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Goal 2: Confronting Unlawful and Irresponsible Company Law Behaviour

Introduction

2010 proved to be a difficult year on the economic front, and this was reflected in the volume of issues which were brought to the attention of the ODCE in 2010.

Statistical Overview of Reports and Complaints

Almost 2,000 new cases were received during the year, a 31% increase on 2009. As outlined in **Appendix 2.1**, the single biggest component was the 50% increase in initial reports obtained from the liquidators of insolvent companies.

Notwithstanding this large increase in new cases and significant work and resource challenges, the Office successfully managed to conclude more than 1,800 cases in 2010, a 26% increase on 2009. The number of issues on hands at year-end was just over 1,000, a 20% increase on the preceding year. **Appendix 2.2** provides further information on the throughput of cases during 2010 while **Appendix 2.3** identifies the primary basis on which the ODCE closed the cases.

Appendix 2.4 defines the economic sectors to which the insolvent companies reported to the ODCE in 2010 were connected. 51% of them were in the construction and wholesale and retail sectors indicating that these types of businesses have been particularly hard hit by the current economic downturn.

The dominant sector for auditor reports and public and other complaints to the Office in 2010 was again real estate and renting which comprised 33% of the total. This was due in part to the performance of property management companies which continued to be a source of considerable public grievance. **Appendix 2.5** provides the detail involved. The 17% of complaints classified in the 'not a company' category reflects the fact that many complaints relate to individual persons, business names and sole traders.

Solvent and Insolvent Liquidations

Unsurprisingly, the severe economic downturn has resulted in a significant increase in company failures in recent years. The impact has been most dramatically illustrated by the fourfold increase in the number of insolvent liquidations (creditors' and Court liquidations) from 344 in 2007 to 1,386 in 2010. Correspondingly, the 899 solvent liquidations (members' liquidations) declined by 22% last year, and this number is the lowest for five years. The following table gives the numbers of insolvent and solvent liquidations notified to the CRO in the past five years.

Liquidations	2006	2007	2008	2009	2010
Creditors' Liquidations	323	308	530	1,124	1,258
Court Liquidations	31	36	83	121	128
Total Insolvent Companies	**354**	**344**	**613**	**1,243**	**1,386**
Members' Liquidations	930	1,057	1,051	1,158	899
All Liquidations	**1,284**	**1,401**	**1,664**	**2,403**	**2,285**

Insolvent Companies Nominally in Liquidation

The ODCE has recently been monitoring the incidence of insolvent companies which are nominally in liquidation but to which no liquidator has been appointed. As the following table illustrates, these cases have doubled in percentage terms in the last two years, and about 100 new companies now fall into this category every year.

Year	Liquidation Notifications	Liquidators not Appointed	%
2008	613	24	4%
2009	1243	106	9%
2010	1386	92	7%

Following discussions with the ODCE, the professional accountancy bodies have reminded their members that they should not be involved in facilitating companies being put into liquidation unless they expect that a liquidator will be appointed. The ODCE continues to examine its own legal and other options to tackle the issue. In addition, it put forward proposals to the Department of Enterprise Trade and Innovation in early 2011 for legislative changes that would help to address the situation. The Office is firmly of the view that an insolvent company should have its affairs formally wound up through the appointment of an independent liquidator.

Insolvent Companies in Receivership

In addition to increased numbers of companies going into liquidation as a result of the economic downturn, the numbers being placed in receivership have not surprisingly also increased. Most companies placed in receivership are the result of financial institutions seeking to enforce secured charges. These companies in receivership are also likely to have failed and to be insolvent. Notwithstanding the appointment of a receiver, the directors continue to have duties to the company, and in particular, they should ensure that any insolvent company is placed in liquidation on a timely basis. Only about one in eight companies in receivership are ever put into liquidation. The following table gives the relevant figures.

Year	Companies Placed in Receivership	Number Placed in Liquidation	%
2008	59	8	14%
2009	200	26	13%
2010	375	43	11%

The Office wrote to a number of receivers during 2010 reminding them of their statutory reporting duties to the Director of Public Prosecutions (DPP) in respect of criminal offences which may be detected during the exercise of their duties as receivers.[21] This action was deemed necessary having regard to the absence of such reports being received from receivers. The ODCE expects all receivers to be vigilant in ensuring that such reporting is made where appropriate.

Of course, a key consequence of the failure to appoint a liquidator to an insolvent company which is in liquidation or in receivership is that the conduct of the directors of those companies is not generally being scrutinised.[22] From the preceding two tables, it will be apparent that, in 2010 alone, the directors of more than 400 insolvent companies are not being subjected to the same accountability as directors of insolvent companies to which liquidators have been appointed.

However, a small number of the directors in question may subsequently face disqualification proceedings where their companies are struck off the Register of Companies for failing to file annual returns unless they can satisfy the Court that the company had no outstanding liabilities.

Dissolved Insolvent Companies

While the numbers of insolvent companies going into liquidation, receivership and examinership constitute the visible consequences of the economic downturn, there may be several hundreds or even thousands of insolvent companies on the Register of Companies at any one time that have ceased to trade but which have not been put into liquidation.

Most of these will come to be struck off the Register eventually but the process can take two or more years. In addition, the number of strike-offs in any year will be influenced by the level of activity by the CRO, Revenue and company directors in pursuing the strike-off option. While the following table gives details of all companies struck off in recent years, it does not distinguish between those that are solvent and insolvent.

21 Section 179 of the Companies Act 1990.

22 Pursuant to Section 56 of the Company Law Enforcement Act 2001.

Type of Dissolved Company	2006	2007	2008	2009	2010
'CRO Strike-off'[23]	5,255	4,085	5,804	5,729	6,272
'Revenue Strike-Off'[24]	444	149	223	142	140
'Voluntary Strike-Off'[23]	3,757	3,975	4,542	5,428	5,488
Total	**9,456**	**8,209**	**10,569**	**11,299**	**11,900**

Sub-Goal 2.1: Identifying Suspected Misconduct

The ODCE's work in 2010 was again dominated by its investigations of Anglo Irish Bank Corporation Ltd and by the large and growing number of insolvent companies requiring its review.

The Investigation of Events at Anglo Irish Bank

The continuing investigations of Anglo Irish Bank were a major priority in 2010. By year-end, the ODCE had transmitted to the DPP a substantially completed investigation file and three reports on four aspects of its investigations. Those aspects related to:

- the provision by Anglo in 2008 of a loan to one of its directors. (This issue was the subject of the investigation file);
- the non-disclosure of certain directors' loans in Anglo's published financial statements over a number of years and related issues;
- the provision by Anglo to a number of persons in 2008 of financial assistance for the purchase of its shares;
- the communication of possible false or misleading information in certain Anglo public statements in 2008.

In all, the material sent to the DPP by year-end comprised about 3,500 pages.

Another extensive draft file containing several thousand more pages of documents was well advanced at the end of 2010. This also deals with Anglo's provision of financial assistance for the purchase of its shares in 2008.

The ODCE is aware that the Garda Bureau of Fraud Investigation (GBFI) also provided papers to the DPP in late 2010 in respect of its elements of the Anglo investigations. The accompanying **Illustration 2.1.1** provides a graphic representation of the main aspects of the current ODCE and GBFI investigations.

Illustration 2.1.1: The Main Aspects of the Anglo Investigations

Aspect 1	GBFI	Short-term back-to-back deposits of about €7.4 billion received by Anglo in late September 2008
Aspect 2	ODCE	Regular transfer of certain Anglo directors' loans to another institution close to Anglo's end-year reporting date and related issues
Aspect 3A	ODCE	Provision by Anglo of funds for the purchase of its shares in July 2008 (possible breach of Section 60 of the Companies Act 1963)
Aspect 3B	GBFI	Provision by Anglo of funds for the purchase of its shares in July 2008 (possible market abuse aspect)
Aspect 4	ODCE	Content of Anglo financial and other public statements in 2008
Aspect 5	ODCE	Provision by Anglo in 2008 of a loan to one of its directors

Earlier in 2010, the DPP had engaged Counsel to support the investigations, and the Office availed of this external advice as required. Senior ODCE and Garda staff provided briefings to the DPP and Counsel on three occasions during the year on the progress of their respective investigations.

Acquisition of Documents and Information

The preparation of these files and reports was underpinned by a continuing evaluation of the many millions of Anglo and related documents which is in the possession of the ODCE. During 2010, the Office continued to acquire additional documentation either voluntarily or through the use of its legal powers. In the latter case, ODCE initiatives led to:

- the issue by the District Court of two search warrants;
- the making of two Orders by the District Court for the production of banking documentation, and

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

24 Section 882 of the Taxes Consolidation Act 1997.

- the making of four ODCE demands for the production of documents and information.

For the first time in the Anglo investigation, the ODCE also initiated four requests under the Criminal Justice (Mutual Assistance) Act 2008. These requests were approved. In consequence, ODCE staff traveled to the UK on a number of occasions to attend interviews and Magistrates Court hearings at which statements and documents were received. In all relevant cases, orders were made by the Magistrates Court permitting the handing over of the statements and documents which were then transmitted to the ODCE via the UK Home Office. A small amount of outstanding information on foot of one request was in preparation at year-end.

Garda officers seconded to the ODCE led some 280 interviews of witnesses and suspects in 2010. Each of these interviews required advance preparation and involved in many cases identifying relevant records in the ODCE's possession so that the interviewee could explain or otherwise address those records. Some of these interviews were conducted over an extended period due to the complexity of the matters at issue. In one case for instance, a lengthy witness statement took nine months to complete.

Processing of Documentation

The quality of interviews undertaken is assisted by the availability of a coherent, accessible and traceable record of the Anglo documents held by the ODCE. Throughout 2010, the Office was involved in processing the extensive volume of individual records contained in the Anglo electronic data. The primary processing tasks undertaken during the year were as follows:

- pre-processing – the identification and exclusion of irrelevant files such as system and application files;
- processing – the identification of individual message records, associated metadata and the other files attached to the various types of records;
- de-duplication – the elimination of duplicate copies of the same documents in, for example, the records of the senders and recipients of emails;
- indexing – to facilitate the searching of the data;
- manual intervention – to identify, for example, documents that may possibly be legally privileged and may therefore lie beyond the scope of the investigation.

The processing work has been time-consuming requiring considerable computing capacity as well as the deployment of expert ODCE staff to the task. Issues which arose from time to time in 2010 created processing difficulties and delays including, for example, the identification of files which were encrypted or password protected. The processing of these files had to await the receipt or detection of the password or encryption key.

In order to improve the speed of processing, the Office upgraded in August 2010 its hardware and software to expedite the processing and analysis of the many millions of seized Anglo electronic documents. While the processing of these records was substantially complete in 2010, the interrogation of the available documents by ODCE investigating staff was continuing at the end of the year in preparation for further planned interviews.

High Court Supervision of the Seized Anglo Data

In executing a search warrant on Anglo's premises in September 2009, the ODCE had acquired certain electronic data using a new extended power of seizure for the first time. Where this power is exercised, the ODCE's retention of the data is subject to High Court supervision. In particular, the law permits the High Court to extend:

- the three month period within which the relevant ODCE officer is to determine if the information is material to the commission of an offence under the Companies Acts and
- the seven day period within which the officer is to return the information following the taking of the decision that it is not material to the investigation.

In May 2010, the ODCE made application for extensions of time citing the large amount of materials in its possession which required examination. Following a number of temporary orders, the High Court granted on 2 July 2010 extensions of both time periods to 9 November 2010 on the lines sought by the Office.

On the basis of the further progress reported by the ODCE on 9 November 2010, the High Court extended the two time periods for a further six months in the manner sought.

Neither of the two search warrants executed in 2010 entailed the use of the extended power of seizure. Therefore, the documents seized on foot of those warrants do not require ongoing High Court supervision.

Legal Professional Privilege (LPP)

The ODCE investigation continued to deal with the LPP issue in respect of the seized documents and data in its possession. The Office received in early 2010 the report of the independent Assessor who was appointed by the ODCE and Anglo in 2009 to adjudicate on certain hard copy documents over which Anglo claimed privilege. Both parties abided by the decisions of the Assessor in respect of those documents, and the ODCE took steps to retain only the hard copy documents or parts of documents which had been cleared of privileged material.

Insofar as the continuing examination of Anglo's extensive electronic documentation was concerned, the ODCE collated in the first half of 2010 some 19 lever arch folders of documents which it considered to be potentially relevant to its investigations. Having received and examined the folders, Anglo only claimed legal privilege over a small number of them, claims which the ODCE decided not to contest. By year-end, the ODCE had identified a further large batch of potentially relevant electronic documents for LPP evaluation by Anglo.

In its supervision of the ODCE's retention of the seized Anglo electronic data, the High Court heard in June/July 2010 of the practical difficulties which the Anglo claims of privilege were causing for the ODCE investigation. Following a number of adjournments, the ODCE and Anglo reached agreement on the ODCE's use of the Anglo documents in any case in which a claim of privilege remained in place. The parties' agreement was scheduled to a High Court Order of 21 July 2010.

Resources

Some 16 Garda, administrative, legal, accounting and IT staff in the ODCE continued to work on progressing the Anglo investigations throughout 2010. Two additional Gardaí were temporarily assigned to assist the ODCE work in the latter part of the year.

The ODCE and An Garda Síochána continued to cooperate closely throughout 2010 in their respective Anglo investigations. The Director of Corporate Enforcement and the Garda Commissioner met twice during the year, and officers of the Director and the GBFI met on 16 other occasions. In addition, the Computer Crime Unit of the GBFI provided ongoing technical assistance to the ODCE as required.

Insolvent Companies – The Liquidator Reporting Regime

In summary, the liquidator of a company in insolvent liquidation is required by law[25] to report to the ODCE on its demise and on the conduct of any person who was a director of the company during the twelve months preceding its liquidation. The liquidator must also proceed to apply to the High Court for the restriction[26] of each of the directors, unless relieved of that obligation by the ODCE.[27]

The essential aim of this reporting regime is to support responsible entrepreneurial endeavour. The purpose of each report is to distinguish the circumstances of honest and responsible business failure (which do not merit any form of sanction being applied on the company's directors) from those where directors knew or ought to have known that the company was insolvent or that they were otherwise conducting the company's affairs in a manner which was contrary to the interests of creditors, other parties or the general public interest.

In discharging its role, the Office expects liquidators to provide it with all of the information which is relevant to the making of an appropriate decision. It also encourages liquidators to make a suitable recommendation on relief by reference to the results of their investigations.

The ODCE considers relief where a liquidator advances a coherent justification in support of a claim that a director has acted honestly and responsibly in conducting the company's affairs. In making its decisions, the Office is anxious to ensure that no director needlessly bears the burden of a High Court hearing where he or she has clearly demonstrated that they behaved honestly and responsibly in the conduct of the affairs of the failed enterprise. In practice, the ODCE acts as a filter to remove from the High Court consideration of those cases which do not warrant its attention.

25 Section 56 of the Company Law Enforcement Act 2001.

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

27 The process and scope of liquidator reporting are outlined in three main ODCE publications, Decision Notice D/2002/3 as supplemented by Decision Notice D/2003/1 and Information Notice I/2009/1. These documents are available at www.odce.ie.

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

Liquidator Reports in 2010

Details of the numbers of liquidator reports in 2010 are contained in **Appendix 2.1.1**. In all, 1,688 liquidator reports were received (1,123 in 2009). Of these, 1,312 were initial reports[28] (876 in 2009) in respect of recently liquidated companies, the substantial 50% increase in reports reflecting the difficult economic conditions.

376 further reports[29] (247 in 2009) were also submitted and arose primarily from earlier 'relief at this time' decisions. The 52% increase was broadly in line with the increased level of liquidator reports generally.

The threefold increase in initial liquidator reports from 406 in 2008 to 1,312 in 2010 has posed a considerable challenge to the Office. Through revised internal work practices and some limited additional staffing resources, the Office has managed to increase its output in this area dramatically. Despite these efforts, it is regrettable that some decline in the timeliness of ODCE decision-making has occurred. The scale of increase in reporting and the tight staffing situation is continuing to cause strain. Management and staff in the Office are making every effort to deal with liquidator reports on a timely basis.

In monitoring the submission by liquidators of their initial and further reports, the Office had cause in 2010 to formally advise 90 liquidators on 303 occasions (172 occasions in 2009) that they were in default with regard to their statutory reporting obligations. Many of these defaults were promptly rectified, and at the end of the year, 97% of the first reports due during the year had been received – up from 95% the previous year. However, a small number of liquidators were facing legal action at year-end for failing to submit their overdue reports. This will continue to be an area of priority attention for the Office in 2011.

The Office considered the standard of liquidator reports received in 2010 to be mostly satisfactory. However, the ODCE had concerns about the standard of reporting in some cases. Where issues are arising, it is believed that these are largely attributable to one or more of the following factors:

- the strains within some liquidation firms arising from the volume of insolvency work being taken on;
- the delegation of insolvency work to relatively junior staff within larger firms;
- the influx of many new entrants (including professionals with extensive experience in other areas such as auditing or law) into the insolvency profession with often limited or no experience of insolvency work;
- the increasing level of complexity that is a feature of a higher proportion of recent liquidation cases.

This experience necessitated a greater level of engagement by ODCE staff with liquidators during 2010 to clarify elements of their reports and to specify ODCE requirements. The Office also raised these concerns with the relevant professional bodies, and it is understood that some of them have recently increased their training for insolvency practitioners which is most welcome. However, it is also understood that the bodies do not envisage any further development of their monitoring regimes for their insolvency practitioner members pending the development and implementation of a planned statutory licensing regime which is likely to be some years away.

The ODCE will continue to encourage high reporting standards in its ongoing engagements with the insolvency profession.

ODCE Relief Decisions

The ODCE made decisions on 1,474 liquidator reports in 2010, a dramatic 70% increase in output relative to the previous year's figure of 872. Of these, 1,240 decisions were made in respect of initial reports, and 234 were in respect of further reports. The equivalent figures for 2009 were decisions on 625 initial and 247 further reports respectively. These figures exclude decisions on final reports, the submission of which has been phased out.

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

29 **A further report is usually received from a liquidator six to nine months** after receipt of his earlier report.

The breakdown of decisions on initial reports in 2010 is outlined in the following table, along with the comparable figures for 2009:

Decision Type	2009	%	2010	%
Full relief[30]	426	68%	871	70%
No relief[31]	41	7%	47	4%
Relief 'at this time'[32]	149	24%	306	25%
Partial relief[33]	9	1%	16	1%
Total	**625**	**100%**	**1,240**	**100%**

The notable features of this table include the slight increase from 68% to 70% in the proportion of 'full relief' decisions between 2009 and 2010, the decrease from 7% to 4% in the incidence of 'no relief' decisions and the small increase in 'relief at this time' decisions from 24% to 25%.

The latter increase reflected the size and complexity of some of the current liquidation cases which has necessitated liquidators seeking extra time to enable the completion of their investigations. Similarly, the ODCE has found it necessary on occasion to postpone a definitive decision on relief due to the complexity of some of the reports requiring staff attention, the need to give liquidators time to respond to Office queries and the volume of reports on hands.

Complete lists of the companies in respect of which full relief and relief 'at this time' were granted in 2010 are available in ODCE Information Notice No. I/2011/1 on the ODCE website at www.odce.ie.

Auditor and Accountancy Body Reporting Regime

Auditors are required by law to report to the ODCE suspected indictable offences under the Companies Acts which arise during the course of their audit of a company.[34]

The ODCE has produced guidance in conjunction with the recognised accountancy bodies on this reporting obligation in an effort to assist auditors perform this important public duty.[35]

A similar reporting obligation applies to professional accountancy bodies in the discharge of their disciplinary functions[36].

Auditor and Accountancy Body Reports in 2010

In 2010, the Office received 194 reports from auditors and accountancy bodies of suspected breaches of the Companies Acts (a drop of 18% on the 2009 figure of 237). In line with the experience of previous years, auditors reported comparatively few offences. One offence (unlawful directors' transactions) again accounted for the majority of reports (70% in 2010) while a second (failure to keep proper books of account) comprised a significant minority (17% in 2010). **Appendix 2.1.2** identifies the incidence of the primary suspected offences reported in 2010 relative to 2009.

Unlawful Directors' Transactions

The auditor reports and other information available to the Office indicates that in 2010, directors irregularly borrowed nearly €85 million from their companies.[37] This was a welcome reduction on the 2009 figure of €162 million. 18 of the cases in 2010 had borrowings in excess of €1 million, and these accounted for €62 million of the total. However as not all companies are audited, it is likely that the figure of €85 million understated the actual scale of this phenomenon that year.

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

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

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

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

34 Under Section 194(5) of the Companies Act 1990 as inserted by Section 74 of the Company Law Enforcement Act 2001 and subsequently amended by Section 37 of the Companies (Auditing and Accounting) Act 2003 and Section 73 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

35 Decision Notice D/2006/2 – Revised Guidance on the Duty of Auditors to report Suspected Indictable Offences to the Director of Corporate Enforcement. This was more recently supplemented by Information Notice I/2009/4 – Reporting Company Law Offences: Information for Auditors.

36 Section 58 of the Company Law Enforcement Act 2001 (in respect of liquidators and receivers) and Section 192(6) of the Companies Act 1990 (as amended by Section 73 of the Company Law Enforcement Act 2001) (in respect of members of the body in general) relating primarily to suspected indictable offences committed under the Companies Acts.

37 Section 31 and related provisions of the Companies Act 1990.

As in previous years, the Office acted in the interest of creditors to encourage directors to rectify the offending transactions by repaying monies to the company or otherwise bringing the outstanding amounts back within the limits permitted by company law. Most cases were successfully resolved in this fashion with 177 directors cautioned as to their future conduct. The Office reserves the right to take legal enforcement action against directors in any suitable case.

Failure to Keep Proper Books of Account

Where a report of a failure to keep proper books of account is received, the Office engages with company auditors in all cases with a view to establishing the gravity of the default.[38] The Office regularly cautions the relevant directors with a view to ensuring that similar deficiencies in the governance of their companies do not recur. More than 60 directors were cautioned in 2010.

In a minority of cases, the Office proceeds to take enforcement action against the company and/or its directors. As indicated later in this Report, one case was successfully prosecuted in 2010, and a second prosecution was initiated.

Audit Quality

In its engagements with the recognised accountancy bodies and in its previous Annual Reports, the ODCE has expressed disappointment with the continuing dominance of the above two offences in auditor reports notwithstanding the presence of more than 100 reportable offences in the Companies Acts. The Office has also occasionally found it necessary to challenge the adequacy of auditor reports in a minority of the cases which it has had cause to examine. The ODCE outlined this experience in addressing the question of audit quality posed by the European Commission in its recent Green Paper on Audit Policy. (This Paper is also discussed in the preceding section of this Annual Report.) **Illustration 2.1.2** contains the relevant extract from the ODCE's submission to the Commission on this topic.

Illustration 2.1.2: ODCE Comment on Audit Quality, December 2010

Our experience with auditors in the context of their legislative reporting obligations and our other engagements with their work does suggest that there are grounds for questioning the consistency and quality of audit work within the profession. As we have no direct supervisory role with respect to auditors and their work, we are not in a position to comment authoritatively on that work. We also acknowledge that the obligation in Irish company law which is placed on auditors to report a suspected serious breach of that law to the ODCE is a consequence (rather than the purpose) of that audit work. Nevertheless, we feel that the following observations will be of assistance to the Commission.

It has been our experience that:

- auditors report surprisingly few types of company law offence to us. Typically, over 75% of the 200 reports made to us annually relate to just one offence, namely directors illegally borrowing from their companies above the prescribed limits. A second offence (the failure to keep proper accounting records) usually comprises about 12% of reports. The balance comprises a handful of other offences. Yet, there are more than 100 reportable offences under the Companies Acts. In an effort to diversify the range of reported offences, we have published guidance in conjunction with the relevant accountancy bodies identifying some 13 types of offences which should be capable of being readily detected by auditors as part of their audit of a company's financial statements. To date, this guidance has not served to materially alter the reporting patterns of auditors to the ODCE;
- some audit firms appear to discharge their reporting obligations to us more frequently than other comparable audit firms. Having regard to the focus of the Green Paper, it will be of interest to the Commission to know that 'Big Four' firms submit surprisingly few reports. In 2010 to date, the number of reports received from 'Big Four' firms is ten approximately, representing about 5% of all reports received;
- in our evaluation of the reports submitted by liquidators on insolvent companies, it is not uncommon that the most recent audit report on the company is unqualified, notwithstanding what appears to be a lack of disclosure of or accounting for obvious business difficulties. Similarly, we have reason to doubt at times that auditors are sufficiently robust in challenging the appropriateness of the 'going concern' concept in the financial statements of companies which are clearly in financial difficulty.

Moreover, in the course of our general investigative work, we have on numerous occasions taken issue with the quality of audit work and audit reports issued by members of the profession. Occasionally, this has resulted in admissions of lapses, and where appropriate, in revised audit reports being issued. Where we have uncovered evidence of poor audit quality, our approach has been to inform the relevant recognised accountancy body, as well as the Irish Auditing and Accounting Supervisory Authority, of our concerns.

38 Section 202 of the Companies Act 1990.

Unqualified Persons acting as Auditors

In 2010, the ODCE continued to receive a small number of complaints from the recognised accountancy bodies and from individual auditors about the practice of unqualified persons acting as auditors. Given its anxiety to ensure that audit quality is not undermined, the Office prioritised these complaints as far as possible. As indicated later, one of these cases was successfully prosecuted during the year, while in a second case, the sentencing of the accused was awaited at year-end.

Public Complaints and Other Detections

While liquidators, auditors and accountancy bodies are required by law to report to the ODCE in certain circumstances, the making of complaints by the public and other entities is entirely a voluntary process. Other State regulators may be facilitated in reporting by information-sharing provisions in their governing legislation. The Office itself also keeps watch for issues of relevance to its company law remit in, for example, its monitoring of media reports and other publications.

Public Complaints and Other Detections in 2010

The number of public complaints and other detections increased to 459 in 2010, a rise of 13% on 2009. There was little overall change in the type of reported defaults as will be evident from **Appendix 2.1.3**. Unsurprisingly in the difficult economic climate, there were large increases in complaints about directors' conduct (up 47% on 2009) and unpaid debts (up 68% on 2009). In the latter case, the ODCE urged complainants to explore their own legal remedies to recover any monies due to them where there was no evident breach of company law.

Many of the public complaints addressed in 2010 again concerned companies limited by guarantee. These are often companies formed for a particular social, community or public purpose. Of the 75 complaints received relating to property management companies for example, 33 cases involved the restriction of the rights of members to attend general meetings, and nine cases dealt with the failure to provide them with audited financial statements. A number of these complaints also raised issues which were beyond the remit of the Office such as the level of service charges and the non-assignment of the common areas in the property development to the management company. In all, 81 property management company complaints were closed in 2010.

Many public complaints again varied in character and complexity. The large category of complaints comprehended by the 'Other' category in **Appendix 2.1.3** reflected the fact that the initial complaint was often very generally defined.

At the same time, public complaints are a rich source of real and perceived grievances relating to company performance and often provide a good picture of the adequacy of the Companies Acts at the level of the ordinary citizen. The following discussion of issues dealt with by the Office predominantly emanate from these complaints.

Deficiencies in the Circulation of Audited Financial Statements

As indicated above, the public regularly complain to the ODCE that audited financial statements are not submitted to the members of a company in advance of the company's annual general meeting (AGM) or that they are circulated to the members late. This often disadvantages the complainants in question as it restricts them from studying the financial statements and holding the directors to account at the AGM. **Illustration 2.1.3** is a case of a substantial company which sought in 2010 to justify its circumvention of the 21 day period of notice which is specified by law.

Illustration 2.1.3: Prior Circulation to Members of Audited Financial Statements

Section 159(1) of the Companies Act 1963 obliges company directors to ensure that the company's audited financial statements and certain other documentation are sent to members at least 21 days prior to the annual general meeting (AGM). This is an important provision which is designed to benefit and protect the company's members by ensuring that they receive the company accounts in sufficient time to study them.

This case concerned a complaint of a breach of law by a guarantee company with a substantial balance sheet of several million Euro. On investigation, the ODCE found that the members had not been given the requisite information on time. While Section 159(3) permits the members to validate a shorter period of notice by unanimous vote at the AGM, it was established that this had not occurred. The Office also rejected the company's claim that Section 159(1) was not breached, because the company's approved Articles of Association permitted the giving of a shorter period of notice.

The ODCE explained to the company that Section 159(1) could not be displaced by a majority vote of the members such that it would bind any and all future general meetings of the company and all of its future members. After further consideration, the company accepted the ODCE view and called a further general meeting in compliance with the applicable law.

Auditor Reporting Deficiencies

The ODCE is regularly surprised that auditors themselves occasionally make quite basic mistakes in completing their audit. While the ODCE will regularly seek clarification from the auditors of the matters at issue, it will also inform the auditor's professional body where it considers that audit quality may have been potentially compromised. In 2010, the Office referred 19 cases to professional bodies for their consideration (15 in 2009). **Illustration 2.1.4** is an example of one of these cases.

Illustration 2.1.4: Defective Audit Opinions on Company Financial Statements

Most residential property owners' management companies are public companies and therefore require to be audited by a suitably qualified practitioner. During the course of examining a complaint relating to a property management company in 2010, the ODCE became aware that an auditor was associating inadequate audit opinions with the financial statements of a number of management companies in the Dublin region.

Arising from the ODCE's investigations, it transpired that in some of these cases:

- the auditor was unaware that he was auditing a company limited by guarantee – he thought that it was a private company limited by shares;
- a statement was included in his audit opinion regarding the obligation on a company to convene an extraordinary general meeting in the event of a serious loss of capital. However, this is not relevant to a guarantee company;
- the audit opinion appended to the financial statements was incomplete in failing to state whether or not proper books of account had been kept.

Following engagement with the auditor, each default was rectified, and each of the companies was brought into compliance with the Companies Acts. However, the professional inadequacies disclosed by the ODCE investigation were considered sufficiently serious to warrant referral to the auditor's professional body. At end-2010, the body was examining the matter.

The Value of a Company Audit

In contrast, the value of a good audit in contributing to effective corporate governance should not be underestimated. In 2010, the ODCE concluded its deliberations on a company which had not been audited. Following the intervention of the Office and the completion of an audit, a very different state of affairs emerged at the company. **Illustration 2.1.5** provides the details.

Illustration 2.1.5: The Possible Consequences of Relying on Unaudited Accounts

Companies limited by guarantee have no entitlement to claim audit exemption and must therefore be audited on an annual basis. In 2010, the ODCE dealt with a guarantee company which had incorrectly filed unaudited accounts with the Registrar of Companies. This company was a charity and was in receipt of State funds.

The Office contacted the Company Secretary to have matters regularised. The resultant audit by a professional firm of auditors brought a number of matters to light. It was clear that the company's directors seriously misunderstood the financial position of the company. Following on from this development, a number of the directors resigned, and the disbursing grants agency intervened.

The main issues disclosed by the audit included:

- the audited accounts identified 'related party transactions' between the company and two of its directors. These directors were also directors of a second company which had successfully tendered for the construction of the premises of the guarantee company. The unaudited accounts had stated that there were no transactions with the directors during the relevant financial period;
- the auditors inserted an 'emphasis of matter' paragraph in their report, because there was no planning permission in place for the company's premises. The report indicated that while steps were being taken to rectify the matter, the outcome was uncertain. It also stated that no provision had yet been made in the accounts for any possible repayment of State grants. The unaudited accounts had been silent on this issue;
- various other identified discrepancies between the audited and unaudited accounts included revenue reserves being in deficit rather than in surplus, the level of debtors being lower than in the unaudited accounts and grant income being a fraction of that originally indicated.

Disqualified and Restricted Directors

During 2010, the ODCE again monitored the registers of disqualified and restricted directors to ensure that the persons in question were not continuing to act as directors in breach of the law. This continues to be a priority area of enquiry, and enforcement action is taken in appropriate cases to maintain the integrity of the disqualification and restriction regimes. Thankfully, no such initiative was necessary during the year.

Dissolved Insolvent Companies

The ODCE is particularly anxious to receive evidence of the existence of 'phoenix' companies and other delinquent practices that typically result in a new company assuming the assets and business (but not the liabilities) of a failed company such that:

- competition in the applicable business market is distorted, because the company enjoys lower-than-market costs (for example, through non-payment of creditors and/or the Revenue Commissioners). As a result, this potentially gives the delinquent an unfair competitive advantage in the marketplace;
- creditors suffer financial losses, some of whom may themselves fail in consequence, and
- directors either bear no personal liability for the commercial losses or otherwise escape accountability for the failure of the company.

Insolvent companies which are abandoned by their directors and which subsequently come to be struck off the Register of Companies for a failure to file their annual returns continued to receive ODCE attention in 2010. It is open to the ODCE to apply to the High Court for the disqualification of the directors of these struck-off companies[39]. However, the law[40] also provides that the Court cannot disqualify a person who demonstrates to the Court that the company had no liabilities at the time of strike-off or that those liabilities were discharged before the initiation of the disqualification application. In considering the penalty to be imposed, the Court may instead restrict the directors where it adjudges that disqualification is not warranted.

However, Court actions do not follow every struck-off company that is investigated by the Office. In some cases, the former directors regularise their position by restoring the struck-off company to the Register. This procedure involves the preparation and submission to the CRO of all outstanding annual returns with financial statements annexed, the payment of all late filing fees and, in cases where the company has been struck off for more than one year, the making of a formal application to the High Court for the restoration of the company.

In other cases, the former directors are able to satisfy the ODCE that all liabilities had been settled at the time of strike-off or prior to the issue of the intended Court proceedings. This usually requires the preparation and submission of appropriate accounts, often stretching back several years, showing the company's trading since the last set of accounts were submitted to the CRO or since incorporation in cases where accounts were never submitted to the CRO. The former directors are also required to show that all creditors have been paid or those debts settled, and independent verification of this from individual creditors is frequently sought.

In 2010, some 79 cases involving many hundreds of struck-off companies were investigated. Of these, 51 were deemed not to be suitable for legal action or remain under investigation. In the remaining 28 cases, disqualification proceedings were initiated or are being actively contemplated at year-end. Further details are provided in the following section of this Report.

During the year, the ODCE also examined some 850 judgements against companies. Some 139 of these companies were determined to merit further investigation by the Office, and these too are the subject of ongoing enquiries with a view to possible disqualification proceedings against their directors in due course.

Where any company is struck off the Companies Register, its remaining assets are vested in the Minister for Finance in accordance with the provisions of the State Property Act. The ODCE brings any company possessing significant assets at the time of strike-off to the attention of the Department of Finance for appropriate action.

In the light of the potential consequences for directors arising from the abandonment of insolvent companies, prudence requires that directors should seriously consider placing their company into liquidation or arranging for voluntary strike-off.

39 Section 160(2)(h) of the Companies Act 1990 (as amended by Section 42(b)(ii) of the 2001 Act).

40 Section 160(3A) of the Companies Act 1990 (as amended by Section 42(c) of the 2001 Act).

Sub-Goal 2.2: Enforcing Serious Breaches under the Companies Acts

Introduction

In 2010, the Office took both civil and criminal enforcement action through the Courts in relation to a number of instances of suspected serious defaults of law and duty with respect to the Companies Acts. A significant event in this area was the Supreme Court Judgment allowing an appeal by the ODCE against a decision of the High Court in 2007 not to disqualify an auditor and director. Further information on this case is given in **Illustration 2.2.1** below.

ODCE Enforcement Proceedings

In 2010, the ODCE secured eight criminal convictions (with a further two charges taken into consideration) and one disqualification for breaches of company law and duty. This table summarises the position and provides the equivalent detail for 2009.

Outcome of Successful Legal Enforcement Proceedings	2009	2010
Charges on which convictions were secured	6	8
Charges taken into account on conviction	12	2
Disqualifications	10	1
Other Decisions	1	-
Total	**29**	**11**

In 2010, the Office participated in ten separate civil and criminal enforcement proceedings before the Courts, of which four were in the Supreme Court and three each in the High Court and the District Court.

The Office also made application for a further eight orders and other reliefs of which three were in the High Court and five at District Court level or its equivalent abroad.

It is clear from the overview of the status and outcome of these and other legal proceedings in **Appendix 2.2.1** that the Office was again substantially successful in these proceedings as in previous years.

Appendix 2.2.2 gives a more detailed breakdown of the enforcement proceedings only, with case details included. In accordance with ODCE practice, a summary of each case result was placed on its website at www.odce.ie during 2010.

The reduced throughput of enforcement cases is substantially due to the continuing redeployment of ODCE staffing resources to the investigation of certain events at Anglo Irish Bank and the examination of the large increase in liquidator reports which must be dealt with within a statutory timetable. In particular, the availability of Garda resources for ODCE criminal investigations was severely reduced by the Anglo work.

Civil Enforcement Actions

Some 13 ODCE disqualification actions[41] were ongoing before the Superior Courts at the start of 2010. Four of these were concluded in 2010, and a further six proceedings were initiated. Five of these were against the directors of dissolved insolvent companies, while one was an application for a High Court order[42] compelling a liquidator to submit an overdue report on an insolvent company in liquidation.

Three of the eight appeals before the Supreme Court were completed or substantially heard in 2010. One appeal against the disqualification of two directors was struck out resulting in the confirmation of those disqualifications made in the High Court. The second case involved an important judgment on the purpose and application of the disqualification regime and is discussed in more detail in **Illustration 2.2.1** below. The third involved an appeal by a former senior National Irish Bank executive director against his disqualification, the hearing of which will conclude in 2011. A further four appeals of former senior National Irish Bank managers were awaiting hearing at the end of the year as was a disqualification case involving the directors of a construction business.

41 All of these disqualification actions were under Section 160(2) of the Companies Act 1990.

42 Under Section 371 (as amended) of the Companies Act 1963.

Illustration 2.2.1: The Director of Corporate Enforcement v. Patrick McCann

On 30 November 2010, the Supreme Court unanimously found in favour of the ODCE in allowing its appeal against a High Court decision in 2007 to refuse an application to disqualify an accountant and auditor, Mr Patrick McCann. Mr McCann had acted as a director and auditor to Kentford Securities Ltd, a company through which Ansbacher-related monies were channelled in the late 1980s and early 1990s. He had also failed to co-operate with the enquiries made on behalf of the then Minister by the authorised officer, Mr Gerry Ryan, from 1999 to 2002.

A primary basis for making a disqualification order is a finding of fraud, breach of duty or unfitness. The High Court in 2007 found that all of the matters which the ODCE complained of had been proven but exercised its discretion not to disqualify Mr McCann. In doing so, the Court took account of a number of mitigating factors, including the length of time that had elapsed, the culture at the time, the fact that Mr McCann had played a relatively minor role in the events and the damage to his professional livelihood which would follow from the making of a disqualification order. In addition, the Court held that in considering whether or not to disqualify a person, the primary test was forward-looking, thereby requiring an assessment as to whether the person would pose a danger to the public in the future.

This finding was of great concern to the ODCE as it appeared to disregard past conduct (irrespective of how serious the misconduct was). If this decision stood, it would make it extremely difficult to get disqualification orders in the future. This would have diminished the prospect for appropriate and proportionate company law enforcement in the State. It would also have led to a divergence in legal practice with other comparable jurisdictions (such as Northern Ireland or England).

Fortunately, the Supreme Court determined that the cumulative effect of Mr McCann's actions was grave and that his disqualification was warranted. It acknowledged that if the approach of the High Court were to prevail, the effect of the existing disqualification regime would be significantly reduced. The Supreme Court said that Section 160 of the Companies Act 1990 contained a number of different elements, and past conduct is the best, if not the only, guide to the test for disqualification. Section 160 also manifestly contains a deterrent element, and another purpose is the improvement of corporate governance.

After hearing submissions in February 2011, the Supreme Court determined that a two year term of disqualification was warranted. It also awarded the ODCE its costs for the appeal.

This Judgment is very welcome because it puts the test for disqualification 'back on track' in circumstances where the original High Court decision was rather novel. The decision will accordingly serve as an important precedent case.

Three disqualification cases were concluded during the year at High Court level and involved the directors of dissolved insolvent companies which had been struck off the Register of Companies for failing to file outstanding returns. One set of proceedings was withdrawn after the directors restored the dissolved company to the Register of Companies and placed the company in liquidation. This was a very satisfactory result from the ODCE's perspective. A second case resulted in the disqualification of a director of three struck-off companies for six years. Further details on this case are given in **Illustration 2.2.2** below. In the third case, the Court exercised its discretion not to disqualify a director. The ODCE had earlier withdrawn its proceedings against a second director after assessing information which had been received following the commencement of the proceedings.

Two other disqualification cases involving former National Irish Bank managers were also still ongoing at High Court level at end-2010.

Illustration 2.2.2: Disqualification of Mr Shaun Blackburn, a director of RFS Group Ltd, Rybur Construction Ltd and Shankill Retail Trading Ltd prior to their dissolution by the Registrar of Companies

On 17 May 2010, the High Court disqualified Mr Shaun Blackburn for six years on foot of an ODCE application under Section 160(2)(h) of the Companies Act 1990. The Court also awarded costs to the ODCE. The Court took into account the aggravating circumstances of the case and the liabilities of almost €100,000. Those circumstances included the making of false representations to the ODCE in an effort to dissuade it from initiating the disqualification proceedings.

Mr Blackburn was a director of Shankill Retail Trading Ltd, RFS Group Ltd and Rybur Construction Ltd when they were struck off the Register of Companies for failing to file annual returns while insolvent. In response to an ODCE statutory warning letter inviting him to make representations on its intended disqualification proceedings, Mr Blackburn indicated that he had only acted as a formation agent for the companies. He also submitted accounts for two of the companies which contained the signatures of his co-directors in circumstances where they had not authorised the accounts. Moreover, the accounts for one of the companies suggested that it had not traded by virtue of the absence of any assets or liabilities on its balance sheet at the time of strike-off, a position which Mr Blackburn maintained during the early part of the Court proceedings. However, he eventually accepted that he had in fact an involvement in the running of this company, that it had traded and that it had liabilities at the time of strike-off.

Criminal Enforcement Actions

Four prosecutions with respect to breaches of company law were pursued in 2010. Two related to companies failing to keep proper books of account[43], and a conviction was obtained in one of these during the year. The second case was awaiting hearing at year-end.

The other two prosecutions dealt with unqualified persons acting as auditors[44]. **Illustration 2.2.3** discusses the circumstances of one of these cases which resulted in the individual's conviction on seven charges. The remaining case also involved a series of other charges including the provision of false information[45]. Although the case had been heard at year-end, a separate sentencing hearing was scheduled for 2011.

Illustration 2.2.3: The Director of Corporate Enforcement v. Brian Byrne

In February 2008, the Institute of Certified Public Accountants in Ireland made a report to the ODCE which notified a finding of the Institute's Disciplinary Tribunal to the effect that one of its former members, Mr Brian Byrne, had acted as an auditor without being authorised to do so. The report disclosing this breach of Section 187 of the Companies Act 1990 identified the two companies concerned.

The ODCE's investigations of this alleged breach included the following:

- the taking of a detailed witness statement from the Secretary of the Institute. This confirmed that from July 2005 to January 2008, Mr Byrne was not accredited to act as a registered auditor;
- the detection, in cooperation with the Companies Registration Office (CRO), of Mr Byrne's provision of audit services to a number of other companies;
- the taking of witness statements from the directors of a number of Mr Byrne's client companies which had been 'audited' by him;
- the taking of statements from officials of the Irish Auditing and Accounting Supervisory Authority and the then Department of Enterprise Trade and Employment;
- the interview of Mr Byrne on a number of occasions and
- the acquisition of necessary documentary and certificate proofs from the CRO and the six recognised accountancy bodies.

The ODCE summary proceedings alleged that Mr Brian Byrne, carrying on business under the name and style of Byrne and Associates, Certified Public Accountants, had acted as the auditor of seven companies at a time when he was not qualified under Section 187 to do so.

The case was heard in Wicklow District Court on 22 June 2010 when, on a plea of guilty, the Court convicted Mr Byrne on seven of the charges and imposed fines totalling €3,500. The remaining two charges were taken into consideration by the Court.

Liquidator Restriction and Disqualification Applications

Mention has been made earlier in this Report of the ODCE's role in relieving liquidators from their statutory duty to take restriction proceedings against the directors of insolvent companies in liquidation. Where the Office issues 'no relief' or 'partial relief' decisions, the liquidators are legally obliged to initiate restriction proceedings in the High Court.

During 2010, the High Court reached decisions on 98 restriction applications (68 in 2009). One or more directors were restricted or disqualified in 97 cases (62 in 2009) representing 99% of the total (91% in 2009). No restriction orders were made in one case (six in 2009)[46]. These outcomes suggest that the ODCE has continued to successfully identify the cases meriting consideration by the High Court.

In terms of individual directors, 156 directors were restricted (108 in 2009); eight directors were disqualified (12 in 2009), and no orders were made against six directors (11 in 2009). This means that the Court made orders against 96% of the 170 directors (92% in 2009) that were the subject of restriction or disqualification proceedings during 2010.

In relation to the restriction proceedings that concluded before the High Court in 2010, **Appendix 2.2.3** to this Report outlines the outcome of the cases where restrictions were made and the identity of the persons in question.

2010 saw the Supreme Court issue a very important judgement relating to the operation of the restriction regime. The case involved an appeal against a restriction order made by the High Court in 2005 against directors of the Mitek group of companies. **Illustration 2.2.4** outlines this Supreme Court Judgment which provided a comprehensive analysis of the law relating to Section 150 of the Companies Act 1990.[47]

43 Section 202(10) of the Companies Act 1990.

44 Section 187(9) of the Companies Act 1990.

45 Section 242(1) of the Companies Act 1990.

46 Yellowstone C&D Ltd (Company Number 396076).

47 A copy of the Judgment in this case is available at www.courts.ie.

Illustration 2.2.4: Re Mitek Holdings Ltd, Mitek Pharmaceuticals Ltd, Mitek Ltd (formerly known as Antigen Holdings Ltd, Antigen Pharmaceuticals Ltd and Antigen Ltd respectively) and Castleholding Investment Company Ltd

On foot of a Judgment of Ms Justice Finlay Geoghegan on 21 February 2005, the High Court restricted Dr Jack Kachkar and Mr Robert McClennan Carrigan for five years on 10 May 2005. The respondents subsequently appealed their restriction to the Supreme Court.

In its Judgment of 13 May 2010, the Supreme Court comprehensively analysed the law relating to restriction and specifically considered the company director's role especially where there was a group of companies or where a company was in 'straitened financial circumstances'.

In summary, the Court concluded that while each case of directorial responsibility must be considered on its own facts, executive and non-executive directors have two basic sets of duties by which responsible conduct will be judged.

Firstly, their compliance with the statutory duties of the Companies Acts (including the proper maintenance of the company's books and records) will be considered.

Secondly, compliance with their common law duties will be assessed. This will particularly include the extent to which the directors have properly managed the commercial business of the company such that they have ensured that they are properly informed about its state of affairs and that they make appropriate decisions based upon this information. It will also include the extent to which the directors have recognised the rights of creditors and ensured the proper distribution of company assets, especially in circumstances of insolvency.

The Court accepted that there was usually a real difference between the duties of executive and non-executive directors. The latter will usually be dependent on the former for information about the company's affairs and finances, a fact that imposes correspondingly larger duties on the former. Non-executive directors must in particular inform themselves about company business and their duties as directors.

While there are instances of non-executive directors having little role or influence, this did not apply in the present case given the inter-relationships of companies and directors in the group as a whole. Accordingly, the Court affirmed the High Court's conclusion that the directors had not acted responsibly in creating a debenture as security and in allowing certain transfers to be made while the companies were insolvent.

Appendix 2.2.4 identifies the eight directors of insolvent companies who were disqualified by liquidator proceedings during 2010 and the related periods of disqualification. The accompanying **Illustration 2.2.5** provides brief outlines of the circumstances in these cases. The ODCE welcomes the continuing willingness of a number of liquidators to bring disqualification proceedings in respect of serious detected misconduct, and he is confident that further similar cases will be taken in 2011.

Illustration 2.2.5: Insolvent Companies – Liquidator Disqualifications in 2010

Ms Halina Ubermanowicz, a director of Advanced Cosmetic Surgery Ltd, was disqualified for eight years. Her co-director, Ms Deborah Ashdown, was restricted for five years. The Court heard evidence of payments of over €2 million from company funds to one of the directors and a former partner of the director and breaches by the directors of their fiduciary duties to the company's creditors. The directors also permitted the company to trade for several years without medical malpractice insurance or adequate provision against malpractice claims in breach of their duties to patients.

A disqualification of seven years was imposed on Mr David Tevlin, a former Finance Director of International Screen Ltd. The Court heard evidence that Mr Tevlin had circulated falsified financial information to his three fellow directors which concealed the company's true trading performance and falsified numerous VAT and PAYE/PRSI tax returns over a period of four years. He also falsified the audited accounts for two accounting years, forged the signatures of the company's auditor and directors on the versions filed with the Registrar of Companies and forged the directors' signatures on the related annual returns accompanying those accounts.

Mr Paul De Brit and Ms Bronwyn O'Dea, directors of Wix Wood Ltd, were each disqualified for six years. The Court heard evidence of irregular accounting practices at the company. While the directors promptly recognised sales revenue, they deferred recognising the matching costs to later accounting periods thereby distorting the company's financial performance. When turnover later fell, the unaccrued costs could not be met from the falling sales revenue. In all, the company was estimated to owe close to €500,000 to trade creditors at the time of liquidation with one creditor being owed about €118,000. The directors had also maintained that the company owed them €125,000 when in fact they owed the company €15,000. The directors had also asserted that its tax liabilities were a mere €1,000 at liquidation when they were closer to €125,000.

Messrs Richard and William McCafferty, directors of McCafferty Developments Ltd, were each disqualified for six years. The Court heard evidence that the directors used company monies to fund their personal lifestyle and transferred its funds into personal bank accounts. For example, a car costing €77,000 was purchased with company funds and registered in the name of the principal director. The directors ignored their tax obligations and continued to trade when they should have known that the company was insolvent. The liquidator was unable to quantify the taxation liability as tax returns had not been made, nor had audited or management accounts been kept. The directors also failed to cooperate with the liquidation and failed to prepare a statement of affairs even when ordered to do so by the High Court.

A six year disqualification was also imposed on Mr Mark Ralph, a director of Del Val Taverns Ltd. The Court heard evidence that the company had failed to maintain proper books and records, file tax returns or pay its liabilities. There were in excess of 360 payments totalling over €760,000 made from the company's bank account for which no details were made available to the liquidator.

Mr Ciaran Brady, a director of Owen Crinigan Motors Ltd, was disqualified for five years. The Court heard evidence of significant personal expenditure by Mr Brady on the company's credit card, a reduction in his director's loan account amounting to a preferential payment, a transfer of a car owned by Mr Brady to the company at a value that resulted in a loss of €57,000 to the company and the improper recording of certain other transactions in its records.

Disqualifications and Restrictions Generally

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

At end-2010, 244 individuals stood disqualified on foot of High Court orders arising from company law breaches including six individuals who have been disqualified arising from their conviction for failure to notify their disqualification in another jurisdiction[48] and five who were disqualified on the basis of their convictions for having acted as a director while restricted[49]. A further 3,200 persons were listed on the Register of Disqualified Persons have been deemed to be disqualified by virtue of their having received a qualifying criminal conviction[50]. Such convictions would include, for example, convictions for fraud.

Overall, there was an increase in the number of restricted persons from 538 to 589. The following table indicates the number of restricted persons at the end of each year since 2006.

Number of Restricted Directors at end-2006 to end-2010 inclusive

End-2006	End-2007	End-2008	End-2009	End-2010
685	791	624	538	589

Conclusion

As indicated earlier, the civil and criminal enforcement activity of the Office was necessarily restricted in 2010 as a result of the continuing redeployment of staffing resources to the investigation of certain events at Anglo Irish Bank and to the examination of the large increase in liquidator reports which must be dealt with within a statutory timetable. In particular, the availability of Garda resources for ODCE criminal investigations was severely reduced.

Notwithstanding these pressures, the Office adopted a number of measures during 2010 to maintain a reasonable level of throughput in the enforcement area. These included:

- a greater utilisation of general ODCE staff in taking witness statements in criminal investigations. Garda staff will continue to make themselves available for the interview of potential suspects;
- a re-assignment of legal staff to the development and management of cases for possible disqualification actions;
- the enhanced use of the remedial option which is available in Section 371 of the 1963 Act (as amended) to rectify delays by liquidators in reporting to the Office.

The benefit of these decisions will become apparent in 2011 and will help to turn around the recent decline in enforcement activity. However, enforcement activity will necessarily remain subdued for the duration of the Anglo investigation.

48 Section 160(1A) of the Companies Act 1990.

49 Section 161(2) of the Companies Act 1990.

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