of public law requirements but that a remedy may exist in the sphere of private law.

Notwithstanding the difficulty of categorising the nature of these complaints and reports, **Appendix 2.2.2** provides information on the type of issues coming to attention under this heading. The following eight main areas constituted close to 78% of the issues raised:

- complaints alleging fraudulent, reckless or insolvent trading (62 cases);
- cases involving debt owed by companies to the complainant and/or other parties (61 cases);
- non-compliance with CRO filing requirements (35 cases);
- issues relating to perceived shareholder grievances (28 cases);
- the submission of forged or false documents to the CRO in particular (27 cases). This represents a doubling of the reported instances for 2004;
- companies trading whilst struck off the Register of Companies (26 cases);
- matters relating to a failure by company directors in particular to discharge their statutory duties which sometimes is the result of a lack of understanding of the requirements of the Companies Acts (26 cases);
- the failure to hold annual or extraordinary general meetings of the company (12 cases).

Throughput of Cases

Appendix 2.2.3 provides the key data in relation to the progress of the Office in 2005 in determining the cases on hands at detection stage. In summary, the ODCE concluded its deliberations on 2,111 cases representing some 73.5% of the 2,872 cases received and on hands in 2005. The corresponding closure figure for 2004 was 66.7%. In addition, a further 154 cases were referred for more detailed investigation of the prospects for possible civil or criminal proceedings.

The substantial increase in the numbers of concluded cases is explained in part by the rise in filing default cases referred to the CRO. However, there was still a significant increase in the numbers of other cases disposed of following assessment by ODCE staff. Notwithstanding this discernible improvement in

¹⁴Section 37(d) of the Companies (Auditing and Accounting) Act 2003

throughput, some 607 cases were on hands at the end of 2005, a significant increase on the 499 on hands at end-2004. This increase is primarily due to an insufficient number of staff being available to handle the large volume and complexity of reports and complaints being received by the Office on an ongoing basis.

It is a matter of continuing concern that it tends to be the more complex or resource-intensive cases which are not receiving timely attention. At end-2005, more than 350 were on hands for more than a year. About half of these cases relate to excessive directors' transactions. In 2005, the Office gave administrative priority to these reported offences with a view to securing rectification of the reported defaults or identifying those of them warranting civil or criminal enforcement proceedings. Significant progress was made during the year in achieving rectification of the associated defaults. Over 250 cases involving transactions to a value of more than €40 million were assessed, and some 700 directors were cautioned in respect of their improper use of company funds. In many of these cases, the loans were repaid to the company with consequent benefits for company stakeholders in reduced credit risk. Nevertheless, some 320 further cases remain on hands at the end of the year. The value of the associated transactions in these cases is about €176 million.

Manner of Disposal of Cases

The accompanying **Appendix 2.2.4** provides a breakdown of the manner in which the 2,111 cases were disposed of in 2005, distinguishing between those which

were the subject of mandatory and voluntary reports.

Leaving aside those cases referred to the CRO for attention or requiring more detailed investigation by the ODCE, it is perhaps useful to illustrate by way of a number of examples:

- where timely action by the complainant could have prevented the occurrence of the events giving cause for his or her concern and
- where intervention by the Office secured a positive result in terms of remedying the reported breach of the Companies Acts.

As indicated above, the non-payment of debt is a common source of complaint to the ODCE. It is not however a matter for the ODCE to undertake debt collection activity on behalf of third parties; creditors must pursue their own legal remedies in conjunction with their professional advisers as appropriate.

It is common for the ODCE to encounter situations where a little advance research by a creditor could have prevented financial losses and the associated time, expense and aggravation of seeking to pursue a debtor. Before engaging in or continuing a significant trading relationship with a company, creditors should at a minimum examine the financial and other data lodged in the CRO and consider if the filed information is audited and relatively up-to-date. **Illustration 2.2.1** outlines the circumstances of one case dealt with by the ODCE in 2005 where the creditor failed to undertake this research and suffered financial losses in consequence.

Illustration 2.2.1: Civil Debt Case not warranting ODCE Intervention - Creditors must evaluate their own Trading Risks in advance

A small trader provided credit facilities on a monthly basis to a company in the hospitality sector in a city location. The extended credit grew to €11,500 over a seven month period to the end of March 2005. Shortly thereafter, the trader complained to the ODCE that:

- the company had ceased operations,
- the principals could not be located and
- the company's accounts had not been audited for over two years.

In evaluating the complaint, it was established that the company concerned last made an annual return to the CRO in March 2004 for the financial year ended 31 December 2002. The financial statements associated with that annual return indicated that:

- the company had incurred a loss,
- creditors had increased by 100% from the previous year and
- the net assets were less than half of the amount of its called up share capital.

Moreover, the complainant was unable to provide sufficient assurance to the ODCE that he had in fact traded with the company and not with an unincorporated entity. The Office concluded that the available information did not warrant intervention by the ODCE. While the Office had considerable sympathy for the plight of the complainant, there did not appear to be any viable basis for the consideration of enforcement action under the Companies Acts. While company law provides remedies to deal with instances of insolvent trading, it is not the case that those remedies follow automatically in all cases where a debt remains unpaid.

The lesson from this type of case is that many creditors fail to undertake basic credit checks on their trading partners. In this case, it was clear that a simple examination of the filed documentation in the CRO would have warned the complainant creditor of the risk of continuing to offer credit to the company or the related trading entity. The failure to do so in this instance resulted in this small trader having to bear a significant commercial loss in relative terms.

Occasionally, a person will complain to the ODCE that information which should have been filed in the CRO was not in fact filed. While such inadequacies are primarily a matter for attention by the CRO, the ODCE

will try to encourage rectification if this is feasible in the circumstances. **Illustration 2.2.2** provides an example of an ODCE intervention in 2005 which led to a CRO filing being corrected.

Illustration 2.2.2: Instance of Administrative Rectification of Inadequate Filing by Medium-Sized Company following the ODCE's Intervention

The ODCE receives a number of complaints from individuals each year relating to the non-filing of complete returns by companies in the CRO. In many of these cases, Office enquiries of the company or its agents are sufficient to resolve the default.

By way of example, a professional person undertook a search of the CRO Register on behalf of a client in 2005. This resulted in his lodging a complaint with the ODCE to the effect that a named company had not made a complete filing in the CRO in respect of the financial period ending 31 December 2003. The complainant asserted that it was his belief that the company was a medium-sized

company¹⁵ and that it had not complied fully with the disclosure requirements necessary for such a company. The company had merely filed an abridged balance sheet and auditor's report with its return, whereas if it were a medium-sized company, it should have also filed a profit and loss account. The Office contacted the auditors of the company in question who subsequently arranged to submit a correctly completed return for the company. The complainant was subsequently advised of the rectification of the default.

In addition, the ODCE will often assist company stakeholders to assert their own rights under company law. **Illustration 2.2.3** provides an example of a successful intervention by the ODCE in 2005 in securing

compliance by a company with its statutory duties to make available to members of the public certain basic information on the company's affairs.

Illustration 2.2.3: Instance of the ODCE intervening to facilitate the disclosure of Company Information to a Stakeholder

An employment dispute arose between a trade union member and a company providing a community service in the Dublin area. The individual's trade union sought to inspect the register of members/shareholders of the company and its register of directors. The company declined to permit access to both registers.

Subsequently, the trade union and various parties acting for the company contacted the ODCE to clarify the company's legal entitlement to refuse access. The Office drew the company's attention to sections 119 and 195 of the Companies Act 1963 (as amended). Section 119(1) permits any member of the public to inspect the register

of members, while section 195(10) gives similar access to the register of directors.

Following these clarifications, the company afforded the required access to a trade union representative. In subsequent correspondence with this Office, the trade union thanked the ODCE for its assistance and indicated that *"the information gleaned from this documentation is invaluable to us, as we prepare to represent our member in the Employment Appeals Tribunal"*.

¹⁵Within the meaning of Section 8(1)(b) of the Companies (Amendment) Act 1986.

It is also the ODCE's experience that certain types of companies are more likely to be deficient in holding annual general meetings or calling them in accordance with the requirements of company law. This is most evident in guarantee and not-for-profit companies (e.g., apartment management companies and charities), in private closely owned companies where there are external non-family shareholders and in companies

benefiting from Business Expansion Scheme funding. **Illustration 2.2.4** outlines one such case in 2005 where the ODCE successfully assisted the members of a company to assert their rights under the Companies Acts and thereby influence the future destiny of their company.

Illustration 2.2.4: Instance of the ODCE assisting the members of a Management Company in asserting their rights to call the directors to account

In October 2005, a resident of an estate contacted the ODCE indicating difficulties in resolving issues with its managing agent. At that point, she was unaware that she and her fellow residents were in fact members of the management company for the estate. The ODCE indicated to her that the members of the company would initially have to pursue their complaints with the company's directors.

Having corresponded without success with the directors in relation to the holding of the company's annual general meeting and the availability of its audited financial statements, the member subsequently made a formal complaint to the ODCE. The Office then wrote to the directors on these same matters but received no response.

Having regard to the lack of progress, the Director exercised his power¹⁶ to direct the holding of an annual general meeting by the company. The direction required that:

- the meeting be held within a defined timeframe,
- specified documentation be circulated to each member and
- the members be advised that the meeting was being called at the direction of the ODCE.

On subsequent examination of the documentation which was issued to members, the Office noted that proxy forms had been withheld, and the ODCE arranged with the company that these forms were posted separately to the members. Immediately prior to the meeting, the directors co-opted an additional director to the board. This director then chaired the annual general meeting of the company, and the 20 members present successfully concluded its business.

Subsequent to the meeting, the member wrote a letter of thanks to the Office for its prompt attention of her complaint. She reported that *"While a lot of questions remain unanswered by the directors, it has commenced dialogue and perhaps now we can move forward"*.

¹⁶Pursuant to section 131 of the Companies Act 1963 (as amended).

Of course, the ODCE does not always wait for public complaints before identifying an issue suitable for possible intervention. **Illustration 2.2.5** is an example of an issue which was in the public domain. While the primary issues in question did not initially warrant ODCE intervention, the Office continued to monitor the situation relating to the company during 2005. In the second half of 2005, steps were taken to notify the company of its obligations under company law with respect to the proper disclosure of employee numbers in its annual accounts.

Illustration 2.2.5: Gama Construction Ireland Limited - Instance of the ODCE encouraging future compliance

In Judicial Review proceedings¹⁷ heard by the High Court in April/May 2005, it was stated on behalf of Gama Construction Ireland Limited, an Irish-registered parent company (“the Company”), that it had only one Turkish employee and that several hundred other Turkish persons working on sites operated by the Company (and/or related companies) were seconded employees of a Turkish company to which it was related - Gama Endustri Tesisleri Imalat Ve Montaj AS (“Gama Endustri”). The Affidavit on behalf of the Company added:

“The 2003 accounts [for the Company] contain a note to the effect that GAMA Ireland had 1,066 employees to whom €28,051,524 was paid in the course of 2003. I would however note that this does not involve the acceptance by [the Company] that the employees were other than the employees of GAMA Endustri...”¹⁸

The Company’s Group Accounts for 2004 were filed in the Companies Registration Office on 28 October 2005. These reiterated that the average number of persons employed by the Company during 2003 had been 1,066 and went on to indicate inter alia that the Company had an average of 1,188 employees in 2004. The relevant note on Company employee and staff costs in these Accounts acknowledged for the first time that these costs included payments made to employees of Gama Endustri who were on secondment to the Company and a related company,

The circumstances of this case are also likely to be relevant to other companies using similar employment practices, and the Director therefore believes that consistent with his compliance function, there is merit in his highlighting the manner in which employment arrangements of a similar type and scale should, in his view, be treated in a company’s financial statements.

Gama-Tubin Construction Ltd.¹⁹

The manner in which the Company’s Group Accounts reported its staffing arrangements led the ODCE to examine the Company’s compliance with the requirements of the European Communities (Companies: Group Accounts) Regulations 1992²⁰ (“the 1992 Regulations”). Following correspondence with the Company, the ODCE review has concluded:

- that the Company should clearly record in its Group Accounts the number of persons who were employed under contracts of service by the Company and its subsidiaries²¹ and
- that by reason of the high proportion of seconded workers, the Company should separately identify in its Group Accounts the numbers of such persons and provide appropriate information on the associated secondment arrangements, having regard to the overriding requirement that “group accounts must give a true and fair view of the company’s state of affairs”²².

Pursuant to its compliance role, the ODCE communicated these views to the Company in late 2005/early 2006, and it has been invited to adopt this interpretation of the ensuing obligations imposed by the 1992 Regulations for the future.

Goal 2.3: Commissioning/ Supporting Formal Company Investigations

Judicial inquiries and professional examinations of company documentation have been used recently on a reasonably regular basis to investigate suspected misconduct in Irish and foreign-registered companies. As well as requiring the production of documents directly from companies and related persons, the Director’s powers in this area include the acquisition of documents and related material by order of the District Court under search warrant and under the Bankers’ Books Evidence Acts.

Completed Investigations

Ansbacher (Cayman) Ltd.

Previous ODCE Annual Reports have dealt with the developments subsequent to the publication in July 2002 of the High Court Inspectors’ Report with respect to Ansbacher (Cayman) Ltd. and related matters. Having concluded his deliberations, the Director determined in 2005 that there were persons criticised in the Inspectors’ Report whose conduct warranted the initiation of possible disqualification proceedings. He subsequently notified a number of them of his intention to initiate proceedings in accordance with section 160(7) of the Companies Act 1990. The preparation of disqualification proceedings in these cases was under active consideration at end-2005.

Barnroe Ltd.

The ODCE’s Annual Report for 2004 indicated that the Director had initiated disqualification proceedings against two of the directors of Barnroe Ltd., a building company which then had its registered office at 4c Kiltalawn Cottages, Blessington Road, Tallaght, Dublin 24. The Report also recorded that the Director’s decision to invoke his investigative powers with respect to the company was the subject of parallel judicial review proceedings at end-2004.

The judicial review proceedings²³ were heard in the High Court in June 2005, while the Director’s disqualification proceedings²⁴ were heard in September 2005. The nature of the information on the company’s affairs which the Director presented to the Court in support of his request for the making of disqualification orders in this case is contained in the accompanying **Illustration 2.3.1**. Judgement in both cases was delivered on 21 December 2005²⁵. The Court ordered that the two directors, Patrick Rogers and Paul Rogers, be each disqualified for a period of five years, although the directors were allowed a period of one month from that date to divest themselves of any company involvement inconsistent with the disqualification orders. The High Court refused the reliefs sought by Barnroe Ltd., Patrick Rogers and Paul Rogers in their judicial review proceedings.

In a separate development, the Revenue Commissioners successfully applied to the High Court in October 2005 to wind up the company, and it remained in official liquidation at end-2005.

¹⁷ Gama Construction Ireland Limited (Applicant) v The Minister for Enterprise Trade and Employment and Edward Nolan (Respondents), High Court Record Number 2005/374 JR.

¹⁸ Paragraph 36(i) of the Affidavit sworn by Mr Hakan Karaalioglu on 12 April 2005 on behalf of the Company.

¹⁹ Note 5 to the Group Accounts of the Company for the year ended 31 December 2004.

²⁰ S.I. No. 201 of 1992.

²¹ Paragraph 15 of the Schedule to the 1992 Regulations.

²² Regulation 14 of the 1992 Regulations.

²³ The High Court - Judicial Reviews – 638 JR/2004 and 639 JR/2004.

²⁴ In the Matter of Barnroe Limited and in the Matter of the Companies Acts 1963 to 2003 and in the Matter of an Application pursuant to Section 160(2) of the Companies Act 1990 Between the Director of Corporate Enforcement, Applicant and Patrick Rogers and Paul Rogers, Respondents – The High Court – 2004 No. 490 COS.

²⁵ 2005 IEHC 433 and 2005 IEHC 440. Copies are available at www.odce.ie.

Illustration 2.3.1: Barnroe Ltd. - Nature of ODCE Evidence on its Affairs

The nature of the evidence presented by the ODCE to the High Court in its application to disqualify Patrick Rogers and Paul Rogers (“the Respondents”) included:

- the opinion of the professional accountant who had examined the company’s books and documents that the company and its officers had failed to keep proper books of account within the meaning of section 202 of the Companies Act 1990;
- evidence that the Respondents had operated a company bank account which was not recorded in the company’s books or records;
- evidence that the Respondents had failed to notify the company’s auditor of the account’s existence;
- evidence that the Respondents had misappropriated company funds to personal bank accounts and used a company bank account for personal expenditure purposes;
- evidence that the Respondents caused the company to expend monies in relation to property owned personally by them;
- evidence that the company failed to file tax returns on a timely basis and
- evidence that the Respondents caused the company to trade over an extended period of time while the company was insolvent.

Kentford Securities Ltd.

The ODCE Annual Report for 2004 adverted to the Director’s consideration of the Departmental report on the examination of this company’s books and documents. Following the completion of necessary preliminary work, the Director initiated High Court disqualification proceedings in March 2005 against a former director and auditor of the company. The individual subsequently responded with an application to the Court to strike out the disqualification proceedings on the grounds of delay. This delay motion was heard in the High Court in December 2005, and judgment was reserved.

National Irish Bank Ltd./National Irish Bank Financial Services Ltd. (NIB)

The High Court Inspectors’ Report on NIB was published on 30 July 2004. Having carefully considered the Report, the Director noted that while a number of identified

persons were criticised, the Report did not identify any of the members of the NIB Audit Committee. This was despite the Committee being criticised for accepting proposed remedial action in respect of the Bank’s compliance with its obligations for Deposit Interest Retention Tax when those proposals did not address the issue of the Bank’s potential retrospective liability in this area. Having regard to the important role discharged by audit committees in corporate governance and having taken account of legal advice, the Director felt that he should seek an order from the High Court granting the Inspectors liberty to identify the person(s) whom they were criticising on the Audit Committee. The purpose of the application was to enable the Director to consider if disqualification proceedings were warranted in any of these cases.

Following the issue of proceedings²⁶, the High Court heard the Director’s motion in February 2005. In its judgement in April 2005, the Court declined to grant the Director’s request²⁷.

In accordance with section 160(7) of the Companies Act 1990, the Director separately wrote in March 2005 to nine former senior managers of the Bank who were criticised in the Inspectors’ Report indicating to them that he intended to apply to the High Court for their disqualification. Having considered the replies received in conjunction with his legal advisers, the Director initiated disqualification proceedings against all nine in July 2005.

One of the respondents, Mr Nigel D’Arcy, the former head of the Bank’s Financial Advice and Services Division, consented to his disqualification²⁸. Having considered the findings in the Inspectors’ Report, the High Court determined in October 2005 that Mr D’Arcy should be disqualified for a period of ten years with immediate effect²⁹.

Having considered the affidavits lodged by a number of the eight remaining respondents in opposition to the disqualification proceedings, the Director determined that he would need access to certain documentation in the possession of the NIB Inspectors for the purpose of assuring the High Court that the respondents’ criticisms of the Inspectors’ findings were not valid. Accordingly, he asked the Court to order the Inspectors to produce certain defined categories of documents. The Director’s application was heard in December 2005 and was opposed by the Inspectors and a number of the respondents. The Court’s judgement was awaited at end-2005.

Other ODCE Company Examination

Reference was made in the ODCE’s Annual Report for 2004 to the examination of the books and documents of an unnamed company. This examination which has concluded did not provide a basis for the taking of any enforcement action under the Companies Acts in relation to the affairs of the company.

Ongoing Investigations

AIB Investment Managers Ltd.

The ODCE Annual Report for 2004 dealt with certain historic problems with respect to AIB Investment Managers Ltd. which caused the Director to examine certain books and documents of the company. The Director considered in 2005 the results of a detailed investigation by the Financial Regulator of those same events, and the case remained ongoing at end-2005.

Cologne Reinsurance (Dublin) Limited

Irish and foreign media reports in June 2005 criticised the activities of Cologne Reinsurance (Dublin) Limited (“the Company”) and specifically its conclusion in 2000 and 2001 of certain dubious contracts of reinsurance with members of the AIG Group. Following contact with the Company and the Financial Regulator, the Director decided to appoint one of his officers to examine the books and documents of the Company. Confirmation of this decision was included in a filing by AIG with the Securities and Exchange Commission in the United States in September 2005.

Since this decision, the Company has made available to the officer a large volume of material. He has also received assistance from the Financial Regulator. This work was ongoing at end-2005.

Departmental Company Examinations

In 2005, the Department of Enterprise Trade and Employment kept the Director informed of developments in relation to the longstanding examinations of the books and documents of College Trustees Ltd., Guinness and Mahon (Ireland) Ltd. and Hamilton Ross Company Limited.

²⁶ In the Matter of National Irish Bank Limited and in the Matter of the Companies Acts 1963 to 2003 and in the Matter of an Application by the Director of Corporate Enforcement pursuant to Section 12 of the Companies Act 1990 – High Court Proceedings Record Nos: 1998/89 COS and 1998/132 COS.

²⁷ Re National Irish Bank Limited [2005] IEHC 126. A copy is available at www.odce.ie.

²⁸ In the Matter of National Irish Bank Limited and in the Matter of the Companies Acts 1963 to 2003 and in the Matter of an Application by the Director of Corporate Enforcement pursuant to Section 160(2) of the Companies Act 1990 Between the Director of Corporate Enforcement, Applicant and Nigel D’Arcy, Respondent – High Court Proceedings Record No: 2005/270 COS.

²⁹ Director of Corporate Enforcement v D’Arcy [2005] IEHC 333. A copy is available at www.odce.ie.

Dunnes Stores Ireland Company/Dunnes Stores (ILAC Centre) Ltd.

Previous ODCE Annual Reports have explained the circumstances which delayed until mid-2003 the effective commencement of the examination of the books and documents of Dunnes Stores Ireland Company and Dunnes Stores (ILAC Centre) Ltd. Mr Cyril Houlihan, an ODCE staff member, maintained his work on these examinations at the end of 2005.

Conclusion

With the support of company stakeholders, the Office has continued in 2005 to resolve many of the company law deficiencies which are brought to its attention or are otherwise detected by it. The ongoing difficult challenge is to deal fairly and in a timely fashion with all of the reports and complaints received by it. While the ODCE has experienced, due to legal change, a welcome reduction in the volume of reported annual return defaults by end-2005, this will have no discernible effect on the overall workload of the Office in 2006 given that these defaults are primarily a matter for enforcement by the CRO.

Goal 3 - Prosecuting Detected Breaches of the Companies Acts

Introduction

2005 was a very active year for the Office on the enforcement front. While the number of criminal charges for breaches of the Companies Acts dealt with by the Courts in 2005 compared well with the preceding year (112 charges in 19 cases in 2005 vis-à-vis 99 in 20 cases in 2004), what was most significant was the better balance achieved between civil and criminal proceedings. Some 49 convictions and 21 disqualifications were secured (compared with 66 and three respectively in 2004).

It was also significant that notwithstanding the reduction in convictions, the total amount of fines imposed by the courts actually rose by nearly 70%, to over €35,000 relative to fines of some €21,550 imposed in 2004. The fines increase is also indicative of the fact that the Courts regarded last year's cases in aggregate as more serious than those of 2004, and the Office aims to continue to bring forward good quality cases of suspected default for legal enforcement action.

In addition, it was very satisfactory that the Office succeeded in obtaining an acceptable result from virtually all of the cases which were determined by the Courts in 2005.

Legal Proceedings

Particular highlights of the ODCE's criminal enforcement proceedings in 2005 included:

- the conviction of six restricted individuals who had failed to abide by the terms of their restriction following the High Court's consideration of their past conduct as directors of insolvent companies. In one of these cases (currently under appeal), a prison term of six months suspended for two years was imposed on the director. As well as the imposition of substantial fines, these convictions entailed consequential disqualifications for periods ranging from three to five years in each case;

- the initiation of a first prosecution under section 243 of the Companies Act 1990 arising from the use of a falsified document affecting or relating to the property or affairs of a company.

Notable developments in the ODCE's civil enforcement proceedings in 2005 included:

- the initiation of disqualification proceedings against nine former directors or senior managers of National Irish Bank Ltd. as a consequence of the findings in the High Court Inspectors' Report of 2004. This was the first occasion in which a High Court Inspectors' Report was being used to directly support disqualification proceedings. The circumstances are discussed in more detail in the preceding section of this Report;
- the imposition of five year disqualification periods on two directors of an insolvent building company arising from their misconduct in relation to the company's affairs. The case is discussed in more detail in the preceding section of this Report where it is accompanied by **Illustration 2.3.1** which outlines the nature of the detected misconduct which was considered by the High Court prior to its determining that disqualification was appropriate;
- the disqualification for periods ranging from one year to five years of ten directors of insolvent companies, which had been struck off involuntarily by the Registrar of Companies for repeated failure to file annual returns;
- the initiation of a first civil enforcement action directing a company and a director to hold an annual general meeting (AGM) in compliance with the law following their failure to comply with a direction to do so, pursuant to section 371 of the Companies Act 1963. See the following **Illustration 3.1.1** for more details;
- the obtaining for the first time of an order, also under section 371 of the Companies Act 1963, compelling a liquidator to initiate restriction proceedings from which no relief had been given and to furnish a second report to the ODCE, pursuant to section 56 of the Company Law Enforcement Act 2001;
- the obtaining of orders joining the Director to

proceedings issued by restricted directors under section 152 of the Companies Act 1990 for relief from the terms of their restriction orders. The Director sought to be joined to the proceedings for the purpose of objecting to the granting of relief (in whole or in part) from the restriction.

The year was also significant for the legal representation of the ODCE at a hearing before the European Court of Justice in the Eurofood (IFSC) Ltd. case on which a decision is awaited at year-end. The background to this case is outlined in Illustration 4.1 of the ODCE Annual Report for 2004.

Overall, the Director directly participated in 69 proceedings, of which 40 were in the Superior Courts and 29 were in the District Court. Of those proceedings, 35 were concluded, and 34 remained ongoing at year-end. All but two of the concluded proceedings were successful in progressing the ODCE's enforcement activity or achieving some other satisfactory outcome. Two cases are under appeal at year-end, one by the Director of a High Court decision not to disqualify any director of a company which had been struck off the Register of Companies for failing to file annual returns and the second by a restricted person who was convicted and disqualified as a result of her acting as a company director while in breach of the statutory conditions governing restriction. An overview of the outcome of these proceedings by type is provided in **Appendix 3.1**.

The accompanying table summarises the nature of the Court decisions made in the successful proceedings in which the Director participated in 2005 (relative to 2004).

Appendix 3.2 outlines the nature of the Court proceedings in which the Director was involved in 2005, together with the status and summary result of each type of proceeding.

Appendix 3.3 identifies the parties who were held by the High Court and the District Court to have breached their obligations under the Companies Acts. The ODCE continued in 2005 to post the results of its enforcement actions on the ODCE website (www.odce.ie) shortly after the Court had made its judgement.