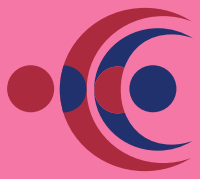
2011

Annual Report 2011



Oifig an Stiúrthóra um
Fhorfheidhmiú Corparáideach

Office of the Director
of Corporate Enforcement

Goal 2: Confronting Unlawful and Irresponsible Company Law Behaviour

Introduction

The difficult economic environment which generated a 31% increase in cases to the ODCE in 2010 continued into 2011. In broad terms, the number of issues received by the Office in 2011 was comparable to the preceding year.

Statistical Overview of Reports and Complaints

Almost 2,000 new cases were received during the year, which is similar in number to 2010. As outlined in **Appendix 2.1**, the single biggest component is the volume of initial reports (66% of all new cases) obtained from the liquidators of insolvent companies.

While the volume of new cases continues to present significant work and resource challenges, the Office successfully managed to conclude more than 1,900 cases in 2011, a 7% increase on 2010. The number of issues on hands at year-end was just over 1,000, similar to the preceding year. **Appendix 2.2** provides further information on the throughput of cases in 2011, 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 2011 were connected. 47% of them were in the construction and wholesale and retail sectors indicating that these types of businesses continue to be particularly hard hit by the current economic downturn.

As is evident from **Appendix 2.5**, the dominant sector for auditor reports and public and other complaints to the Office in 2011 was again real estate and renting which comprised 14% of the total. At the same time, this was a welcome reduction on the 33% of complaints recorded for that sector in 2010, although an increase in complaints was again evident towards the end of the year. The 13% of complaints classified in the 'not a company' category reflects the fact that many complaints relate to individual persons, business names, cooperatives, credit unions and sole traders.

Solvent and Insolvent Liquidations

As a result of the severe economic downturn, company failures continued at a high level in 2011. As is clear from the following table, this is the third consecutive year in which the number of insolvent liquidations (creditors' and Court liquidations) has exceeded 1,000. With many enterprises under continuing financial pressure, a return to the relative normality of 2008 when just over 600 insolvent companies went into liquidation seems some way off yet. Solvent liquidations (members' liquidations) increased by 17% last year from 899 to 1,054, returning to pre-2010 levels.

Insolvent Companies Nominally in Liquidation

For some years, the ODCE has monitored the incidence of insolvent companies which are nominally in liquidation but to which no liquidator has been appointed. As the first table on page 17 shows, the number of these cases fortunately fell back in 2011 to 67 companies.

Liquidations	2007	2008	2009	2010	2011
Creditors' Liquidations	308	530	1,124	1,258	1,311
Court Liquidations	36	83	121	128	99
Total Insolvent Companies	**344**	**613**	**1,243**	**1,386**	**1,410**
Members' Liquidations	1,057	1,051	1,158	899	1,054
All Liquidations	**1,401**	**1,664**	**2,403**	**2,285**	**2,464**

Year	Liquidation Notifications	Liquidators not Appointed	%
2008	613	24	4%
2009	1,243	106	9%
2010	1,386	92	7%
2011	1,466	67	5%

Prompted by the ODCE, the professional accountancy bodies have been reminding their members that they should not be involved in facilitating companies being put into liquidation unless they expect that a liquidator will be appointed. This may be the reason for the welcome drop in the 2011 figure. While the Office remains committed to taking legal action in suitable cases, it did make proposals to the Department of Jobs Enterprise and Innovation in early 2011 for legislative changes that would help to address the phenomenon on a comprehensive basis. It is hoped that these changes will be made in the forthcoming Companies Bill which will modernise and consolidate Irish company law. The Office remains 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

The large numbers of companies going into liquidation as a result of the economic downturn have been unsurprisingly accompanied by recent increases in the numbers being placed in receivership. Most receiverships are the result of financial institutions seeking to enforce secured charges, and many were engaged in property development activity in recent years. These companies 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. However, the following table suggests that only 6% of companies in receivership are now being put into liquidation.

Year	Companies Placed in Receivership	Number Placed in Liquidation	%
2008	59	8	14%
2009	200	26	13%
2010	375	43	11%
2011	533	31	6%

A key consequence of the failure to appoint a liquidator to an insolvent company which is in liquidation or in receivership is that the standard of conduct of the directors of those companies is not generally being scrutinised to detect dishonest or irresponsible conduct which has caused collateral damage to other stakeholders.[25] From the preceding tables, it will be apparent that while the directors of about 1,410 insolvent companies to which liquidators were appointed in 2011 are being held to account, the conduct of the directors of a further 569 insolvent companies are not being subjected to the same level of scrutiny. This increasing trend may require legislative amendment to ensure that some form of enquiry and reporting is undertaken in respect of the behaviour of the directors of insolvent companies in receivership in order to apply comparable standards of scrutiny to the conduct of the directors of all insolvent companies.

The ODCE has reminded receivers in the past of their statutory reporting duties to the Director of Public Prosecutions (DPP) in respect of criminal offences which they detect during the exercise of their duties as receivers.[26] However, very few reports are ever received. The Office expects all receivers to be vigilant in ensuring that these reports are made in appropriate circumstances, and action will be taken in any suitable case where this does not appear to have occurred.

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

26 Section 179 of the Companies Act 1990.

Type of Dissolved Company	2007	2008	2009	2010	2011
'CRO Strike-off'[27]	4,085	5,804	5,729	6,272	7,938
'Revenue Strike-Off'[28]	149	223	142	140	0
'Voluntary Strike-Off'[27]	3,975	4,542	5,428	5,488	5,653
Total	**8,209**	**10,569**	**11,299**	**11,900**	**13,591**

While this inconsistent approach to the phenomenon of insolvent companies is undesirable, some directors of unliquidated insolvent companies will subsequently face ODCE disqualification proceedings[29]. This may arise where their companies are struck off the Register of Companies for failing to file annual returns, and they are unable to satisfy the High Court that the company has 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 above table gives details of all companies struck off in recent years, it does not distinguish between those that are solvent and insolvent.

Sub-Goal 2.1: Identifying Suspected Misconduct

ODCE work in 2011 was again dominated by its Anglo Irish Bank investigations and by the large number of insolvent companies requiring its review.

The Investigation of Events at Anglo Irish Bank

Anglo is the biggest and most complex company law investigation by far that the ODCE has undertaken to date, and it is likely to be one of the biggest criminal investigations that the State has ever been involved in. Throughout the year, some 16 Garda, legal and administrative staff within the ODCE continued to work full-time on this investigation. A significant number of additional Garda officers also remained deployed within the Garda Bureau of Fraud Investigation (GBFI). At end-2011, a large amount of work had been completed by both the ODCE and the GBFI in their respective investigations.

The following **Illustration 2.1.1** provides a graphic representation of the main aspects of the current ODCE and GBFI investigations and their status at end-2011.

Documentation and Data

The previous ODCE Annual Reports for 2009 and 2010 outlined at some length the scope and complexity of the investigations with respect to the acquisition, processing, evaluation and securing of millions of pages of Anglo documentation and data. Related work of this character continued throughout 2011.

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

28 Section 882 of the Taxes Consolidation Act 1997.

29 Pursuant to Section 160(2)(h) of the Companies Act 1990 (as amended).

Illustration 2.1.1: Anglo Investigation: Status of the Main Strands at end-2011

1)	Short-term back-to-back deposits of about €7.4 billion received by Anglo in late September 2008	GBFI	Investigation largely completed. Investigation files with the DPP
2)	Regular refinancing of certain Anglo directors' loans close to Anglo's end-year reporting date (Section 197 of the Companies Act 1990)	ODCE	Investigation largely completed. Report sent to the DPP in December 2010. Two investigation files to be sent in early 2012
3)	Provision by Anglo in 2008 of a loan to one of its directors (Section 297 of the Companies Act 1963)	ODCE	Investigation completed. Two investigation files sent to the DPP in December 2010 and December 2011
4)	Suspected failure by Anglo to maintain a register of loans to its directors (Section 44 of the Companies Act 1990)	ODCE	Investigation completed. Two investigation files sent to the DPP in August 2011 and December 2011
5)	Content of Anglo financial and other public statements in 2008	ODCE	Report sent to the DPP in December 2010. Initial investigation file to be sent in February 2012
6A)	Provision by Anglo of funds for the purchase of its shares in July 2008 (Section 60 of the Companies Act 1963)	ODCE	Investigation largely completed. Report sent to the DPP in December 2010. Two investigation files sent in March 2011 and December 2011
6B)	Provision by Anglo of funds for the purchase of its shares in July 2008 (possible market abuse aspect)	GBFI	Investigation largely completed. Investigation file with the DPP

Indeed in the case of the investigation of the refinancing of directors' loans (strand 2 above), new documentation and information became available in early 2011 which indicated that the practice of refinancing was more complex than originally thought. This gave rise to further analytical and investigation work which extended the timeframe of investigation for this strand.

'Reluctant Witnesses'

A critical feature of early 2011 was the unwillingness of certain witnesses to the events under investigation to provide statements to assist the ODCE's work. This hampered and delayed the investigation due to necessary and intensive engagements with the witnesses and their legal representatives on various matters. This was a particular problem with respect to the investigation of the provision by Anglo of funds for the purchase of its shares in July 2008 (strand 6A above).

However, a welcome provision (Section 15) in the Criminal Justice Act 2011 which came into effect in early August enabled a member of An Garda Síochána to apply to the District Court for an order requiring a person:

- to produce specified documents and
- to prepare answers to questions and/or produce a statement regarding information in the possession of that witness

relating to the commission of certain offences including a number which were relevant to the ODCE investigations.

This enabled the ODCE to begin a process of engaging afresh with all of the 'reluctant witnesses' and/or their legal representatives, drawing attention to the commencement of Section 15 and asking them to reconsider their earlier position. Favourable responses were received from some of the 'reluctant witnesses', but some others failed to give an immediate favourable response or indicated a continuing disinclination to engage with the investigators.

In consequence, a Garda Detective Inspector seconded to the ODCE made applications to the District Court in late September 2011 under the 2011 Act in respect of a certain person. An Order was made later that day by the District Judge requiring him to produce relevant documents and to prepare answers to specified questions or produce a statement and/or both. This Order was subsequently complied with.

Following the hearing, contact was again made with all of the other 18 'reluctant witnesses' and/or their legal representatives. This correspondence eventually resulted in the ODCE securing substantial cooperation with its investigations by the end of 2011. The remaining work was expected to be completed in early 2012.

General Developments

During 2011, progress was also made in areas which were relevant to one or more of the ODCE investigation strands. General developments included:

- the taking of some 75 statements/memoranda by officers of the Director;
- the arrest and detention of two former officers of Anglo by Gardaí on secondment to the ODCE;
- the execution of three further orders under the Bankers' Books Evidence Act 1879 as amended. Documentation also continued to be secured during the year pursuant to pre-existing bankers' books Orders as required;
- the agreement between the ODCE and Anglo of an almost complete list of legally privileged documents. This process will continue for as long as the investigations continue. When they are completed, it will be possible to agree a fully comprehensive list of privileged documents;
- the conduct of about ten formal meetings between senior officers of the ODCE and the GBFI to review progress on aspects of their respective investigations. There was also very regular contact during the year between both organisations to ensure cooperation and consistency in addressing the various strands of these investigations;
- the undertaking of a series of formal consultations with Counsel which has been complemented by regular requests for legal opinions and advices in relation to certain outstanding matters.

High Court Supervision of Anglo Data

As a result of the ODCE's seizure of a large volume of Anglo electronic data in September 2009 under provisions contained in the Companies (Amendment) Act 2009, the High Court receives regular updates on progress. An officer of the ODCE appeared before the High Court in May and July 2011, and a further hearing is scheduled for late January 2012. On each occasion, the Office secured an extension of time to enable it to continue to utilise this seized data.

Engagement with the DPP

At an early stage in the Anglo investigation, the Garda Authorities and the Director agreed with the DPP a special arrangement whereby each organisation could send 'not fully completed' investigation files to facilitate the early consideration by the DPP of the material. This has been helpful in securing comment and feedback from the DPP's staff and from Counsel.

In addition to the very regular communications with the DPP's staff and with Counsel, there were three formal meetings between the DPP, the Director, senior staff of both Offices and/or Counsel during 2011. These contacts proved to be helpful.

Of course, it is a matter for the DPP alone to determine the extent to which (if at all) charges may be warranted against any person in respect of one or more of the above investigation strands. The matters involved are complex and unprecedented, and it is hoped that the DPP will be in a position to begin making decisions in the case during 2012.

Insolvent Companies – The Liquidator Reporting Regime

In summary, the liquidator of a company in insolvent liquidation is required by law[30] 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[31] of each of the directors, unless relieved of that obligation by the ODCE.[32]

The essential aim of this reporting regime is to support responsible entrepreneurial endeavour. The purpose of each report is to distinguish the cases 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 consideration by the High Court those cases which do not warrant its attention.

At the same time, ODCE decisions of 'no relief' or 'partial relief' do not constitute a finding of honesty or responsibility for 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 2011

Details of the numbers of liquidator reports in 2011 are contained in **Appendix 2.1.1**. In all, 1,725 liquidator reports were received (1,688 in 2010). Of these, 1,287 were initial reports[33] (1,312 in 2010) in respect of recently liquidated companies. 438 further reports[34] (376 in 2010) were also submitted and arose primarily from earlier 'relief at this time' decisions.

This continuing high level of new liquidations reflects the difficult economic conditions. In addition, a number of these insolvent companies were also substantial entities in the construction or other sectors. This has added complexity to the ODCE evaluation of the relevant liquidator reports. The introduction of revised internal work practices has enabled the Office to improve its throughput of determined reports in recent years despite the large increase in reports, the complication associated with some of the businesses in question and staffing constraints generally. At the same time, the Office acknowledges that some decline in the timeliness of ODCE decision-making has occurred. However, every effort continues to be made by staff to deal with liquidator reports on a timely basis.

30 Section 56 of the Company Law Enforcement Act 2001.

31 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.

32 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*.

33 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.

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

In monitoring the submission by liquidators of their initial and further reports, the Office had cause in 2011 to formally advise 109 liquidators on 339 occasions (303 occasions in 2010) 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, 95% of the first reports due during the year had been received – compared with 97% in the previous year. However like 2010, a small number of liquidators remain exposed to the risk of ODCE legal action in 2012 for failing to submit their overdue reports in 2011. This area will continue to be prioritised.

The Office considered the standard of liquidator reports in 2011 to be mostly satisfactory. However, the ODCE has concerns about the standard of reporting in some cases, and 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 high level of engagement by ODCE staff with liquidators during 2011 to clarify elements of their reports and to specify ODCE requirements. In some instances, individual liquidators were requested to attend at the ODCE to review their standard of reporting or their conclusions in specific cases. Prompted in part by an influx of new entrants and ODCE concerns about standards of reporting in the recent past, the relevant professional bodies are providing more training for insolvency practitioners which is a welcome development. 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 1,597 liquidator reports in 2011 (1,474 in 2010). Of these, 1,177 decisions were made in respect of initial reports, and 420 were in respect of further reports. The equivalent figures for 2010 were decisions on 1,240 initial and 234 further reports respectively.

The breakdown of decisions on initial reports in 2011 is outlined in the following table, along with the comparable figures for 2010:

Decision Type	2010	%	2011	%
Full relief[35]	871	70%	806	69%
No relief[36]	47	4%	59	5%
Relief 'at this time'[37]	306	25%	296	25%
Partial relief[38]	16	1%	16	1%
Total	**1,240**	**100%**	**1,177**	**100%**

35 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.

36 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.

37 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.

38 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.

25% of initial reports receive 'relief at this time' decisions, because the size and complexity of some of the current liquidation cases 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 2011 are available in ODCE Information Notice No. I/2012/1 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.[39] 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.[40]

A similar reporting obligation applies to professional accountancy bodies in the discharge of their disciplinary functions[41].

Auditor and Accountancy Body Reports in 2011

In 2011, the Office received 178 reports from auditors and accountancy bodies of suspected breaches of the Companies Acts (a drop of 8% on the 2010 figure of 194). 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 (77%), while a second (failure to keep proper books of account) comprised a significant minority (10%). **Appendix 2.1.2** identifies the incidence of the primary suspected offences reported in 2011 relative to 2010.

Unlawful Directors' Transactions

The auditor reports and other information available to the Office indicates that in 2011, directors improperly borrowed about €44 million from their companies.[42] This was a welcome reduction on the 2010 figure of some €85 million which maintained a recent trend of decline. However as a result of more companies qualifying for and availing of audit exemption, it is likely that this trend is masking the scale of the phenomenon.

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 261 directors cautioned in 2011 as to their future conduct. The Office reserves the right to take enforcement action in any suitable case, and a small number were under active investigation at year-end.

39 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.

40 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.

41 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.

42 Section 31 and related provisions of the Companies Act 1990 (as amended).

The accompanying **Illustration 2.1.2** outlines one case in 2011 where a company with directors' loans issues was put on a compliant footing without the need for ODCE enforcement action.

Illustration 2.1.2: Case relating to Accounting Deficiencies and Directors' Loans

The ODCE received a wide-ranging complaint from a director of a family-owned company operating in the North East. The company's auditors also made an indictable offence report with regard to directors' loans and other accounting deficiencies at the company. The company was also significantly in arrears in its filings to the Companies Registration Office.

Having examined the complaint, the ODCE engaged with the company and its professional advisers to help rectify the reported matters. This led the company to engage a firm of consultants to recommend how best it should conduct its affairs in future so as to remain compliant with the Companies Acts at all times. A series of measures came to be adopted which saw new financial controls and procedures being put in place, all outstanding filing returns being made to the Companies Registration Office and the directors' loans of about €350,000 plus interest being repaid to the company.

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.[43] The Office regularly cautions the relevant directors with a view to ensuring that similar deficiencies in the governance of their companies do not recur, and 37 directors were cautioned in 2011.

In a minority of cases where the Office considers it appropriate to do so, it proceeds to take enforcement action against the company and/or its directors. As indicated later in this Report, two cases were successfully prosecuted in 2011, one of which is under appeal.

Audit Quality

In its previous Annual Reports and in its engagements with the recognised accountancy bodies, the ODCE has expressed its disappointment on occasion with evident inadequacies in the performance of individual auditors. The Office attaches a high value to a good audit given the safeguards which it offers to a company's stakeholders. Where standards fall short of expectations, consideration is given to referring the matter to the auditor's professional body for evaluation. It is standard practice to copy any ODCE complaint to the Irish Auditing and Accounting Supervisory Authority for information.

In one recent case, the Office engaged with a company auditor about errors in the audit opinion for a financial year prior to the company going into receivership. The ODCE's dissatisfaction with the response prompted a report to his professional body whose examination concluded in 2011. The Office welcomes the fact that the body shared its dissatisfaction with the professional standards in question. The outcome is summarised in the following **Illustration 2.1.3**.

Illustration 2.1.3: Professional Body Finding on foot of an ODCE Complaint

The professional body found that its member had:

- failed to ensure that work undertaken on behalf of the client company was adequately resourced and supervised;
- failed to provide appropriate audit reports on the client company's accounts;
- failed to ensure that the accounts conformed to the requirements of the Companies Acts and Financial Reporting Standard 8 regarding related party transactions and
- failed to provide a complete and adequate explanation to the ODCE to enable it to understand the cause of the errors in the accounts presented to the Companies Registration Office.

The member in question was sanctioned, fined €2,000 and required to pay costs of €1,500 to the body.

43 Section 202 of the Companies Act 1990.

Unqualified Persons acting as Auditors

As mentioned earlier in this Report, successful steps have been taken by the Companies Registration Office and the recognised accountancy bodies in particular to limit the incidence of unqualified persons acting as auditors. However, the ODCE continued to receive a small number of complaints from the recognised accountancy bodies and from individual auditors in 2011 in this area. Given its anxiety to ensure that audit quality is not undermined, the Office continued to investigate such cases. Five cases were resolved administratively in 2011. As indicated later, it was considered appropriate to prosecute a further three cases that resulted in convictions, one of which has been appealed. Other similar cases are currently under active investigation.

Public Complaints and Other Detections in 2011

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.

There was a decrease to 422 in the number of public complaints and other detections in 2011, a fall of 8% on 2010. Details of the type of reported defaults are contained in **Appendix 2.1.3**.

Unsurprisingly in the difficult economic climate, there were further large increases in complaints about unpaid debts (up 69% on 2010 following a similar increase on 2009). In many of these cases where there was no evident breach of company law, the ODCE urged the complainants to explore their own legal remedies to recover any monies due to them.

There was also a threefold increase in allegations of fraudulent or reckless trading in insolvent companies, but the evidence offered to support an instance of criminal behaviour was often very limited. However, a small number of such cases continue to be examined.

Illustration 2.1.4: ODCE Engagement with Aventine Resources plc

In late November 2011, Aventine Resources plc, formerly Minmet plc, ("the Company") announced that it was holding an Annual General Meeting ("AGM") on 22 December 2011 at 12 noon. This announcement which was placed on its website served as the notice to its shareholders of the Meeting. It indicated an intention to conduct substantive business at the AGM but proposed to do so without giving shareholders the opportunity to consider the Company's accounts for the year ended 31 December 2010. Apparently, these accounts were only in the process of being audited.

In advance of the AGM, the ODCE wrote to the Company and its officers drawing attention to the fact that they were in default of their company law requirements by failing to provide the shareholders with a copy of the Company's accounts for the year ended 31 December 2010 and the related directors' and auditor's reports at least 21 days in advance of the AGM. The Company and its officers were requested to rectify their defaults. The Office made it known that no substantive business should be conducted at the scheduled AGM.[44]

Over the following days, the Director took into account the fact that many of the Company's shareholders were not Irish and that those wishing to attend the AGM should be given the opportunity to avoid a potentially unnecessary and costly journey to Dublin. In the circumstances, he issued a public statement about his recent engagement with the Company relating to the forthcoming AGM and placed the statement on the ODCE website. Consistent with ODCE requests, the AGM was opened and adjourned on 22 December without any substantive business having been conducted.

44 Section 150(9) and Section 159(1) of the Companies Act 1963 (as amended).

Many public complaints again varied in character and complexity. They are considered to be 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. Every effort is made to address adequately the notified concerns within the limits of the Office's remit.

Listed and Unlisted Public Companies

Particular attention is paid to companies and issues with a large potential impact, including companies which are or have been listed on a stock exchange. A number of such cases arose in 2011 which led to the exercise of the Director's powers. **Illustration 2.1.4** above outlines one case where the Office found it necessary to act at short notice to remedy evident non-compliance with company law in an unlisted public company.

Guarantee Companies

Many of the public complaints addressed in 2011 again concerned companies limited by guarantee. These are often companies formed for a particular social, community or public purpose. A number of property management company cases involved the restriction of the rights of members to attend general meetings or the failure to provide them with audited financial statements or access to the register of members. In these types of cases, the Office expects complainants to have engaged directly with the company and exhausted their own remedies before seeking assistance. The following **Illustration 2.1.5** deals with a case where a company incorrectly cited data protection legislation as the basis for denying access to its register of members.

A number of the property management company complaints in 2011 again raised issues which were beyond the remit of the Office. These included the level of service charges and the non-assignment of the common areas in the development to the management company. These issues have been addressed in the Multi-Unit Developments Act 2011. The Property Services Regulatory Authority has also been recently established under the Property Services (Regulation) Act 2011. Both legislative initiatives were promoted by the Department of Justice and Equality. The ODCE hopes that these developments will help to resolve these problems and bring about a decline in these complaints.

Illustration 2.1.5: Access to a Company's Register of Members

A member of a large property management company based in Dublin had concerns regarding the maintenance of the development and decided that the holding of an extraordinary general meeting (EGM) was the best way to address the issue with the company. To do so, he needed to obtain the support of 10% of the members for the requisition of an EGM.[45]

In consequence, the complainant sought access to the register of members containing their names and addresses, but these requests were refused. In justification, the company's agent cited data protection issues as a reason for refusing the members' contact details. The complainant contacted the Office which drew his attention to the obligation on a company and its officers to permit access to the register of members.[46]

Having renewed his request for access, the company supplied an incomplete register. Following receipt of a further complaint and the ODCE's direct engagement with the company, a complete copy of the register was given to the member.

Disqualified and Restricted Directors

In 2011, the ODCE continued to be alert to any situation where a disqualified or restricted director or a bankrupt acted as a director in breach of the law. Action is taken against defaulting directors in appropriate cases to maintain the integrity of the disqualification and restriction regimes in the interests of enterprise sustainability.

45 Section 132 of the Companies Act 1963.

46 Section 119 of the Companies Act 1963.

Dissolved Insolvent Companies

The ODCE remains 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 come to be struck off the Register of Companies for a failure to file their annual returns continued to receive ODCE attention in 2011. It is open to the ODCE to apply to the High Court for the disqualification of the directors of these struck-off companies[47]. However, the law[48] 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 2011, some 70 cases involving more than 100 struck-off companies were investigated. Of these, 50 were deemed not to be suitable for legal action or remain under investigation. In the remaining 20 cases, disqualification proceedings were initiated or are being actively contemplated at year-end.

In 2011, the ODCE developed our relationships with, and obtained good cooperation from, a number of bodies and entities in relation to company debts. The entities involved included:

- the Construction Industry Monitoring Agency which investigates complaints of non-compliance with registered employment agreements in the construction industry. These agreements place a legal obligation on employers to register their workers and make contributions on their behalf;
- the Pensions Board and the Office of the Pensions Ombudsman with respect to unpaid pension contributions and
- the Department of Social Protection in relation to outstanding redundancy liabilities.

The information received has been of value in identifying unliquidated insolvent companies, and it has been used to engage with the former directors of those companies. In one disqualification case in 2011, one of these established debts formed part of the evidence of insolvency, and similar debts are expected to feature in other disqualification cases which will be heard in 2012 and beyond. Further details on the legal proceedings undertaken by the ODCE in 2011 are provided in the following section of this Report.

47 Section 160(2)(h) of the Companies Act 1990 (as amended).

48 Section 160(3A) of the Companies Act 1990 (as amended).

Where any company is struck off the Companies Register, its remaining assets are vested in the Minister for Public Expenditure and Reform in accordance with the provisions of the State Property Acts. In any case where a company appears to possess a significant asset at the time of strike-off, the ODCE brings this to the attention of the Department of Public Expenditure and Reform 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. Alternatively if the company has no assets or liabilities, the directors can arrange for voluntary strike-off.

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

Introduction

The ODCE undertakes both civil and criminal enforcement actions in the Courts. Significant events in 2011 with respect to company law proceedings included:

- a first criminal conviction by the Circuit Court for a company law offence which resulted in the offender starting a term of imprisonment (of three years);
- the imposition by the High Court of a nine year term of disqualification on a former bank director for breaches of law and duty (now under appeal by him);
- the determination by the Supreme Court of an appeal relating to a number of preliminary evidential issues in the ODCE's long running disqualification action against the directors of a company in the construction industry. This case was remitted back to the High Court for plenary hearing.

Further information on these cases is given below.

ODCE Enforcement Proceedings

In 2011, the Office was very successful in enforcing a number of instances of suspected serious defaults of law and duty with respect to the Companies Acts. The outcome gave rise to 44 convictions, disqualifications and other successful results, the highest number since 2008. The following table summarises the position and provides the equivalent detail for 2010.

In 2011, the Office participated in or contributed to 21 separate civil and criminal enforcement proceedings, of which three were in the Supreme Court, 13 in the High Court, one in the Circuit Court and four in the District Court. This compares with the total of ten enforcement proceedings in 2010.

The Office also made application for eight investigative orders and other reliefs, of which two were in the High Court and six at District Court level.

It is clear from the overview of the status and outcome of the civil and criminal enforcement proceedings in **Appendix 2.2.1** that the Office was again substantially successful in pursuing its Court actions.

Outcome of Successful Legal Enforcement Proceedings	2010	2011
Charges on which convictions were secured	8	20
Charges taken into account on conviction	2	2
Disqualifications	1	18
Restrictions	–	2
Other Decisions	–	2
Total	**11**	**44**

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 2011. Where a stay was placed on the effective date of the sanction, publication of the notice was postponed until the stay expired.

The redeployment of Garda and other Office resources to the Anglo Irish Bank investigation in particular has served to curtail the throughput of ODCE enforcement proceedings since 2009. However, counter-measures taken in recent years to limit this impact bore fruit in 2011 as is evident from the fourfold increase in successful results vis-à-vis 2010.

Civil Enforcement Actions

Some 15 ODCE actions were ongoing before the Superior Courts at the start of 2011, and a further ten were initiated during the year. The vast majority of these actions were disqualification proceedings,[49] while two were applications for High Court orders compelling liquidators to submit overdue reports on insolvent companies to the Office[50]. 12 of these 25 cases were concluded in 2011.

Three of the seven appeals before the Supreme Court at the start of 2011 were completed or substantially heard in 2011, and of these, the Court:

- allowed an ODCE appeal against a High Court decision refusing to disqualify an accountant and auditor and imposed a two year term;
- indicated that it was minded to substitute a restriction for a nine year disqualification term imposed by the High Court on a former Executive Director of National Irish Bank Ltd. The case was ongoing at year-end, as the Supreme Court wished to hear representations on the impact of a restriction on the respondent in early 2012;
- rejected the appeals of both the ODCE and the Respondents in relation to preliminary evidential issues in the ODCE's long running disqualification action against the directors of a company in the construction industry.

The features of the first of these judgments were outlined in **Illustration 2.2.1** of the ODCE's Annual Report for 2010, because the main Supreme Court judgment was delivered in 2010 with only the period of disqualification to be determined early in 2011. As the remaining two judgments are similarly important, **Illustration 2.2.1** and **Illustration 2.2.2** below discuss aspects of each of these judgments. The latter disqualification case will now proceed to plenary hearing before the High Court.

49 Under Section 160(2) of the Companies Act 1990 (as amended).

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

Illustration 2.2.1: Director of Corporate Enforcement v. Barry Seymour

In July 2004, the Report of High Court Inspectors into bogus non-resident accounts and other improper practices at National Irish Bank Ltd ("NIB") and National Irish Bank Financial Services Ltd was published. Having considered the Report's findings of responsibility, the Director initiated High Court disqualification proceedings against nine former NIB senior management personnel in mid-2005. One of those persons, Mr Barry Seymour, had held the position of Executive Director from 22 April 1994 to 15 July 1996. The proceedings under Section 160(2)(b), (d) and (e) of the Companies Act 1990 ("the 1990 Act") were vigorously defended by Mr Seymour.

Ultimately after a six day hearing in 2007, the High Court disqualified him for nine years and awarded the Director his costs. Mr Seymour then appealed the decision to the Supreme Court, and the disqualification and costs orders were stayed pending the outcome of the appeal.

On 6 December 2011, the Supreme Court unanimously allowed Mr Seymour's appeal and ruled that a disqualification order was not appropriate in the case. The Court found that the High Court had failed to make clear findings against Mr Seymour in accordance with the applicable test for disqualification, save possibly for one ground. The Court held inter alia:

"It is difficult to see how the test as established in this jurisdiction could be found to support an Order, save, as mentioned earlier, in one respect to which I will return. I know of no authority, case law or academic writing which includes responsibility arising, ipso facto, by virtue of a person being an executive director, such as to generate, automatically, an 'ultimate responsibility' liability, and consequent disqualification order of such a draconian nature…

Nevertheless, there remains the important issue of the failure to ensure the DIRT payments were properly returned to the Revenue Commissioners, in compliance with the Finance Act, 1986. This relates to both 'bogus non-resident accounts' and 'Special Savings Accounts'. The evidence makes it clear that the figures were generated automatically by computer, at branch level, and then remitted to head office, and presented for signature with an averment that they were correct and accurate. These returns were never checked by the appellant as to their accuracy or correctness, even though it was clear that there were continuing failings in both non-resident accounts and special savings accounts, but were rather signed and presented on the assumption that they were correct, and were not so. They therefore, on their face, breached the specific terms of the 1986 Act. Although the appellant did not appreciate the possible retrospective tax issue, it was essential that such returns were not made on the basis of a representation to the Revenue that they were correct and accurate and in time. This was a grave failure."

After a further hearing in early 2012, the Supreme Court exercised its discretion under Section 160(9A) of the 1990 Act and restricted Mr Seymour for five years effective from 6 December 2011. The Court also awarded the Director 50% of his High Court and Supreme Court costs in the case.

A further five appeals of former senior National Irish Bank managers were awaiting hearing at the end of the year, one of which was a new appeal initiated against a nine year disqualification term imposed by the High Court in 2011 against a former chief executive and director of the Bank.

A final disqualification case involving a former National Irish Bank manager was also still ongoing at High Court level at end-2011.

Illustration 2.2.2: Director of Corporate Enforcement v. Michael and Thomas Bailey

In 2006, the ODCE initiated High Court disqualification proceedings against Mr Michael Bailey and Mr Thomas Bailey, the directors of Bovale Developments. Prior to the hearing, the Respondents commenced a legal challenge to the admissibility of certain ODCE evidence which included reliance on certain findings in the Flood Tribunal Reports.

Following judgment by the High Court in 2007, the matter was appealed, and in July 2011, the Supreme Court gave judgment in the matter confirming, inter alia, that the findings of tribunals of inquiry could not be used in later litigation. In his judgment, Mr Justice Hardiman referred to the leading case of Goodman International and Lawrence Goodman v. The Honourable Mr Justice Liam Hamilton, Ireland and the Attorney General [1992] 2 IR 542 as follows:

> *"There is no doubt that the core of the passage from Finlay C.J. to which the Director of Corporate Enforcement objects is the statement that:*
>
> > *'[the finding of a tribunal] either of the truth or the falsity of any particular allegation which may be the subject of existing or potential litigation, forms no part of the material which a court which has to decide that litigation could rely upon. It cannot either be used as a weapon of attack or defence by a litigant who in relation to the same matter is disputing with another party rights arising from some allegation of breach of contract or illegal conduct or malpractice'.*
>
> *It is that passage, quite specifically, which prevents the deployment of the Tribunal's findings as a weapon of attack in the hands of any litigant, here the Director of Corporate Enforcement.*
>
> ***Legal nature of a tribunal.***
>
> *In the words, not of Finlay C.J. but of Costello J. (as he then was) who gave the judgment of the High Court in* ***Goodman****, the finding of a Tribunal of Inquiry is:*
>
> - *not imposing any liabilities or effecting any rights (p.557),*
> - *its conclusions merely have the status of opinion and 'this opinion is devoid of legal consequences' (p.557),*
> - *a body whose findings are 'sterile of legal effect' 562 and*
> - *whose purpose is 'merely to enquire and report' (ibid).*
>
> *Elsewhere it is found that the function of a tribunal of inquiry is:*
>
> > *'To make a finding of fact, in effect, in vacuo and to report it to the legislature (590)'."*

Nine other 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. Details of the cases which resulted in the imposition of a disqualification or restriction on one or more directors are contained within **Appendix 2.2.3** to this Report. The circumstances of one of the cases involved are contained in the following **Illustration 2.2.3**.

One set of ODCE disqualification proceedings was struck out after the directors in question reinstated two dissolved companies to the Register following the service of the proceedings and swore affidavits that another five dissolved companies had no debts. These affidavits exhibited audited financial statements for each of the companies in question.

At end-2011, a further five newly initiated disqualification actions were awaiting hearing.

Illustration 2.2.3: Director of Corporate Enforcement v. David, John and Matthew Hogan

In 2009, the ODCE received a complaint from a creditor of Shannonside Mushrooms Limited ("Shannonside") relating to an unsatisfied judgment. Following investigation, it transpired that the directors of Shannonside were directors of other companies, all of which had been struck off the Register of Companies for failure to file annual returns. Prior to strike off, the latest accounts filed in the Companies Registration Office in respect of all four companies showed that each had outstanding creditors. ODCE enquiries revealed that the creditors included the Revenue Commissioners, the Department of Social Protection and other third parties, and the directors furnished no evidence to indicate to what extent the sums due were discharged at the time of strike off. Other aggravating factors were also placed in evidence before the Court, but it gave no obvious weight to these matters in its Judgment.

In December 2011, the Court disqualified three directors, John Hogan, David Hogan and Matthew Hogan, for five years with a stay on the order in respect of the former two directors for a period of twelve weeks. The Court also awarded the Director his costs to be taxed in default of agreement on a joint and several basis.

Two other ODCE cases against liquidators who had repeatedly failed to present overdue reports to the Office on the companies of which they were liquidators also concluded successfully. In both cases, the liquidators submitted their reports after the service of the proceedings but in advance of the High Court hearings.

Liquidator Restriction and Disqualification Applications

As mentioned earlier in this Report, liquidators are obliged to take restriction proceedings against the directors of insolvent companies in liquidation unless relieved of that obligation by the ODCE.[51] Liquidators proceed with restriction or disqualification proceedings before the High Court in a minority of cases.

During 2011, the High Court reached decisions on 88 restriction applications (98 in 2010). One or more directors were restricted or disqualified in 82 cases (97 in 2010) representing 93% of the total (99% in 2010). No restriction orders were made in six cases (one in 2010), and these are identified in **Appendix 2.2.4**. These outcomes suggest that the ODCE has continued to successfully identify the cases meriting consideration by the High Court.

Arising from liquidator proceedings, 119 individual directors were restricted (156 in 2010); nine directors were disqualified (eight in 2010), and no orders were made against thirteen directors (six in 2010). This means that the Court made orders against 91% of the 141 directors (96% in 2010) that were the subject of restriction or disqualification proceedings during 2011.

In relation to the liquidator restriction proceedings that concluded before the High Court in 2011, **Appendix 2.2.5** to this Report outlines the outcome of the cases where restrictions were made and the identity of the persons in question.

Appendix 2.2.6 identifies the nine directors of insolvent companies who were disqualified by liquidator proceedings during 2011 and the related periods of disqualification. The accompanying **Illustration 2.2.4** provides brief outlines of the circumstances in these cases. The ODCE is gratified by the continuing willingness of some liquidators to bring disqualification proceedings in respect of serious detected misconduct, and the Director expects that further similar cases will be taken in 2012.

51 Section 56 of the Company Law Enforcement Act 2001.

Illustration 2.2.4: Insolvent Companies – Liquidator Disqualifications in 2011

Mr Michael Lynn, a director of Kendar Holdings Ltd, was disqualified for 12 years. The High Court heard evidence that Mr Lynn fraudulently gave multiple undertakings to financial institutions in order to obtain loans for property acquisitions, and they sustained large losses as a result. He used company funds to meet personal lifestyle costs and the significant marketing and advertising expenditure of his overseas companies. Mr Lynn acted to put assets beyond the reach of creditors. Hundreds of property buyers who paid large deposits have been unable to contact him or recover their funds as he has resided abroad since December 2007 in a bid to avoid serious civil and criminal proceedings. Mr Lynn was also struck off the Roll of Solicitors and ordered by the Court to pay €2 million in fines to the Incorporated Law Society.

A ten year disqualification was imposed on Mr Michael (Gerry) O'Shea, a director of Bacus Cafes Ltd. The High Court heard evidence that he sold company assets in the weeks prior to the company being wound up by Court Order which prevented the liquidator using these proceeds for the benefit of creditors. Mr O'Shea used over €100,000 of company funds to discharge the debt of another company of which he was a director. He also failed to maintain proper books and records in the company.

Mr Jas Kalsi, a director of MPS Global Ltd, was disqualified for eight years in respect of this property investment company. The Court held that Mr Kalsi was knowingly a party to the carrying on of the business in a reckless manner with intent to defraud creditors and ordered that he should be held personally liable for debts and liabilities to the maximum sum of €4,491,444. The liquidator was granted a 'freezing order' over Mr Kalsi's personal assets. The Court heard evidence that his failure to keep proper books of account contributed to the company's inability to pay all of its debts and resulted in substantial uncertainty as to the assets and liabilities of the company and substantially impeded the orderly winding up of the company's affairs.

Six and five year disqualifications were imposed on two directors of Acuspread Ltd, Mr David McWeeney and Mr Noel Mackin respectively. The High Court heard evidence that they ought to have known that the company was trading while insolvent well before its liquidation in May 2010 given the 16 judgements registered by its creditors as far back as mid-2008 and the incidence of bounced cheques. There was a large body of unsecured creditors with debts totalling over €528,000. A number of depositors for the company's spreader machines did not receive them, and their deposits were used to fund other company expenses. There was also poor accounting for many cash transactions and a failure to cooperate fully with the liquidation.

A disqualification order 'for such period as to the Court seems appropriate' was made against Mr Patrick Mahony, and a five year restriction was made against Mrs Ita Mahony, both of whom were directors of Boxform Ltd, a company in the construction sector. It is understood that a further Court application will be made by the liquidator to determine the appropriate period of disqualification of Mr Mahony. The Court held that the directors had made certain payments to a bank which were deemed to be a fraudulent preference of the company's creditors and consequently invalid. Both Patrick and Ita Mahony were declared by the same Court Order to be personally liable without any limitation of liability for all of the company's debts and liabilities pursuant to Section 297A of the Companies Act 1963 (as amended) which relates to fraudulent or reckless trading. However, the Court ordered that the personal liability attaching to Mrs Mahony would not be enforceable if she were to file a sworn statement of affairs demonstrating that she had no personal assets of substance and undertook to inform the liquidator of any change in her position within the period of three years from the date of her disqualification. It is understood that she has since furnished a sworn statement of affairs to the liquidator.

Mr Dermot Doran, a director of Eamonn Doran Ltd, was disqualified for five years. The High Court heard evidence that the company traded while significantly insolvent with losses in 2005, 2006, 2007 and 2008 and that it was unable to meet its Revenue liabilities from July/August 2007. The liquidator believed that bad debts of €332,000 related to loans made to Mr Doran by the company. The director also failed to keep proper books and records which precluded the monitoring of its financial position.

A five year disqualification was imposed on Mr David Casey, a director of Keylogues Fabrication Ltd. The High Court heard evidence that Mr Casey had falsely attributed a lodgement of €105,000 to himself when in fact it had come from a trade debtor. He also had outstanding loans from the company of €95,538 at end 2007 which grew by €54,000 a year later, and this negatively impacted on the company's prospects.

Mr Joseph Bruen, a director of Phone-Pak Ltd, was disqualified for five years. The High Court heard evidence that the liquidation resulted from the escalation of substantial arrears in the company's account with its main supplier. This major creditor was owed in excess of €1.6 million and petitioned the High Court to wind up the affairs of the company. Several assurances including incorrectly prepared financial statements had been given to the creditor that failed to materialise.

Number of Restricted Directors at end-2007 to end-2011 inclusive				
End-2007	**End-2008**	**End-2009**	**End-2010**	**End-2011**
791	624	538	589	528

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-2011, 210 individuals stood disqualified on foot of High Court orders arising from company law breaches including five individuals who had been disqualified arising from their conviction for failure to notify their disqualification in another jurisdiction[52] and four who were disqualified on the basis of their convictions for having acted as a director while restricted[53]. A further 3,622 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[54]. Such convictions include, for example, convictions for fraud.

Overall, there was a decrease in the number of restricted persons from 589 to 528. This decline reflected the fact that the numbers who completed their mandatory five year restriction period in 2011 exceeded the numbers of newly restricted directors. The table above indicates the number of restricted persons at the end of each year since 2007.

Criminal Enforcement Actions

Five cases involving company law offences were successfully prosecuted in 2011 and resulted in convictions on 20 charges with a further two charges taken into account.

One of these cases resulted in the imposition of terms of imprisonment on the accused which was the first occasion that such a penalty was implemented. While a small number of company law convictions in the past had resulted in the imposition of penalties of imprisonment, these had all previously been suspended or overturned on appeal. **Illustration 2.2.5** below provides details of the case.

Illustration 2.2.5: Director of Public Prosecutions v. Kenneth Shanny

This investigation started following receipt of an extensive report from the Companies Registration Office (CRO). The CRO had received a defective company annual return which necessitated correspondence with the apparent presenter. However, the presenter denied that he had filed the return in question or had conducted the audit of the accompanying accounts. Following investigation, it transpired that Mr Shanny had filed the return and the false audited accounts. It was also discovered that there were instances of theft and fraud relating to the assets of the company involved.

This case was primarily investigated by the Gardaí seconded to the ODCE who were in a position, pursuant to Section 12(4) of the Company Law Enforcement Act 2001, to use both their normal Garda powers and those available to officers of the Director under the Companies Acts. Following referral of the investigation file to the DPP, Mr Shanny was ultimately charged with 16 offences, 13 under the Criminal Justice (Theft and Fraud Offences) Act 2001 and three under the Companies Act 1990. The company law offences related to Section 187 (qualification for appointment as auditor) and Section 242 (furnishing false information).

Following hearings in January and April 2011, Dublin Circuit Court convicted the defendant on two charges, one under each Act. Concurrent three year jail terms were imposed on each charge with the last year suspended on each. He will also be required to comply with a good behaviour bond for two years after his release.

52 Section 160(1A) of the Companies Act 1990 (as amended).

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

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

Two of the remaining five cases in 2011 related to companies failing to keep proper books of account[55] where convictions were obtained on a total of seven charges. One of these cases has since been appealed.

Another two prosecutions dealt exclusively with unqualified persons acting as auditors[56] and involved a total of 12 charges. The convictions imposed in one of these cases has since been appealed.

A sixth case involving charges of acting as an auditor while unqualified and providing false information to the Registrar of Companies was scheduled for hearing in early 2012.

Conclusion

As indicated earlier, the civil and criminal enforcement activity of the Office improved in 2011 notwithstanding the continuing redeployment of staffing resources to the investigation of certain events at Anglo Irish Bank and the large inflow of liquidator reports which must be dealt with within a statutory timetable.

This improvement resulted from the adoption of a number of measures in recent years to maintain a reasonable level of throughput in the enforcement area. These included in particular:

- a greater utilisation of general ODCE staff in taking witness statements in non-Anglo criminal investigations. Some 44 witness statements were taken in this manner in 2011. Garda staff continue to make themselves available for the interview of potential suspects;
- a re-distribution of responsibility among a small group of legal and other staff to profile and progress possible disqualification cases.

It is hoped that the 2011 level of enforcement activity can be maintained in 2012. However, the Anglo investigations will remain a significant priority for the year in terms of the completion of the Office's investigations and addressing any follow up requirements of the Director of Public Prosecutions in respect of the investigation files. Depending on the extent of such requirements, there may be some scope for the Office to refocus its resources on other priorities as the year progresses.

On the civil enforcement front and as mentioned earlier in this Report, a provision in the Finance Act 2011 has unwittingly affected the utility of information exchanges from Revenue to this Office. We are seeking to have this legal problem removed this year by way of a legislative amendment. In the absence of satisfactory change, this problem will curtail the Office's ability later in 2012 to identify dissolved insolvent company cases and ultimately to take disqualification actions with respect to their former directors in appropriate cases.

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

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