

Illustration 4.3.1: Summary of the High Court Judgments in the Clawhammer Limited, Shinrone Food Market Limited and Cautious Trading Limited Cases

All of these cases involved companies which had been struck off the Register of Companies following a failure to file annual returns. Section 160(2)(h) of the Companies Act 1990 (as amended) provides that the former directors of such companies at the time of strike-off are eligible to be disqualified from acting as a company officer. Section 160(3A) provides however that the respondents may avoid disqualification if they can satisfy the Court that the company had no liabilities at the time of strike-off or that any such liabilities were discharged before the initiation of the disqualification proceedings.

In dealing with the cases, the Court set out some general principles on section 160(2)(h) disqualifications as well as dealing with the individual applications. The High Court accepted the Director's view that the enactment of section 160(2)(h) in 2001 was indicative of a serious legislative concern on the part of the Oireachtas about the practice whereby to the detriment of creditors, insolvent companies are allowed by their directors to be struck off the Register rather than be wound up in a proper fashion. The Court also accepted that the Oireachtas regarded the fact that directors may have permitted a company to be struck off the Register as a result of their failing to make annual returns as more than a technical breach of their obligations under the Companies Acts. The Court

determined that a minimum level of proof was sufficient to warrant a disqualification order. It also confirmed that the onus is on the respondents to demonstrate to the Court that the company had no liabilities at the time that it was struck off the Register or that such liabilities as existed were discharged prior to the date of any disqualification action. The Court established that there is no onus on the ODCE to establish facts in relation to such a company's liabilities in making an application for disqualification.

In considering the appropriateness of a disqualification order, the Court decided that in the absence of any exculpatory evidence from the directors either as to their involvement in the company, the circumstances leading to the strike-off of the company or the outstanding liabilities of the company, an order for disqualification was probably in general justified. The Court considered it appropriate that it should attempt to apply a consistent period of disqualification in such cases and that a period of five years' disqualification appeared appropriate.

In the three specific cases referred to, the Court applied its general principles and imposed disqualifications of one year in the first case having taken into account the efforts of the respondents in question to regularise the affairs of the dissolved company and five years in the remaining two cases.

In all, over 100 struck-off companies were selected for action in 2005. In 30 of these cases, the directors were able to show the ODCE before the issue of any court proceedings that there were no liabilities currently or at the time of strike-off. This was on the basis of the production of appropriate formal accounts along with an auditor's certificate covering the period from the date of the last accounts up to dissolution along with sworn declarations from the directors that no liabilities existed. Confirmations were also required from creditors where it was alleged that liabilities were settled, including Revenue liabilities. In three cases, the directors committed to restoring the company to the Companies Register. At the end of 2005, eight cases were before

the courts. Many of the remaining cases remain open at year-end, and it is anticipated that several additional cases will be initiated before the courts in 2006.

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 for 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 courts. Involuntary strike-off should not be seen as a mechanism for directors of insolvent companies to avoid the scrutiny of their conduct that is applied to directors of insolvent companies in liquidation under the section 56 process described earlier.

In all cases where companies are struck off the Companies Register, the assets of the company are vested in the Minister for Finance in accordance with the provisions of the State Property Act. 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.

Trading Insolvent Companies

While it is primarily the responsibility of company creditors to protect their financial interests, the ODCE occasionally involves itself in investigating suspected misconduct in trading insolvent companies. Reference has been made earlier in this Report to the ODCE's success in 2005 in securing the disqualification for five years of two directors of a company in the building industry for serious misconduct. See **Illustration 2.3.1** above.

Conclusion

With a further 145 director restrictions and 19 director disqualifications known to be directly related to insolvent companies in 2005, the ODCE made further progress in collaboration with liquidators and the Courts in deterring irresponsible or unlawful conduct in this area. Market research undertaken on behalf of the ODCE in late 2005⁵⁹ confirmed that the new legal framework for corporate insolvency is contributing to better standards of corporate conduct, viz:

- 66% of directors surveyed were aware that the ODCE applied for director disqualifications following companies who had liabilities outstanding being struck off the Register of Companies;

- 56% of directors were aware of the fact that insolvent companies in liquidation come to the notice of the ODCE;
- 68% of directors believe that the behaviour of directors of insolvent companies has become more responsible in the last number of years;
- nine out of ten liquidators have indicated that ODCE is effective.

The research also identified a number of particular issues for further useful work by the ODCE in the insolvency area, and some of these will be taken forward in 2006.

Goal 5 - Providing Quality Services to Internal and External Customers

Introduction

The ODCE endeavoured in 2005 to continue to provide quality customer services for its customers, and the Director believes that his staff substantially succeeded in meeting this objective. The following records the highlights of Office work in this area during the year.

Sub-Goal 5.1: Securing and Managing ODCE Resources

5.1.1 Staffing

The ODCE remained close to its approved staffing complement throughout the year. Having regard to the nature and extent of the ODCE's current workload, the Director deemed it necessary in May 2005 to seek sanction for an extra 20 staff comprising administrative, Garda and some specialist resources. No definitive decision is available on this Staffing Submission at year-end, and the Director continues to press for a positive response. **Appendix 5.1.1** provides a breakdown of the Office's staffing at the end of the year.

⁵⁹Market Research undertaken by Millward Brown IMS for the ODCE in late 2005/early 2006.

The Director wishes to acknowledge the valuable contributions made by Pat Collins, Marie Devaney, Denis Murray and Denis O’Sullivan to the development of the Office in its formative years. All four left the Office in 2005 to take on new challenges.

5.1.2 Financial Resources

The administrative costs of the Office in 2005 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 are provided in the following table.

Subhead A09, Vote 34	2005 Allocation (€000s)	2005 Expenditure (€000s)
Pay	1,793	1,809
Non-Pay	2,745	1,090
Total	4,538	2,899

A more detailed breakdown of the 2005 figures is contained in Appendix 5.1.2.

The outturn of €2.899 million represented a 5.9% decrease on the outturn of €3.07 million in 2004. While pay expenditure was very close to the allocation, a saving was recorded on the non-pay budget. This was primarily due to legal and other professional costs being less than anticipated. Given current and anticipated legal proceedings, the figure for 2006 is likely to exceed the 2005 outturn. In accordance with Government Accounting Procedures, the surplus of €1.639 million was surrendered at the end of 2005.

5.1.3 Organisational Development

An upgrade and expansion of the Office’s database which records and tracks its detected, enforcement and insolvency cases was commenced in 2005 and was well advanced by year-end. This development will further enhance Office effectiveness, and it is expected to be fully implemented early in 2006.

The ODCE had occasion in 2005 to engage external expertise to assist it in undertaking its investigative and

enforcement work in particular. The ODCE Legal and Accounting Panels were continued and expanded, and they remain open to applicants who wish to provide such services to the Office.

5.1.4 Risk Management Action Plan

During 2005, the ODCE co-operated with the Department of Enterprise Trade and Employment in reviewing and updating the Office’s risk management system in accordance with the recommendations of the Mullarkey Report.

Sub-Goal 5.2: Developing Staff

5.2.1 Performance Management

The Office implements the Performance Management and Development System which applies across all Government Departments and Offices. The system is directly related to the Business Plan of the Office, which in turn is based on the focus identified in the ODCE’s current Strategy Statement.

The individual roles of staff members were reviewed during 2005, and adjustments to tasks and training requirements were made as necessary in the light of work-related developments.

In 2005, some 96 external training days were provided to 16 ODCE staff across all grades. 62 of these were IT-related training days and benefited 10 staff. The Department of Enterprise Trade and Employment provided an additional 55.5 days of training to 32 ODCE staff, of which 5.5 days were IT-related training benefiting five ODCE staff. In-house seminars on various topics were also undertaken related to the work of the Department, the Office and the Public Service generally.

5.2.2 Team-Based Working

Multi-disciplinary teams continued to operate within the ODCE in order to handle the Office’s rising volume of casework. This is particularly so in the detection, enforcement and insolvency areas. The teams’ operating procedures and performance were reviewed, developed

and adjusted during the year, in order to improve the quality and quantity of case evaluation and throughput. It is fair to say that the arrangements have matured well at this stage with standard procedures having been developed and implemented in a number of particular case types. A pictorial representation of the respective involvements of ODCE staff by functional area is at Appendix 5.2.1.

During 2005, the Director made a number of revisions to the powers delegated to designated staff under section 13 of the Company Law Enforcement Act 2001. In all, four members of staff working in various teams and areas of the Office were formally delegated to discharge one or more of the Director’s legal functions. This encompassed seven changes to existing delegations.

The Office Management Committee, chaired by the Director and representative of all staff, met on a reasonably regular basis in 2005 to deal with policy and organisational issues affecting the Office’s continuing development and direction.

Sub-Goal 5.3: Developing and Maintaining Quality Customer Services

5.3.1 Services Offered

Since its establishment, the ODCE has committed considerable resources to the development and use of technology to provide information to its customers, to receive input from customers and to enhance efficiencies in work practices. The services offered by the Office to the public and professionals include:

- information on company law and related matters via the Office’s website, publications, etc. In this context, some 174 customers self-registered in 2005 to be notified of new information being placed on the website;
- talks, seminars and other compliance initiatives provided by Office staff;
- the facility permitting the making of complaints of suspected corporate misconduct;

- statute-based services, whereby auditors, liquidators and other interests are required to report in certain circumstances to the Office;
- general assistance offered to Office clients in dealing with telephone queries, correspondence, e-mail, etc.

Internal and external customer concerns are key issues for the ODCE and have been addressed in its Strategy Statement, Business Plans and Annual Report. During 2005, staff of the Office continued to make every effort to provide quality services both to its internal and external customers.

5.3.2 Publications

The following publications were prepared and issued during 2005:

- the Director’s End-of-Year Statement and Review of 2004;
- the ODCE Annual Report for 2004 (in both the Irish and English languages);
- the ODCE Customer Service Charter, the Statement of ODCE Principles of Quality Customer Service and the ODCE Customer Complaints Procedure (in both the Irish and English languages);
- Information Notice I/2005/1 which outlined the companies in insolvent liquidation in respect of which the ODCE had decided to grant full relief or relief ‘at this time’ in 2004 pursuant to section 56 of the Company Law Enforcement Act 2001;
- Information Notice I/2005/2 which explained the key changes to company law arising from the enactment of the Investment Funds, Companies and Miscellaneous Provisions Act 2005;
- Information Notice I/2005/3 which informed auditors in particular that they were exempted with effect from 1 September 2005 from reporting suspected annual return defaults to the ODCE.

As indicated earlier, the Director also issued a number of press statements, and a number of ODCE staff contributed papers and presentations to the national and professional media and business and other groups.

5.3.3 Website

The ODCE website was continually updated in 2005 with information on the ODCE's work and associated corporate governance developments. New material posted to the website included the following:

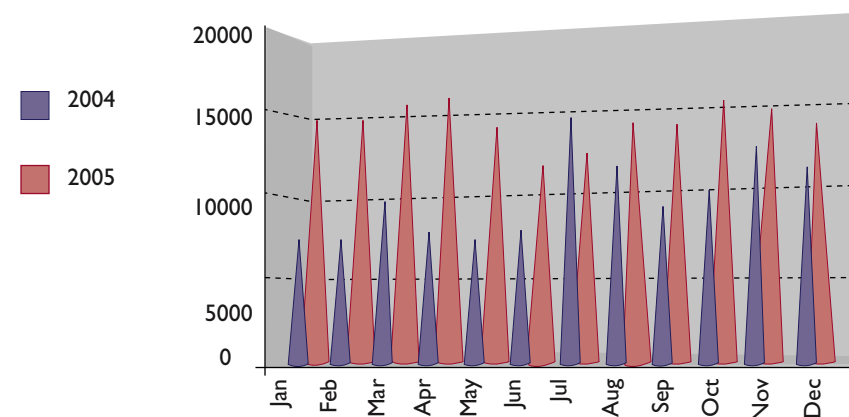
- new Office publications as indicated above;
- copies of certain presentations made by Office staff to business, professional and related interests;
- press statements, articles, etc. issued by the Director and other staff and
- the results of Court cases in which the Director prosecuted suspected breaches of company law or duty and other Court decisions relevant to company law.

The Office's website at www.odce.ie continued in 2005 to attract significant numbers of visitors reflecting the utility of the site for corporate governance and related information. In all, some 178,904 visits were made which represented a 53% increase on the 116,783

figure achieved in 2004 (which itself was up 54% on the 2003 figure of 75,597). The chart below indicates the monthly distribution of visits from which it is evident that visits adopted a reasonably consistent pattern during the year.

During 2005, the Office commissioned a website design company to assist in a fundamental overhaul of the ODCE website with a view inter alia to bringing it into line with the highest standards of accessibility (i.e., WAI compliance level III giving maximum accessibility for users with disabilities). This overhaul was felt necessary following four years' experience with the website structure and the intervening exponential growth in visitor traffic. The new website, when ready in 2006, should allow users easier access to the available corporate governance information.

Some 229,961 downloads of information on the ODCE website were recorded in 2005, a substantial increase on the comparable figure of 59,261 in 2004. The downloads related to a total of 335 documents (191 in 2004). **Appendix 5.3.1** itemises the classes of documents most in demand in 2005. It is clear that there is a wide interest in the various categories of documents on the website.



Visits to www.odce.ie in 2004 and 2005

5.3.4 Market Research

As part of the Office's policy of establishing independently its standing in regulating companies, the ODCE commissioned Millward Brown IMS in late 2005 to conduct a survey of market perceptions in a number of areas. Reference has already been made in other sections of this Report to the findings denoting inter alia improvements in the company law compliance environment.

Insofar as perceptions of ODCE effectiveness are concerned, it was clear from the survey that in its key corporate and professional constituency, there was a very satisfactory improvement relative to the results from similar research in 2004. Of the 130 accountants and liquidators interviewed, 90% of them rated the Office as effective. A very satisfactory result of 68% effectiveness was also returned from the 300 directors polled, and this indicated a significant improvement on 2004 across a number of headings as identified in the accompanying diagram.

In a parallel poll of the general public, Millward Brown IMS also found that awareness of the ODCE was

confined to about one in three Irish adults. The profile of the Office was also raised during the year when it featured in a story line on RTE's series "Fair City".

5.3.5 Freedom of Information (FOI) Acts

The FOI Acts permit the disclosure of records concerning the general administration of the Office only. During 2005, the ODCE received three new requests for records under the Acts. One request was refused as it did not relate to records concerning the general administration of the Office, and the other two were partially granted.

5.3.6 Data Protection Acts

The ODCE is registered with the Office of the Data Protection Commissioner as a Data Controller. The Data Protection Acts 1988 and 2003 protect against the improper disclosure of any information held about an individual. In 2005, the ODCE continued to adhere to this requirement by updating its registration, as well as by complying with its own strict confidentiality provisions contained in the Company Law Enforcement Act 2001.

Effectiveness of ODCE in.....

Base: All Directors	Very effective %	Total effective %	% Change on 2004	Up to 10 employees %	11-50 employees %	51+ employees %
In ensuring that accountants & auditors have a greater knowledge of, & appreciation for their duties & obligations under company law	32	66	+25	63	65	72
In encouraging adherence to the Companies Act	14	65	+24	59	65	73
In deterring company directors & others from breaching company law or otherwise acting dishonestly or irresponsibly	14	62	+25	57	62	68
In ensuring company directors have a greater knowledge of, and appreciation for their duties & obligations under company law	13	56	+17	52	53	63
In bringing to account those who disregard the Companies Acts	8	43	+14	42	41	45
In ensuring that shareholders & creditors have a greater knowledge of & appreciation for their rights and powers under Company Law	9	39	+20	42	37	36
Overall effectiveness	9	68	n/a	66	68	71

Q.I am going to read out a list of aims and activities associated with the ODCE, and for each one I would like you to tell me, in your opinion, how effective or otherwise you believe the ODCE to be. So firstly....

5.3.7 Prompt Payment of Accounts Act 1997

The Prompt Payments of Accounts Act provides for the payment of interest to suppliers whose invoices are unpaid at the prescribed date. In line with the Office's policy of arranging that all invoices be settled in a timely manner, the ODCE incurred no interest surcharge on payments in 2005.

5.3.8 Compliance with Agreed Customer Service Standards

The Office published in 2005 its statement on the standards of service which its customers may expect. A Customer Charter was also published, along with a Customer Complaints Form and information on Complaints Procedures in relation to ODCE customer services.

The ODCE is committed to providing a quality customer service to all members of the public who have dealings with it as well as to its own staff. The Office regularly reviewed and sought to improve further the service standard provided. The Feedback and Complaints Services on the website is part of this process, as is the ongoing redevelopment of the website.

However, the Director believes that customer services levels have declined in 2005 due to work pressures. For instance, reference has been made earlier in this Report to the fact that notwithstanding the increasing numbers of cases being dealt with, there is a large and growing backlog of cases. A substantial increase in the staff numbers of the Office will be necessary if the positive impact which the Office has had on the company law compliance environment is to be maintained in 2006 and beyond.

Conclusion

The Director is satisfied overall that taking account of ODCE successes and notwithstanding the difficult challenges which it is facing, the Office has again delivered very good value for taxpayers' investment in it in 2005.

Conclusion

The ODCE's results for 2005 represented a further significant development of its remit with respect to its civil enforcement role in particular. The market research results were also substantially positive in relation to:

- the improved compliance environment with respect to the obligations of company law and
- the perceived effectiveness of the Office among company directors and professionals.

The Office retains a strong desire to develop the quality of its work over time, and it is important that its compliance and enforcement capacity matches the challenges which it is facing. If it does not, ODCE effectiveness will decline.

At present, the public perceives that only 50% of companies are good at fulfilling their obligations under company law⁶⁰. The fact that the ODCE continues to receive 1,000 new reports and complaints per year confirms that significant corporate wrongdoing still exists. The greater appreciation of the need for better corporate standards has also generated demand for more compliance information. Present ODCE resources are stretched in dealing effectively with this ongoing work.

In this regard, the Director has identified a number of recurring problems and deficiencies, the alleviation of which require a step change in the ODCE's compliance and enforcement capacity. Present resource constraints mean that:

- the ODCE can only progress one or two large investigation cases every year due to their complexity and scope. Larger companies also have the resources to resist or delay inquiry. Small and medium sized business should not be the only sector which is regularly brought to account after the detection of misconduct;
- no targeted resources are available to tackle properly the problem of 'phoenix' companies;
- only limited capacity is available to devote to the Office's compliance effort. The Director would like

to develop more guidance material and focus his Office's compliance effort on start-up enterprises and social, voluntary and community groups.

Company law aims to provide an attractive and reliable environment for the conduct of economic and social relations. When stakeholders ignore their obligations, market performance suffers, and Revenue, other creditors and compliant companies become the victims. The public interest requires a strong ODCE in order to make markets work effectively and better meet these particular objectives:

- equity - securing implementation of the law by all stakeholders, regardless of their market power or sphere of operations;
- competition - the prevention of abusive and unlawful commercial practices which undermine sustainable market competition;
- excellence - the attainment of quality governance practices and procedures on a more reliable basis in small, medium and large enterprises.

Ireland has secured an international reputation as an attractive place to do business in the recent years. This success must be consolidated in the coming years by a strong capacity to tackle serious or recurring corporate misconduct in all forms and sizes of enterprise.

⁶⁰ Research undertaken by Millward Brown IMS for the ODCE in late 2005/early 2006.