

Goal 2 – Uncovering Suspected Breaches of Company Law

Introduction

The visibility of the Office in encouraging and promoting compliance with the Companies Acts has continued to result in the Office receiving a large number of reports and complaints of suspected corporate misconduct. It was again our experience in 2004 that the reports from professional firms and bodies and from State or regulatory authorities were quite specific in identifying the suspected company law offence, while those complaints received from the general public tended to be more general in identifying a difficulty with a company. As a result, the Office often required to engage with the complainant to secure more definitive evidence of the problem with a view to identifying if a company law default was at issue. Some of the Illustrations under this Goal identify cases which were the subject of public complaint and where the Office intervened successfully to secure compliance with company law obligations.

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

Number/Sources of Suspected Breaches

The detection and reporting of suspected company law offences to the ODCE arises principally as a result of:

- mandatory obligations imposed in the Companies Acts on certain parties, such as auditors⁴, liquidators⁵, professional bodies⁶ and the Registrar of Companies⁷ and
- voluntary reports made to the Office by the public, the State or other authorities. The ODCE also follows up information in the public domain suggesting company law offences, whether from the media or other public sources, such as the

4 Section 194(5) of the Companies Act 1990 (as amended by section 74 of the Company Law Enforcement Act 2001).

5 Section 299 of the Companies Act 1963 (as amended by section 143 of the Companies Act 1990 and section 51 of the Company Law Enforcement Act 2001).

6 Section 58 of the Company Law Enforcement Act 2001 and sections 192(6) and (7) of the Companies Act 1990 (as inserted by section 73 of the Company Law Enforcement Act 2001).

7 Section 194(1)(b) of the Companies Act 1990 (as amended by section 74(b) of the Company Law Enforcement Act 2001).

corporate information filed in the Companies Registration Office.

Relative to 2003, there was little change in the total number of new issues brought to ODCE attention in 2004. Some 1,956 reports and complaints were received in 2004 relative to 1,950 in 2003. The majority were from auditors, and complaints from the public (usually from or on behalf of affected directors, members/shareholders or creditors) also showed an increase.

The increase in auditor and public reporting was primarily balanced by the non-recurrence in 2004 of reported defaults in respect of the filing obligations of external companies. The Office had determined that these defaults were a matter for pursuit by the Registrar of Companies.

A breakdown of the reports by source is outlined in **Appendix 2.1.1**.

Cooperation between Regulatory Authorities

During 2004, the Director of Corporate Enforcement signed two Memoranda of Understanding (MOU) on the sharing of confidential regulatory information, the first with the Irish Stock Exchange in February and the second with the Revenue Commissioners in December. In addition, discussions took place



Signing of the Memorandum of Understanding between the ODCE and Revenue

with two Government Departments in relation to formalising exchanges of information.

The MOU with the Stock Exchange yielded 18 reports to the ODCE in 2004, 15 of which related to the failure to notify the market on a timely basis of possible price sensitive information. The 18 reports concerned transactions in 16 listed companies.

The MOU with the Revenue Commissioners formalised the assistance which currently exists between both organisations, but the Director hopes that it will also deepen mutual co-operation over time and widen the incidence of detected non-compliance in the public interest.

The Office continued to have regular consultations with the Garda Bureau of Fraud Investigations and other Garda authorities on matters of mutual interest in relation to companies. The Garda Unit within the ODCE recorded some 126 such contacts during the year.

Arising from the signing of a Memorandum of Understanding with the Irish Financial Service Regulatory Authority in 2003, the ODCE continued to have regular contacts in 2004 on issues of concern in the financial sector. During the year, the Office also provided material to a professional accountancy bodies and a non-European Union authority in accordance with its legal powers permitting assistance to fellow regulators.

The Director acknowledges in particular the continuing assistance of the Registrar of Companies and his staff during 2004 in the registration and certification of filed documentation and in the attendance of CRO staff at Court proceedings initiated by the ODCE. This cooperation continues to be essential in supporting our compliance and enforcement work.

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

The nature of the matters reported in 2004 was quite similar to the previous year in respect of both mandatory and voluntary reporting.

Nature of Issues identified in Mandatory Reports

The 1,594 mandatory reports received in 2004 disclosed 2,007 suspected offences under the Companies Acts. **Appendix 2.2.1** to this Report outlines the nature of the offences reported to us in any numbers in 2004 relative to the previous year. The following six offences represented almost 99% of those reports:

- some 1,560 offences (or more than 77% of the total) involved the failure to file on time annual returns with the Registrar of Companies. The ODCE's general approach to these reports is to refer them to the Registrar for possible enforcement action. This offence will cease to be an offence reportable to the ODCE once section 37 of the Companies (Auditing and Accounting) Act 2003 is commenced by Ministerial order;
- over 300 cases of excessive use of company assets for the personal purposes of directors and connected persons (representing about 15% of the total number of reported offences) were referred to the Office for investigation or otherwise came to our attention. In only a small minority of these cases was wilful default apparent, which is the standard of proof required to secure a conviction in respect of this default;
- about 60 instances of failure to keep proper books of account in companies were received (about 3% 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 30 cases (or almost 1.5% of the total number of reported offences) were notified in respect of the 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. This level of reporting was one-third of that for 2003, and the welcome improvement suggests that the relevant companies are now acting by way of an EGM to address their weak capital positions;
- 15 reported instances (or less than 1% of the total) related to the late notification to the market of possible price sensitive information. The Irish Stock Exchange has indicated to the Office that the timeliness of company reporting to the market has improved since they put listed companies on notice of this mandatory reporting obligation;
- 12 companies (also less than 1% of the total number of reported offences) were notified in

respect of which there was no Irish resident director. This represented a drop of 50% on the 2003 figure and can be attributable to the increased public awareness of this relatively new obligation.

Nature of Issues identified in Voluntary and Other Reports

For 2004, the ODCE made available a revised Complaint Form in the English and Irish languages, the purpose of which was to encourage complainants to define better the specific company law offence(s) which were at issue. While some success was achieved with this Form, many public complaints continue to report some general suspicion of misconduct which may or may not have validity in reality. 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 through this source. It will be noted that while many issues in 2004 were similar to those of 2003, the prominence of certain individual issues varied vis-à-vis the 2003 outturn in many cases.

The following four main areas constituted close to 50% of the issues raised:

- outstanding debt owed by companies, including in the following circumstances:
 - non-payment of Court determinations;
 - debts contracted by companies which are not paid on time or at all;
 - cases where Court Judgement has been obtained against the company but where the sheriff or County Registrar finds "no goods" when an attempt is made to enforce the Judgement;
 - the company has ceased to trade but has not been liquidated.

As the ODCE has no debt collection functions, creditors must pursue their own legal remedies. Complainants are advised to take professional advice (if they have not done so) on their legal options under company law and other legislation. The company law options include liquidating the company and seeking a Court order for the return of assets for which no or insufficient payment has been made;

- complaints alleging fraudulent, reckless or insolvent trading necessitate careful examination. **Illustration 2.2.1** deals with a case of two related companies which were put into liquidation following ODCE enquiries on foot of public complaints, where the creditors have the satisfaction of knowing that the companies' remaining assets will be recovered and sold to discharge the liabilities of the liquidation and the companies and where the directors will have to account to the liquidator for their stewardship of the companies;
- matters indicating a lack of understanding of the requirements of the Companies Acts in regulating a company's affairs. **Illustration 2.2.2** provides an example of a successful intervention by the ODCE in securing compliance by a company's directors with their statutory duties;
- the non-holding of Annual General Meetings or the failure to call them in accordance with the requirements of company law. In a significant number of these cases, the individual member or shareholder has not been given 21 days'

written notice of the meeting or provided with the directors' report, the audited financial statements and a proxy form. These concerns are most prevalent in guarantee and not-for-profit companies (e.g., apartment management companies or charities), in private closely-owned companies where there are external non-family shareholders and in companies benefiting from BES funds. Where such issues arise, the ODCE attempts to clarify what has happened, seeks to reconcile the parties and where this is not possible, directs the holding of an annual meeting under powers vested in the Director of Corporate Enforcement. An example of one such case in a property management company is provided in **Illustration 2.2.3**. An unsolicited letter thanking the Office for its involvement in rectifying non-compliance to the benefit of the property owners in question is provided in **Illustration 2.2.4**. This letter has been edited to omit the identity of the company and other parties.

Disposal of Cases

Of the 2,362 cases received and on hands in 2004, the ODCE concluded its deliberations on 1,577 or over 66.7% of them. In addition, a further 493 cases were referred for investigation with a view to the potential initiation of criminal or civil proceedings. Some 292 cases were on hands at the end of 2004, a significant drop on the 406 on hands at end-2003. An overview of the throughput of these cases is provided in **Appendix 2.2.3**.

Illustration 2.2.1: Case where Two Companies were put into Liquidation following Public Complaints and ODCE Enquiries

Complaints relating to the activities of a retailer alleged that significant deposits were being taken from customers in the knowledge that it would not be able, or would be very unlikely to be able, to supply the goods in question. Because of concerns that this might amount to reckless and/or fraudulent behaviour, the ODCE initiated enquiries into the business activities of the principals in a number of related companies.

On examination, it was found that a central principal director was involved in two companies. According to information filed on the Register of Companies,

the individual was recorded as having four residential addresses. Notwithstanding this, the ODCE sought certain information from him in relation to the present status of the companies and their apparent failure to comply with certain indicated company law requirements. After considerable persistence by the Office, the directors initiated the liquidation of both insolvent companies. At end-2004, the liquidation was underway, and the liquidator is scheduled to submit a report in early 2005 in respect of his investigation of the affairs of the companies and the conduct of the relevant directors.

This successful outturn masks a deteriorating age profile for a small number of the more difficult cases which are at initial assessment stage. The following table indicates that no decision has yet been made on some 121 cases which were received more than 12 months ago. This is symptomatic of a shortage of staffing resources which will require to be addressed in 2005:

Age Profile of Cases	2003	2004
Less than six months	222	126
Less than 12 months but six months or older	141	45
Less than 24 months but 12 months or older	40	101
24 months or older	3	20
Total	406	292

Appendix 2.2.4 provides a breakdown of the manner of disposal of the 1,577 cases which were assessed and closed in 2004, distinguishing between those which were the subject of mandatory or voluntary reports.

The majority of these cases related to filing defaults. Others were closed because of the absence of any evident criminal liability issues under the Companies Acts; some of these were appropriate for civil action by the complainants. Many of the remainder were dealt with by issuing letters warning of legal action in the event of a recurrence of the default. This is likely to result in improved compliance with company law in the future and is therefore consistent with the Director's overall compliance objectives. As indicated earlier, the balance of cases were resolved by successful administrative or legal intervention by the ODCE to correct or improve non-compliant behaviour.

The positive impact of the Office in improving compliance is perhaps most obvious in the area of company directors and connected persons using company assets for personal purposes. In conjunction with the reporting of these indictable offences by auditors in 2003 and 2004, many of the relevant directors have informed the ODCE that the loans in question have now been repaid. In all, some €100 million worth of company assets have been returned to the companies with consequent benefits for company stakeholders in reduced credit risk. In a number of individual cases, these loans were for substantial sums or represented a large part of the value of the company and were very substantially in

Illustration 2.2.2: Rectification of Non-Compliance by a Charity following a Member's Complaint and ODCE Intervention

A company was incorporated as a guarantee company for charitable purposes in 2000. It subsequently acquired property.

In early 2004, the ODCE received a complaint indicating that an original subscriber to the company had been denied access to the books of account. Amongst the other issues raised was the non-holding of Annual General Meetings and a complete breakdown in normal concepts of corporate governance.

Following ODCE enquiries, it transpired that:

- regular financial statements were not being prepared,
- the company's financial affairs were not being audited,
- the board of directors did not appear to have been properly constituted and

- no annual returns had been filed for the company since its incorporation.

Notwithstanding these deficiencies, the Company had obtained grant assistance from a Health Board (for the provision of a pre-school facility) and from FÁS (for the operation of a coffee shop as part of an outreach programme).

When contacted by the ODCE, the directors appeared to be unaware of their obligations to hold Annual General Meetings and to provide full audited accounts to members. There was also uncertainty as to the role and involvement of the company's board of directors in supervising the conduct of the company's affairs.

The Office's dialogue with the directors resulted in the appointment of professional auditors, the convening of an annual general meeting and the updating of registers of members and directors.

excess of the permitted limits. The investigation of many of these cases has failed to disclose sufficient evidence that the relevant defaulters knew or had reasonable cause to believe that the company would, by entering into the transactions, be contravening the legislative prohibitions – an essential element of the criminal offence. However, this impediment to successful prosecutions should diminish in the future having regard to the extent to which the ODCE has been to the forefront in raising corporate awareness of these prohibitions.

Sub-Goal 2.3: Commissioning/ Supporting Formal Company Investigations

Judicial inquiries and professional examinations of company documentation have been used on a reasonably regular basis over the last eight years to establish facts in relation to suspected misconduct involving Irish and foreign-registered companies. Since the establishment of the ODCE, this facility has been extended by use of the Director's search warrant powers. These powers have particularly been used in connection with criminal

investigations and are supplemented as necessary by legally acquiring bank documentation in relation to the companies in question.

Completed Investigations

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

The publication of the Inspectors' Report into NIB and NIBFS on 30 July 2004 was a significant event. The Report's publication was facilitated by the ODCE at the request of the High Court. The Director and his staff arranged for the printing of the Report in hard copy and CD formats and for its release and sale via the Government Publications Sales Office. The ODCE also distributed copies of the Report to the persons named in it, to domestic and overseas banking regulators and to other prominent persons.

The NIB/NIBFS Inquiry had been ongoing for over six years, and the Report makes a number of adverse findings against the companies, senior management and the companies' auditors and audit committee. Since publication, the Director has been taking legal

Illustration 2.2.3: Rectification of Non-Compliance by a Property Management Company following a Member's Complaint and ODCE Intervention

A company limited by guarantee was incorporated in 1994, and it was responsible for servicing a block of more than 50 apartments and offices. The developers of the complex were the directors, one of whom provided a bookkeeping service to the company. Its most recent annual return was made up to 30 September 2002 to which was attached audited accounts for the year ended 31 December 2001.

The complainant, a member of the company, indicated that he owned one of the properties in the complex. Since its incorporation, the company had never invited its members to an annual general meeting and had never issued to the members the annual report of the directors or any other documentation appropriate to an annual meeting.

The ODCE's enquiries included an examination of the company's registers of members and directors and contact with the company's auditor who was asked a number of questions relating to:

- the entitlement of the company, being a guarantee company, to submit abbreviated accounts;
- his consent to the holding of a general meeting at short notice when the corresponding approval of the members was not available.

As a result of these enquiries, the ODCE directed the company's directors to hold an annual general meeting. Appropriate documentation was issued to the members, and the Annual General Meeting was subsequently held. At the meeting, a number of the members were elected to the board, and the developer directors retired. Subsequently, the new directors filed the company's outstanding filings, including its financial statements, with the Companies Registration Office.

Following the ODCE's successful intervention, the Director of Corporate Enforcement received a letter of thanks from the complainant. A copy of the letter in question which omits the identity of the company and of other named parties is included in **Illustration 2.2.4**.

advice on the possibility of initiating disqualification proceedings against a number of the parties criticised in the Report. No formal decision had been made on this at end-2004.

The cost of the NIB/NIBFS inquiry amounted to some €6.5 million. This was initially borne on the Vote of the Department of Justice Equality and Law Reform, but it is envisaged that this sum will be recouped by the Department from the Bank.

Ansbacher (Cayman) Ltd.

Previous ODCE Annual Reports have dealt in some detail with the developments subsequent to the publication of the High Court Inspectors' Report with respect to Ansbacher (Cayman) Ltd. in June 2002. Reference was made in particular to the subsequent applications to the High Court by the Revenue Commissioners and the ODCE for access to the Inspectors' documentation. In 2002, the ODCE adjourned on legal advice its more limited application for access pending the Court's

decision on the wider Revenue application.

On 25 May 2004, the President of the High Court delivered his Judgement on the Revenue application and held inter alia that the Commissioners were entitled to obtain access to and copies of all of the Inspectors' documents not contained in their Report (except those working papers over which the Inspectors claimed privilege). This decision applied in particular to clients of Ansbacher (Cayman) Limited and persons and companies found by the Inspectors not to have co-operated with their Inquiry. Revenue were also given liberty to re-enter an application for access to the Inspectors' documents relating to any other individual or company not named in the Report.

Subsequent to the High Court decision, the ODCE sought the advice of Counsel in relation to its future proceedings. This was received towards the end of 2004 and was under consideration by the Director at the end of the year.

Illustration 2.2.4: Text of Letter thanking the ODCE for remedying defaults in complying with Annual General Meetings in a Property Management Company

**Peter Durnin Esq.,
Office of Directors of Corporate Enforcement,
16 Parnell Square,
Dublin 1.**

26th March '04.

Dear Mr. Durnin,

Just a note to bring you up to date on matters.

The A.G.M. relating to the year and accounts for Y/E 31/12/02 was held on 16/03/04. Four new directors appointed – all three previous directors had tendered resignations to the company's solicitors, who announced the resignations on the night. He pointed out it was an 'oversight' not to have notified the members of previous A.G.M.'s.

The auditor was re-appointed and is very co-operative.

On behalf of the new board we would like to thank your office for it's efficient timely support on this matter.

We hope to sort out the problems we have inherited.

Thanking you.

Yours sincerely,

Kentford Securities Ltd.

The Departmental report on Kentford Securities Ltd., a company related to Ansbacher (Cayman) Ltd., was transmitted to the ODCE in November 2002. Unlike the reports of Inspectors where the facts and opinions set out therein are admissible as evidence for the purpose of any subsequent civil proceedings, the facts and conclusions of an authorised officer require to be independently evidenced. Having investigated the contents of this report, the Director determined that the conduct of one person warranted enforcement proceedings, and the necessary affidavit evidence to support such proceedings was substantially prepared by the end of 2004.

Celtic Helicopters Ltd.

Having examined the Departmental report on Celtic Helicopters Ltd. which the Director received in 2003, the Director determined during 2004 that no enforcement action would be taken by him at this time against any of the persons mentioned in the report.

Barnroe Ltd.

Following the receipt of a number of public complaints about the conduct of its affairs, the ODCE initiated in May 2004 a company examination of the books and documents of Barnroe Ltd., a building company, with a registered office at 4c Kiltalawn Cottages, Blessington Road, Dublin 24. The Office engaged a professional accountant to assist it with this work. Subsequently, search warrants were secured from the District Court and executed. Company documentation was seized and made available to the appointed professional accountant for examination.

Having reviewed the accountant's completed report, the Director determined that disqualification proceedings were warranted against two of the company's directors, and these were initiated in December 2004. In parallel, the Director's decision to invoke his investigative powers in respect of this company has been judicially reviewed, and both sets of proceedings were awaiting a hearing date at end-2004.

Ongoing Investigations

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

The ODCE's Annual Reports for 2002 and 2003 dealt at length with the various Supreme Court and High Court proceedings which delayed the examination of the books and documents of Dunnes Stores Ireland Company and Dunnes Stores (ILAC Centre) Ltd. until mid-2003. Mr Cyril Houlihan, an ODCE staff member, continued his work on this assignment during 2004, and the examinations were ongoing at end-2004.

AIB Investment Managers Ltd.

In May 2004, the Director became aware of certain historic problems in the AIB Group, particularly with respect to AIB Investment Managers Ltd. Having examined the matter, he directed the production of certain books and documents relating to these problems, and these were provided. At end-2004, the Director's examination was ongoing, and his Office was considering the results of the detailed investigation by the Irish Financial Services Regulatory Authority into the same events which became available in December 2004.

Other ODCE Company Examination

An examination of a company's books and documents, commenced in December 2003, was also ongoing at the end of 2004. It is hoped to conclude this work during 2005.

Departmental Company Examinations

The Departmental examinations of the books and documents of College Trustees Ltd., Guinness and Mahon (Ireland) Ltd. and Hamilton Ross Company Limited continued through the end of 2004.