

## 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](http://www.odce.ie)) shortly after the Court had made its judgement.

Number/Nature of Successful Enforcement Results	2004	2005
Bankers' Books Orders	2	-
Charges on which convictions were secured	66	49
Charges taken into account on conviction	9	28
Charges thought proven	24	35
Disqualifications	3	21
Judicial Reviews	-	2
Orders made in compliance proceedings	2	1
Restrictions	2	-
Retention of Seized Documents	5	4
Search Warrants	4	-
Other Decisions	5	4
Total	122	144

Enforcement Cases

The volume of cases for possible criminal enforcement dealt with in the Office continued to increase last year. Some 368 cases were on hand at end-2005, compared with 284 at the start of the year. In all, some 159 new cases were received in 2005. **Appendix 3.4** provides further statistical information on the throughput of these cases in 2005 vis-à-vis 2004.

**Appendix 3.5** shows that the character of the cases on hands on which criminal enforcement action is being considered was dominated by two particular offence categories: the failure to keep proper books of account (section 202 of the 1990 Act) and the failure of restricted directors to comply with the terms of their restriction (section 161 of the 1990 Act).

In an effort to deal with rising volumes of enforcement cases, the Office continued to refine its system of case prioritisation. This necessarily has meant the selection of those cases of a serious nature for more detailed attention and decisions to close less meritorious cases. Very often, the Office engages with the suspects directly and/or with their auditor, and this may be sufficient to encourage the persons concerned to take the necessary remedial action to prevent a recurrence of the default.

For example in relation to deficiencies in the keeping of books of account, a suitably qualified person may be employed by the company to carry out that function for the future.

In addition, a decision not to proceed with a prosecution in relation to one complaint or report does not prevent the ODCE from having some regard to the facts of that case when considering the exercise of its prosecutorial discretion in relation to second and subsequent complaints in relation to the same parties.

Sub-Goal 3.1: Developing a Balanced Enforcement Policy

As indicated above, the combination of case volumes and small numbers of front-line enforcement personnel obliges the Office to be innovative, proportionate and responsive in the way in which it executes its enforcement policy, so that the full range of available enforcement actions is employed in a manner which obtains the optimal result for the least expenditure of resources.

Therefore, factors such as the character and scale of the offence, set against the quality of the evidence and the accessibility of that evidence, meant that we continued in 2005 to employ one or more of the following options to rectify, deter or sanction misconduct under the Companies Acts:

- acceptance of actual remediation or an offer of voluntary rectification of the default;
- the issue of a warning letter indicating that any repeat of the default will be treated seriously;
- the issue of a warning letter urging early rectification of the default, failing which High Court proceedings will be initiated to seek to compel compliance;
- the initiation of High Court restriction or disqualification proceedings to sanction past non-compliance;
- the taking of summary criminal proceedings for a suspected company law offence;
- the referral of an indictable offence case to the Director of Public Prosecutions for decision.

Reference is made in other sections of this Report to the Office’s success in securing voluntary rectification of certain defaults and/or in cautioning individuals that any future similar defaults would be viewed more seriously. In one instance in 2005, our efforts to secure

rectification of a default on an administrative basis failed, and it became necessary to obtain a High Court order to compel compliance. The details of the case which involved a company failing to hold an AGM are contained in the accompanying **Illustration 3.1.1**.

Illustration 3.1.1: Grangewood Estate Services (Rosslare) Limited - Need for High Court proceedings to secure the calling of its AGM

Following complaints from the members of a management company that the company had failed to hold an AGM in accordance with its obligations under the Companies Acts, an officer of the Director issued a demand under section 145 of the Companies Act 1963 for the minutes of the company’s meetings in order to ascertain the position with regard to the holding of an AGM by the company. It was clear from the minutes produced by the company that no AGM had taken place during the relevant periods. Therefore, the officer issued a direction under section 131 of the 1963 Act requiring the calling of the AGM.

When it became clear that this direction would not

be complied with, the Director initiated High Court proceedings against the company and a director under section 371 of the 1963 Act. These proceedings sought orders directing the company and the director to make good their default in failing to hold an AGM together with an order for the Director’s costs.

Following the initiation of the High Court proceedings, the company and the director in question called an AGM, and this took place in the second half of 2005. At year-end, the High Court was aware that the AGM had been adjourned for the resolution of some final matters.

The ODCE did not refer any cases to the Director of Public Prosecutions (DPP) for decision in 2005. However, reference was made in last year’s Annual Report to the submission of a file relating to a number of parties suspected to have been in breach of various company law obligations. The DPP informed the ODCE during the year that it had decided not to institute criminal proceedings against the suspects in question.

The following three sub-sections, covering three main types of offence, provide more detail on a number of the matters pursued by the Office in 2005.

Sub-Goal 3.2: Upholding Disclosure Requirements

In return for the privilege of limited liability, the Companies Acts require that companies and their directors maintain up-to-date information on the status and performance of their company and that this information is made available on a timely basis, so that members, creditors and other stakeholders can judge its future prospects and make an informed decision on the risks of continuing to engage with the enterprise.

## Failure to Keep Proper Books of Account<sup>30</sup>

The maintenance of a proper record of the transactions of a company is a fundamental requirement of the Companies Acts. In many cases, it is accompanied by an obligation to make summary financial and other information available to the CRO, so that company stakeholders and the general public can access the information. A failure to record all material transactions may, for instance, result in the company's books not showing its real level of income or liabilities, thereby misleading the stakeholders on its financial or other performance. Furthermore in cases where a company becomes insolvent, the absence of full and complete accounting information may hinder the liquidator's ability to ensure that the liabilities of the company are discharged in an orderly manner according to the priorities set down in the Companies Acts. Such a situation will naturally increase the cost and effectiveness of the liquidation process.

Given that it is a core element of the public scrutiny aspect of limited companies, the ODCE continued in 2005 to give priority to the prosecution of detected breaches of this requirement. Convictions were secured on 20 charges in respect of seven companies and 12 directors, with a further nine charges taken into consideration. Fines totalling over €11,000 were imposed.

In another case involving 29 charges, the Probation Act was applied in respect of seven related companies where the charges were thought proven by the Court.

### Provision of False Information<sup>31</sup>

The ODCE continued in 2005 to treat seriously any case involving the making available of false information to company stakeholders.

This Report has already adverted to the initiation for the first time of ODCE criminal proceedings under section 243 of the Companies Act 1990. This involved the use of a falsified document affecting or relating to the property or affairs of a company. The document in question was supposed to represent a set of audited financial statements for the company and was presented to a

bank for the purpose of renewing a credit application. The case in question was scheduled for hearing in early 2006.

The Office also prosecuted two cases in 2005 involving inter alia the provision of false information of a material character to the CRO. Both cases related to the submission by unqualified auditors of financial statements which were represented as having been audited by a qualified auditor. Four convictions were secured in one case, while in the second, the District Court took three charges into account when convicting the individual in question of acting as an unqualified auditor.

### Failure by Person Disqualified abroad to disclose that Disqualification<sup>32</sup>

The ODCE's Annual Report for 2004 discussed the requirement that persons disqualified in another jurisdiction must notify the Registrar of Companies<sup>33</sup> of that disqualification on their appointment as a director of an Irish-registered company. Where they fail to do so, s/he is deemed to be disqualified in the State. And if they act as a director while disqualified, they are guilty of an offence.

In 2005, the ODCE initiated prosecution proceedings against an individual who was deemed to be disqualified arising from his failure to disclose his disqualification as a company director in the UK. The case in question is scheduled to be heard in early 2006.

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

The Companies Acts contain many provisions where the freedom of company stakeholders to act is prohibited or restricted in order to protect the integrity of commercial relations and reduce the risk attaching to the creditors, employees and investors of the companies involved.

## Undischarged Bankrupts<sup>34</sup>

It is an offence under company law for an undischarged bankrupt to act in a responsible position in a company in the State without having first sought and obtained permission from the High Court to do so. In 2005, the

Office again identified individuals acting as company directors in this jurisdiction who remained undischarged bankrupts in Northern Ireland. **Illustration 3.3.1** outlines the circumstances of the case which was prosecuted with the cooperation and support of the Northern Ireland Insolvency Service.

### Illustration 3.3.1: ODCE Conviction of two Undischarged Bankrupts

It came to the notice of the ODCE that two individuals, Messrs Conor and Tony McGreevey who had been declared bankrupt in Northern Ireland in 2003 were acting as directors of Covert Inns Ltd., a company registered in this jurisdiction.

Our enquiries with the Northern Ireland Insolvency Service confirmed that both persons were undischarged bankrupts. Their bankruptcy orders arose from their involvement with an insolvent company in the North. We also learned that the Official Receiver of the company in liquidation had successfully petitioned the High Court in Belfast to make a second order in the case of Mr Tony McGreevey preventing him from obtaining an automatic discharge from his bankruptcy after three years. This order directed that the automatic discharge period should run until he had complied with the original order which required inter alia that he cooperate with the Official Receiver.

In November 2005, the District Court was informed that Covert Inns Ltd. was no longer operating. Having heard

the evidence, the Court convicted the two individuals and imposed fines totalling €1,500. These convictions carry disqualifications of five years for each of them from the date of conviction.

The success of this case and a similar prosecution in 2004 underline the willingness of the authorities on both sides of the border to work together in the public interest. A primary rationale for the prohibition on undischarged bankrupts acting as company directors is to prevent their bypassing their obligation to account for all moneys received by them by forming and operating a limited company with a separate legal personality. The wide definition of undischarged bankrupt in Irish company law is also intended to ensure that persons barred for valid reasons from acting as company directors in an external jurisdiction cannot inflict potential commercial damage on the unsuspecting public in the State simply by establishing a business here. This case accordingly demonstrates the valuable public protection purposes associated with this type of provision.

<sup>30</sup> Section 202 of the Companies Act 1990.

<sup>31</sup> Section 242 of the Companies Act 1990 as amended by section 106 of the Company Law Enforcement Act 2001.

<sup>32</sup> Section 195 of the Companies Act 1963 as amended by section 51 of the Companies Act 1990, section 47 of the Companies (Amendment) (No. 2) Act 1999 and section 91 of the Company Law Enforcement Act 2001.

<sup>33</sup> CRO notification is of course intended to enable the public in general to access the information that a director has previously been disqualified elsewhere, so that they can assess the associated commercial risks of dealing with or continuing to deal with the company

<sup>34</sup> Section 183 of the Companies Act 1963 as amended by section 169 of the Companies Act 1990.



## Restricted Persons acting in breach of the Statutory Conditions<sup>35</sup>

Now that some 600 persons stand restricted, the Office has focused attention on identifying situations where persons restricted by the High Court appear to be in breach of the terms of their restriction. In 2005, convictions were secured on 15 charges affecting six individuals, with fines of almost €18,000 imposed. Each person was also disqualified for periods ranging

from three to five years. In one of these cases which is being appealed at year-end, a custodial sentence of six months suspended for two years was imposed together with a fine.

Some of the investigated cases involve restricted directors continuing to act in companies limited by guarantee. **Illustration 3.3.2** explains that a restricted person is precluded from acting as a director in such a company for the duration of his or her restriction.

### Illustration 3.3.2: Prohibition on a Restricted Person acting as a Director of a Company limited by Guarantee

Section 150(3) of the Companies Act 1990 provides that a restricted person is prohibited from acting as a director in a company unless it complies with certain 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.

A company limited by guarantee is a company which cannot meet the above conditions, and it must follow therefore that a restricted person cannot act as an officer of a company limited by guarantee for the duration of his

or her restriction. Such companies are usually involved in charitable, community and non-profit activities.

In a number of recent cases, the District Court has confirmed that a restricted person is in breach of the terms of their restriction by acting as a director of a company limited by guarantee. Accordingly, restricted persons should resign from a leading role in any guarantee company from the date of their restriction in order to comply with the Companies Acts. Any failure to do so is an indictable offence, and if convicted, the person will generally be deemed to be disqualified for a period of five years from the date of conviction.

Further proceedings for suspected offences in this area were ongoing at year-end, and the Office is continuing to watch for similar instances of persons acting in breach of the terms of their restriction.

## Acting as Auditor while not Qualified or while Disqualified<sup>36</sup>

Under the Companies Acts, only properly qualified and certified persons can act as auditors. In 2005, the ODCE secured convictions on eight charges against three

individuals who acted as auditors while not qualified. A further 13 charges were taken into consideration in the three cases in question. A feature of many of these cases is that the persons involved could reasonably have been expected to be aware of the reserved nature of the auditing function.

The Acts also prohibit a qualified auditor from acting in a company with which he or she has or has had a business or family connection. The ODCE has one set of proceedings in this area on hands at year-end.

## Acting as Liquidator while Disqualified<sup>37</sup>

Similar legal restrictions apply in respect of liquidators acting as liquidators of companies with which he or she has or has had a business or family connection. This requirement applies, in order to secure the independence and integrity of the liquidation process. An ODCE prosecution against a liquidator of a company who was suspected of being disqualified from acting in that company was ongoing at year-end.

## Excessive Directors' Transactions<sup>38</sup>

The preceding section of this Report has discussed the extensive number of such cases which are under examination in the ODCE. Only a small minority of these cases produce sufficient evidence to consider a criminal prosecution. In 2005, a company director received the benefit of the Probation Act, the Court having thought the six charges proven. One further case is ongoing in the Courts at year-end, and it is expected that a small number of other cases in this area will be initiated in 2006.

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

The Director vigorously examines any case where it appears that a company or company officer persists in engaging in conduct which is contrary to law.

## Persistent Failure to comply with Company Law and Other Requirements

In 2005, the Director secured from the High Court ten disqualification orders under section 160(2)(h) of the Companies Act 1990 against persons who were directors and who had abandoned indebted companies, failed to comply with statutory filing obligations and allowed the companies to be struck off the Register of Companies. **Illustration 4.3.1** in the following section summarises the key features of an important High Court judgment in a number of these cases.

The Director remains anxious in appropriate cases of corporate indebtedness to pursue actively parties who seek to avoid being made accountable for their behaviour by failing to appoint a liquidator.

## Failure by a Liquidator to initiate Restriction Proceedings against the Directors of a Company in Liquidation<sup>39</sup>

Following on the ODCE's success in 2004 in securing a number of orders against liquidators requiring them to comply with their reporting requirement to the Office, the Director continued to actively monitor this area and to take action where any liquidator was in default. For the first time in 2005, it became clear that a liquidator had failed to apply to the High Court to restrict the directors of a company in liquidation, notwithstanding his obligation to do so. When correspondence from the ODCE failed to persuade the liquidator of the need to correct this default, the Director found it necessary to initiate proceedings under section 371 of the Companies Act 1963 to compel the liquidator to do so and to file a second section 56 report with the ODCE. The High Court subsequently granted the Director the order sought.

## Conclusion

2005 marked a continuing development of the enforcement activity of the ODCE with a new focus on civil enforcement actions. The ability of the Office to respond to detected misconduct on an administrative basis or by way of civil or criminal enforcement proceedings offers considerable flexibility. It is a strength of the Office that when the high standard of proof required for criminal proceedings is not reached, the option of civil enforcement proceedings may still be available to sanction and deter misconduct. In the interests of effecting a continuing improvement in market conduct and reducing commercial risk for corporate enterprises, the ODCE will continue in 2006 to seek a good balance between its administrative and legal actions and between its civil and criminal enforcement options.

<sup>35</sup> Section 161 of the Companies Act 1990.

<sup>36</sup> Section 187 of the Companies Act 1990.

<sup>37</sup> Section 300A of the Companies Act 1963 as inserted by Section 146 of the Companies Act 1990.

<sup>38</sup> Section 40 of the Companies Act 1990.

<sup>39</sup> Section 56 of the Company Law Enforcement Act 2001.