



CORPORATE RESTRUCTURING  
AND INSOLVENCY IN IRELAND 2011

A dramatic seascape featuring a lighthouse on the right, a dark sea with white-capped waves crashing against a breakwater of large, dark concrete blocks in the foreground. The sky is filled with dark, heavy clouds, with a bright sunburst breaking through a gap in the clouds in the upper center. The overall mood is powerful and intense.

WE'VE GOT THE  
**FULL** PICTURE



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# EXECUTIVE SUMMARY

# 1 | Executive Summary

*Tom Kavanagh* - Partner, kavanaghfennell



Welcome to the 2011 edition of 'Corporate Restructuring and Insolvency in Ireland' prepared by kavanaghfennell in association with [www.insolvencyjournal.ie](http://www.insolvencyjournal.ie).

## Getting us back on track

In 2011, Insolvency and Corporate Restructuring activity reached unprecedented levels. The sheer size and volume of cases continues to amaze us all, and the range of professionals engaged in this space is expanding to so many variations of 'asset manager', that it's difficult to keep track. The developing mechanisms such as Share Receivers, Pre-packs, Debt Sales are constantly being fine tuned to suit our circumstances. It's a full-time job keeping pace with the macro changes in the banking world, such as the establishment of Certus, merging of EBS and AIB, and INBS with IBRC, combined with the internal changes of management structures and relationship managers within each bank.

It's almost shocking to read of the Review of Insolvency events last year, because it's hard to believe that this all happened in just one year.

But the tide has got to turn sometime, and maybe winning the little battles we fight every day will start to build confidence, create some momentum, and the sooner it starts, the better.

I once heard a story of how they teach Formula 1 Drivers to avoid crashing into a wall when they lose control of their car on a bend at 200mph...the logic is that an untrained driver will stare at the wall in shock/disbelief and if the driver's focus is on the wall, it's 100% certain that

he'll hit the wall. So the driver is trained to stay as calm as possible with the utmost belief he will survive, focus on the gap, steer the car towards the gap and even if he can get it close...he might just do enough to save his life.

We all work in the distressed space; where even in the most challenging enforcement case, things don't have to be entirely negative. We can be insightful, hard working, creative, energetic, and by strong leadership and teamwork, we can get a positive result.

So for all of us, it's incredibly important that we demonstrate individual leadership, stay calm and focused and instill in ourselves the certainty that we will survive this storm. And if we can win the little battles, we can build a lot of confidence and that will put us on the right road... maybe not in a Ferrari, but back on track.

Contained in the report you will find the 'Review of Key Insolvency Events 2011' which brings you on a month-by-month basis through some of the key events and developments that took place in the corporate restructuring and insolvency market during a very eventful 2011.

We then examine some of the 'Insolvency trends and outlook for 2012' and provide detailed commentary on our 'Insolvency Statistics' including Total Insolvencies, Insolvency by Industry, Insolvency Types and Receiverships.

A team of Irish and International experts give their views on what is currently happening in the market and expectations for 2012.

We hope you find this review both useful and informative and as always, we welcome your feedback.



**REVIEW OF KEY  
INSOLVENCY  
EVENTS 2011**

## 2 | Review of Key Insolvency Events 2011



Below, we have a month-by-month look back at 2011 highlighting some of the more high-profile insolvencies and major corporate restructuring events during a very eventful year. At a corporate level, there were several major casualties while there was also an increased level of restructuring in the financial services and banking sector. – *Kenneth Tyrrell*, Insolvency Director, kavanaghfennell

2011

### EVENT

January

- Celtic Bookmakers – Receiver appointed over business with 47 outlets and 237 staff
- McInerney Homes – The High Court rejects the examinership scheme as it was unfairly prejudicial to the secured creditors, a decision which is then appealed to the Supreme Court
- Zumo Juices successfully emerges from examinership
- Receiver appointed to McEneaney Construction by NAMA
- Examiner appointed to Murray Nolan Ltd, which fails to exit examinership and Receiver subsequently appointed
- Bank of Scotland Ireland is merged into Bank of Scotland plc in the UK and ceases to trade in Ireland. Certus, a newly formed bank outsourcing services company, is appointed to provide customer support and administration services in Ireland & Northern Ireland.

February

- Receiver appointed to Tribune Newspapers
- Four Star Pizza successfully emerges from examinership

March

- Guardian Healthcare – Receiver appointed to 4 nursing homes
- Petmania – Examiner appointed to chain of 15 pet stores and successfully exits examinership in July saving 200 jobs
- Mao Restaurant Group successfully sold by Receiver
- Paddy Kelly – NAMA appoints Receiver over number of properties linked to well known developer
- Belgard Motors Decision – In a landmark judgment, the High Court ruling significantly reduces the usefulness of crystallising notices of a floating charge by removing the ability to use this to obtain preference over preferential creditors. A second judgment in the same case emphasises the need for debenture to be drafted properly to allow for the conversion of a floating charge.
- Total Fitness Group – Liquidator appointed at meeting of creditors to well known chain of gyms

2011

## EVENT

April

- Paddy McKillen – Supreme Court decision issues decision that NAMA legislation was constitutional but that Mr. McKillen should have been given an opportunity to make representations to NAMA before a decision to acquire loans was made
- Derek Quinlan has Receiver appointed to several of his properties by NAMA
- The first Allsop/Space distressed property auction takes place in Dublin with 99% of properties sold realising in excess of €15m. Three further auctions were held in 2011 yielding similar results.
- Share Receiver is appointed to the Quinn Group by Anglo Irish Bank

May

- Xtra-vision – Examiner appointed, which successfully emerges from examinership in July
- NAMA appoints Receiver over Glenkerrin Group in respect of loans of €650m
- Supervalu Churchtown – Receiver appointed over flagship store, which Musgrave's purchases in November
- M&J Wallace Ltd, controlled by TD Mick Wallace, has Receiver appointed
- P Elliot Group – Receiver appointed over building company
- Receivers also appointed to South Dublin Motors Ltd & Collier Kitchen Supplies Ltd
- AIB & EBS – agreement reached on proposed merger to form one of two “pillar banks”

June

- David Daly – a Statutory Receiver is appointed to a number of his properties on foot of debts of €457 million, legal action initiated by David Daly is settled later in the year
- ODCE Report 2010 published – details work on Anglo investigation and increased volume of reports from Liquidators in 2010 resulting in 8 Directors being disqualified and further 156 restricted
- Personal Bankruptcy Reforms – announced by Minister for Justice in the Bill-Publication of the Civil Law (Miscellaneous) Provisions Bill 2011 (“The Bill”)
- Insolvencyjournal.ie releases stats for H1 2011 indicating 819 insolvencies, an increase year of 3% on 2010
- D2 Property Management – Receiver appointed to investment vehicle controlled by developer David Arnold & financier Deirdre Foley

2011

## EVENT

July

- **Sean Dunne** – A Statutory Receiver is appointed to several of the high-profile developer's Irish assets
- **McInerney Homes** – Appeal dismissed by Supreme Court and fails to exit examinership. Receiver subsequently appointed
- **Superquinn Group** – In a "Pre-pack" type transaction, a Receiver is appointed by syndicate of Banks and subsequent examinership application is withdrawn after the proposed purchaser Musgrave's announces €10 million fund to reimburse certain creditors.
- **Court Service** issues its annual Report for 2010 noting an increase in personal bankruptcies and disqualification of directors but overall reduction in court liquidations
- **Anglo Irish Bank** renamed "IBRC" Irish Bank Resolution Corporation after its merger with Irish Nationwide Building Society
- **Bank of Ireland** avoids majority state ownership after a group of investors agreed to buy more than one billion euro in the bank's shares
- **Bowen Construction** – well-known building company goes into liquidation

August

- **Start Mortgages Decision** – identifies a lacuna in the legislation which effects the enforceability of secured creditors on certain mortgages prior to 1 December, 2009 that have certain rights under the Conveyancing Act, 1881.
- **Irish Medical Systems** – Examiner appointed

September

- **Corporate Restructuring Summit** – hosted by kavanaghfennell & A&L Goodbody in the National Convention Centre, speakers included Paul Gallagher SC, Alan Dukes (IBRC), Brendan McDonagh (NAMA), Justin Bickle (Oaktree Capital), Bernard Somers (Somers & Associates), Nils Melngailis (Alvarez & Marsal), Paul Duffy (Rothschild), Jon Moulton (Better Capital)
- **Kavanagh & Lowe v Lynch Decision** – On foot of an application by the Receivers including kavanaghfennell, this ruling provided welcome clarity on Start Mortgages decision in relation to mortgages reliant on the Conveyancing Act, 1881 but legalisation is expected in 2012 to remedy the lacuna identified in the Start Mortgages decision.

2011

## EVENT

October

- **Manor Park Homebuilders** – Receiver appointed to high-profile house builder
- Judgment obtained against **Mick Wallace TD** for €19m
- **Mr. Binman Group** – Receivers appointed after the High Court refused to confirm the appointment of an Examiner
- **McSweeney Pharmacy Chain** – Examiner appointed over 11 companies with 95 staff and debts of €17 million
- **CARB** issues Discussion Paper on the Regulation of Insolvency Practitioners in Ireland which is widely welcomed by established insolvency practitioners
- **Quinn Insurance** – Sale of business to Liberty Mutual Group / IBRC joint venture by joint administrators is completed

November

- **Sean Quinn** files for bankruptcy in Belfast, a move which is being disputed by the Irish Bank Resolution Corporation
- Liquidator appointed to **Murray's rent a car** business with 60 staff
- **Fastnet Line Group** – Examiner is appointed to business which operates Cork Swansea ferry line
- **Ashford Castle** – Receivers appointed to landmark five-star hotel

December

- **Garret Kelleher's, Shelbourne Developments Group** has Receiver appointed to prime Dublin properties in the Group
- **NAMA** publishes a review of the agency by the former Group Chief Executive of HSBC Holdings Plc, Mr. Michael Geoghegan
- **Insolencjournal.ie** releases total insolvency figures for 2011 indicating an overall increase of 7% from 2010 and 16% from 2009 in the total level of insolvencies. Corporate Receiverships are up 26% from 2010 while construction/property business still account for 25% of all insolvencies.



**TRENDS & OUTLOOK**  
FOR 2012

# 3 | Trends & Outlook for 2012

*Tom Kavanagh* - Partner, kavanaghfennell

Below, we present a month-by-month incisive commentary on the key trends in Corporate Restructuring and Insolvency at the current time and the outlook for 2012 in this sector.

## Liquidity

**Trend** - The lack of liquidity in the market is still a huge factor in investing in business and property, whether distressed or not.

**Outlook** - Market to remain volatile as it's hard to see how we can achieve a normal functioning market without a normal level of liquidity.

## Receiverships

**Trend** - The level of Corporate Receiverships is at a record high with headline cases including: Celtic Bookmakers, M+J Wallace, P Elliots, Manor Park, Mr Binman, Ashford Castle. The level of Fixed Asset Receiverships is also running at unprecedented levels (although we still have no formal public record to track them). The strategy adopted by Receivers to engage various types of Asset Managers to maintain value in assets is developing at an exponential rate, depending on the class of asset, e.g. Receivers are engaging Property/Project Managers, Architects, QS firms, Auctioneers, Hotel Operators, Pub Operators, Supermarket/Retail Operators, Nursing Home Operators, etc.

**Outlook** - The level of enforcement by banks is not expected to decrease anytime soon. We may see a move from property/construction dominated receiverships to the necessary financial restructuring of over-debted trading entities, either formally or informally.

## Statutory Receiverships (NAMA)

**Trend** - During 2011 NAMA continued its enforcement strategy on some of the larger developers including Derek

Quinlan, Glenkerrin, Paddy Kelly, Sean Dunne and others. NAMA has achieved several notable sales during 2011, particularly in the UK market but also including the sale of the Treasury developed Montevetro building to Google.

**Outlook** - With the establishment of a new Insolvency division in NAMA under Aidan O'Connell, it's expected that this enforcement strategy will continue at an increased pace as they work their way through the case load this enforcement strategy will continue at an increased pace as they work their way through the case load and receivership is the only option left if the borrower is not co-operative or does not present and adhere to an acceptable Business Plan. Asset disposals outside Ireland are expected to continue at the same pace while the domestic market presents a more difficult environment.

## Pre-packs

**Trend** - The Superquinn sale by the Receiver in a Pre-pack deal proved very effective, with the business and jobs preserved and it even allowed for a fund to be set aside for a payment to unsecured creditors. However, rather surprisingly there were no other prepacks reported during the year.

**Outlook** - There should be more Pre-packs this year, particularly as this mechanism is likely to develop in smaller trading cases that may be too small for Examinership.

## Share Receivership

**Trend** - The appointment of a Receiver over shares in the Quinn Group is a new trend in obtaining control of a large trading group, keeping the companies alive but changing control to the secured creditors.

**Outlook** - This technique has proved very effective and while not an everyday occurrence, it will be used again in these types of circumstances.

# 3 | Trends & Outlook for 2012

*Tom Kavanagh* - Partner, kavanaghfennell

## Examinerships

**Trend** - Examinership proved again to be a very effective mechanism for trading entities, such as Zumo Juices, Four Star Pizza and Xtravision. The Supreme Court's rejection of the McInerney Examinership proposals put the final nail in the coffin of Examinership for Building/Development companies. The McInerney case did clarify the concept that a secured creditor could be technically crammed down in the process, although at a practical level in light of strong resistance and objections over valuations, this is unlikely to happen without bank support. However, there are still relatively few cases going through this process and it remains inaccessible to smaller trading entities.

**Outlook** - Given the squeeze on personal spending power, we expect to see more trading Examinerships this year.

## Debt Restructuring

**Trend** - Up to now, there has been a marked reluctance by banks to write off or downsize loans.

**Outlook** - Banks are expected this year to work out restructuring models which can assist them to make arrangements with individual borrowers to get the best solutions. There will be no overall deal on debt forgiveness for borrowers, but a framework for entering individual deals can be worked out to suit each borrowers circumstances.

## Auctions and Auctioneers

**Trend** - The Space Allsop auctions were a successful new trend last year. Auctioneers are now taking straightforward Fixed Asset Receivership appointments on a regular basis.

**Outlook** - Both of these developments are expected to continue for the foreseeable future.

## Legal decisions

**Trend** - The Start Mortgages decision put the cat among the pigeons for all the banks in August and despite the helpful decision in Kavanagh V Lynch, the lacuna remains. The decision in Belgard Motors, refusing the crystallisation of a floating charge was a landmark judgement. The Paddy McKillen challenge to transfer to NAMA was largely successful.

**Outlook** - Legislation is imminent to rectify the lacuna in the Start Mortgages case and the Belgard decision is under appeal.

## Bankruptcy

**Trend** - An election promise by the coalition introduced further amendments in The Civil Law (Miscellaneous Provisions) Bill 2011 reducing the timeline for automatic discharge from 20 to 12 years and the period after which the bankrupt can make an application to Court for release from bankruptcy reduced from 6 to 5 years.

These changes may bring us closer to EU norms and address certain conditions of the EU / ECB / IMF bailout. Both release mechanisms still fall short of the 3 year period recommended by the Law Reform Commission and 12 month period currently in operation in the UK. This, plus the fact that many of the recommendations of the Commission have not been implemented still creates an attraction for bankruptcy tourism.

**Outlook** - Once final amendments have been made to the legislation, substantial increases in the number of Irish Bankruptcies / Personal Insolvencies can be expected. However, further substantial reductions in periods may bring a public backlash as many of the developers and businessmen perceived as being to blame for Ireland's current economic difficulties may choose to engage in the process and walk free from their debts.



**IRISH** INSOLVENCY  
STATISTICS  
ANALYSIS & COMMENT

# 4.1 | Total Insolvency Stats - Analysis & Comment



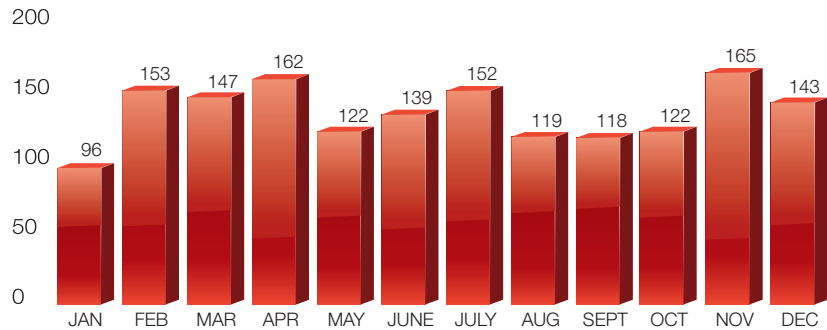
This section of our Annual Review looks in detail at the various statistics and trends for the various forms of insolvency including:

- Total Insolvencies
- 2011 Breakdown by Insolvency Type
- Total Insolvencies by Industry
- Total Receiverships

## Methodology

Our statistics are based on the most up-to-date information and statutory filings available from the Companies Registration Office. Insolvencyjournal.ie monitors, collects and collates this information on insolvency statistics and it is uploaded for viewing on a daily basis. Our annual review aggregates all the insolvency statistics from 2010 based on the most up-to-date filings.

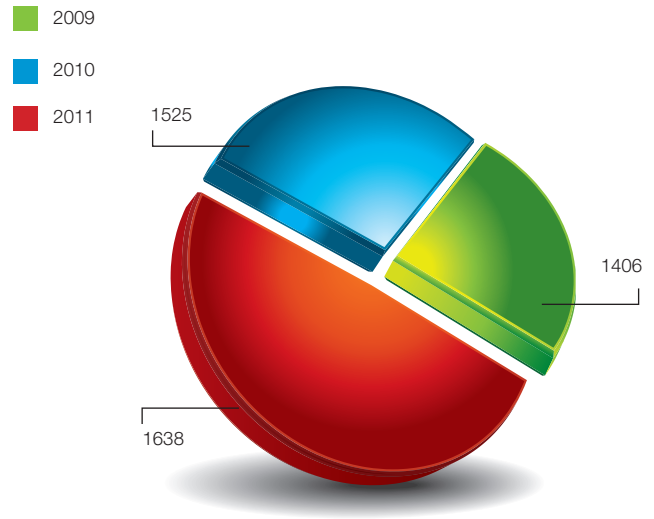
### Total Insolvencies 2011 by month



Corporate insolvencies for 2011 have totalled 1,638. This total shows a 7% increase on the figure of 1,525 for 2010 and over 16% increase on 2009 figures.

2011 proved to be a very challenging year for Irish businesses as total corporate insolvencies continued to rise and were very much in line with our predictions at the start of the year.

### Total Insolvencies 2009 / 2010 / 2011



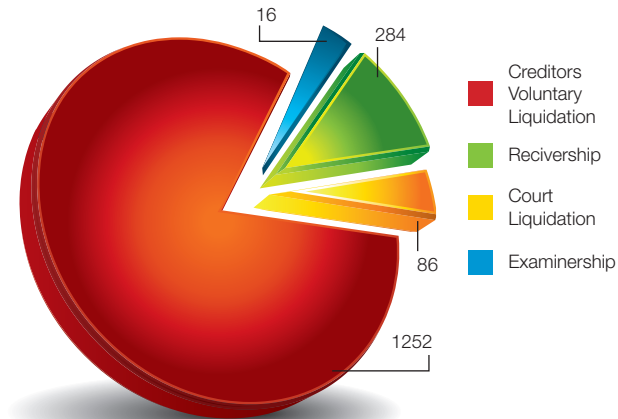
2012 will no doubt be a very difficult year for both hospitality and retail sectors. Recent budget changes to vat rates and the failure of Government to deal with upward only rent reviews will have a significant impact on both these sectors. We would anticipate total insolvencies for 2012 to be slightly higher than 2011.

*Ken Fennell* - Partner, kavanaghfennell

\*Please note: for the purposes of the statistics, grouped companies have been counted as one insolvency.

## 4.2 | Analysis by Insolvency Type & Industry

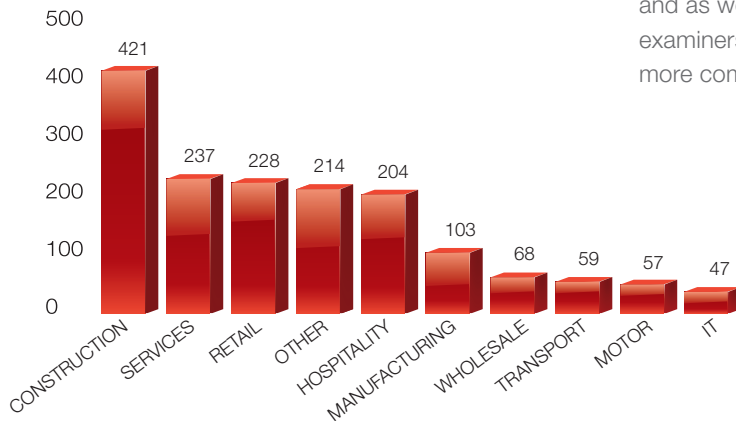
### 2011 Breakdown by Insolvency Type



The number of liquidations during 2011 totalled 1,338; this includes both Creditors Voluntary Liquidations and Court Liquidations and accounts for 82% of all insolvencies for 2011. CVLs continue to remain the most prevalent form of insolvency in the Republic of Ireland.

The low number of examinerships continued during 2011 and equalled the total of 16 for 2010. During the year, however, there were examinership failures for McInerney's and Mr. Binman Group which both had receivers appointed. The Xtra-vision examinership was successful with the group agreeing variations of their lease agreements.

The continuing low number of examinerships is worrying and as we have previously pointed out changes to the examinership legislation is urgently needed to encourage more companies in difficulty to avail of this procedure.



### Insolvencies by Industry

Once again, Construction was the hardest hit sector accounting for 26% of total insolvencies. However, there was a slight improvement in year-on-year figures, with an 11% decrease from 472 insolvencies in 2010 to 421 in 2011. A welcome improvement considering construction has suffered the worst hit since the recession began in 2008.

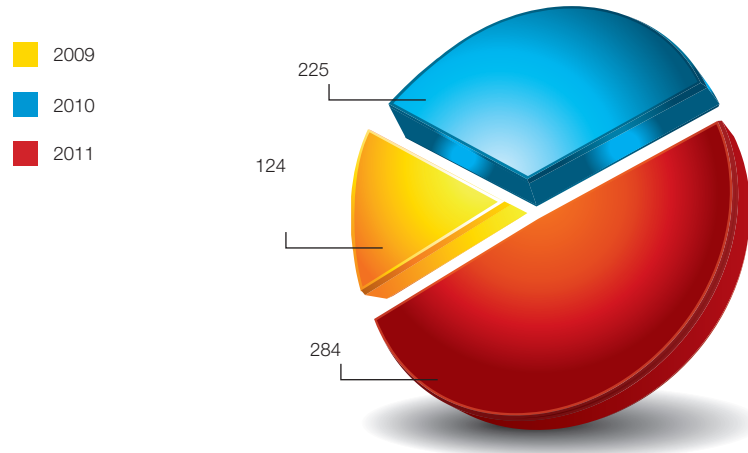
The Retail industry accounted for 228 of the total insolvencies up 29% from 2010 total of 177; however, these figures only include corporate insolvencies and do not take account of sole traders or partnership failures, of which there are no official statistics available.

The increase in retail insolvencies is not surprising given the continued weak consumer sentiment, a tough budget and continued uncertainty regarding employment.

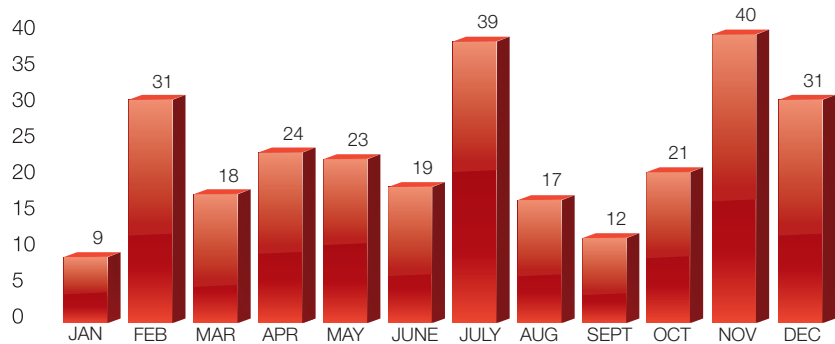
The Hospitality sector also continued to suffer in 2011. The total number of hospitality insolvencies reached 204 a 5% increase on the 2010 figure of 194. Some of the hotels that went bust include; Shannon Oaks Hotel, West County Hotel, Shandon Hotel and more recently the renowned Ashford Castle Hotel in Kong, Co. Mayo.

## 4.3 | Total Receiverships Stats - Analysis & Comment

Total Receivership  
2009 / 2010 / 2011



Total Receiverships  
2011 by month



Corporate receivership totals for 2011 were 284, an increase of over 26% compared to 225 in 2010. However these statistics do not include Receiverships over assets held in personal names and partnerships. As there are no formal notices required for these cases, it is difficult to judge the quantum, however, there continues to be a significant increase in these types of appointments.

During 2011, NAMA showed they are prepared to move against borrowers when they believe it will result in more beneficial recoveries for the tax payer. Some Statutory appointed receivers by NAMA for 2011 included: Whelan's Quarries and Bowen Construction. NAMA also moved in on developers such as Sean Dunne, Grehan Brothers, Paddy Kelly and Derek Quinlan during the year.

A bright sunburst in a blue sky with clouds. The sun is positioned in the upper center, creating a starburst effect with many rays of light. The sky is a deep blue, and there are several white, fluffy clouds scattered throughout, particularly on the left and right sides. The overall scene is bright and clear.

**EXPERT** COMMENTS

## 5.1 | Personal Insolvency Update

*Willie O' Grady* - Partner, O'Grady Solicitors

The most significant amendment to the Act is to Section 85 which sets out the circumstances in which a Bankrupt may be discharged. The Act now provides for an automatic discharge after a period of 12 years.

Any property of the Bankrupt which remains vested in the Official Assignee in Bankruptcy at this date shall be returned to the Bankrupt and such property will re-vest in the Bankrupt for his own use and benefit. The Debtor will be discharged from Bankruptcy, a line will be drawn in the sand, and he will be free of his historic debts.

The 2011 Act also introduces a new "5 Year Rule" which provides that a Bankrupt may apply to Court for an Order discharging him from Bankruptcy after a period of five years. In order to avail of this provision, a Bankrupt must be in a position to prove that he has realised his Estate in full, paid the costs, fees and expenses of the Official Assignee, paid his Preferential Creditors in full and that he has disclosed all of his After Acquired Property. The Court must also be satisfied that it is reasonable and proper to discharge the Bankrupt.

There are also significant amendments to Sections 57 and 58 of the Bankruptcy Act which now renders invalid every Conveyance or Transfer of property, and every Charge created against property, which is carried out by an individual who is subsequently adjudicated Bankrupt within 1 year of the date of the Conveyance, Transfer or Charge.

### Proposed Reform in 2012

We will see further reform of our Bankruptcy Legislation in 2012 with the publication of a Personal Insolvency Bill. The Memorandum of Understanding - which the Irish State entered into with the EU/IMF - contains a commitment to publish this piece of legislation before the end of March 2012. It is not envisaged that the Personal Insolvency Bill will reduce the Bankruptcy period to 12 months in line with our UK neighbours rather, we anticipate that the Bill will follow the Recommendations contained in the Law Reform Commission Report of December 2010 which proposed, amongst other matters, an automatic discharge from Bankruptcy after three Years together with the abandonment of the preferential status afforded to the Revenue Commissioners in the Bankruptcy process.

### COMI and Bankruptcy Tourism

2011 also saw a number of high-profile Irish debtors apply for Bankruptcy related Orders in other jurisdictions. Mr Sean Fleming successfully emerged from the Bankruptcy process in the UK after a period of 12 months, others applied to the High Court of Justice in the United Kingdom and obtained Interim Orders of Protection with a view to putting together a formal Scheme of Arrangement with their Creditors and most recently, Mr Sean Quinn petitioned for his own adjudication in Bankruptcy before the High Court of Justice in Northern Ireland.

## 5.1 | Personal Insolvency Update

*Willie O' Grady* - Partner, O'Grady Solicitors

The origin of this “Bankruptcy Tourism” lies in the European Insolvency Regulations which state that Insolvency Proceedings may be commenced in the debtors Centre of Main Interest (COMI). The law of the Country in which the Proceedings are opened will determine the conduct and duration of the Bankruptcy process. Thus, if you can establish that your COMI is, for example, the UK, then there is no reason why you cannot apply to one of the Bankruptcy Courts in Northern Ireland or England for an Order of Adjudication and thereby benefit from the significantly shorter Bankruptcy period of 12 months.

While there is no definition of COMI in the Regulations themselves, Recital 13 states that it should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. While many Irish debtors have travelled to the UK and successfully obtained Bankruptcy Orders, there are other individuals who are facing a considerable challenge by their creditors, particularly financial institutions. One Debtor is currently facing a significant challenge by Danske Bank t/a National Irish Bank and, as has been widely reported, Irish Bank Resolution Corporation (IBRC) (formerly Anglo) has sought to annul the Bankruptcy Order obtained by Mr Sean Quinn in Belfast on the 11th November last, which they have now succeeded in doing. Whilst this latter case is a high profile matter, given the large sums of money and the individual involved, the challenge by IBRC is perhaps indicative of the attitude being adopted by creditors, particularly financial institutions, to Bankruptcy tourism.

### Position with Pensions

Aside from the 12 month Bankruptcy period, there is another reason why a debtor may seek to establish his COMI in the UK. Following the enactment of the Welfare Reform and Pensions Act, 1999 the pension entitlements of a debtor, arising from tax approved pension schemes, will fall outside the Bankruptcy process in the UK and will not vest in the Official Receiver for the benefit of creditors. The position is not so clear cut in this jurisdiction. While it is often assumed that the pension entitlements of a Bankrupt do not vest in the Official Assignee, this is not necessarily the correct position and, in certain circumstances, pension entitlements due to a person adjudicated a Bankrupt in Ireland will be considered to be property which vests in the Official Assignee.

Section 36 of The Pensions Act 1990 vests in the Trustees of any pension scheme, in respect of preserved benefit or contributory retirement benefit, a discretion to pay any benefit which may arise to the member or such other person as specified. The absolute prohibition is not free from doubt and is subject to judicial interpretation

In addition, an Approved Retirement Fund (ARF) is deemed to be an investment product and the assets of a Bankrupt in an ARF will vest in the Official Assignee to be realised and distributed for the benefit of the Bankrupt's estate subject to any prior rights or claims.

Determining the status of pension entitlements within a Bankruptcy in this jurisdiction is complex and we anticipate that questions on this issue will come before the Bankruptcy Court in 2012 for judicial determination.

## 5.2 | An International Perspective - SME's

*Nick Hood* - Chairman, BTG Global Network



Sitting in London amid the flat-lining wreckage of Britain's economic recovery and bemoaning how hard the slowdown is hitting our SME's, it's natural to question whether things are the same around the world and in particular in Europe, where

politicians are busy turning a financial crisis into a potential global disaster.

Certainly, the situation in Denmark would suggest that the UK is not alone in seeing family-owned businesses suffer. The Confederation of Danish Industry says that a quarter of all companies reported that they had little or no access to bank funding, following a regional banking crisis in which three lenders have failed already this year. Lending to small businesses has fallen by 25% since 2008.

Amazingly, even worse problems face the unimaginable hordes of Chinese SME's. For almost a year, they have been battling a severe liquidity crunch and impossibly high interest rates since the Chinese authorities imposed a relentless credit rationing regime on its banking sector. This has created a "shadow" loan market, with interest rates as high as 25%. In coastal Zhejiang's richest city of Wenzhou, some 90 business owners have disappeared, committed suicide or filed for bankruptcy, writing off \$1.6bn of bank loans in the process.

Wherever you look, the issues are neither falling sales nor shrinking profits, because SME's have an uncanny ability to tighten their belts and ride out tough conditions. The problem is access to sufficient working capital in a post-recessionary world, where bankers are extremely risk averse and their lending capacity is much less.

The UK's Office for National Statistics, published last month, show a disturbing picture of tightening credit for SME's in 2010. In every one of the 20 EU countries surveyed, the percentage of successful loan applications by SME's has fallen since 2007. The greatest drop was in Bulgaria, where 87% of applications were granted in 2007, but only 42% in 2010. But other notable casualties of restricted credit were SME's in Ireland and the UK, where failed loan requests rose from 1% to 27% and from 6% to 21% respectively.

Even the apparently steady ship of Dutch commerce saw unsuccessful applications climb from only 7% in 2007 to 23% in 2010.

Of course, these startling statistics could be explained away by some sense of reality returning to the credit assessment processes within the world's banks, reacting to the new economic situation and reflecting the inevitable switch from complete risk blindness to extreme risk awareness, which always follows a recession. It certainly seemed that back in the boom times it took a particular talent for incompetence to be turned down for a loan. But the awful truth is that Europe's SME's are being shut out of their traditional funding markets.

## 5.2 | An International Perspective - SME's

*Nick Hood* - Chairman, BTG Global Network

One major source of finance for SMEs has been the European Investment Bank, which lent €72bn to SME's via local banks in 2010 alone. But there are rumours that this programme is being cut back. Mainstream commercial lenders will struggle to fill this gap against a background of the €103bn recapitalization programme for European banks agreed at the G20 summit in Cannes and due to be completed by June 2012.

Inevitably, the performance of British SME's is compared unfavourably with Europe's economic powerhouses, France and especially Germany where the famed Mittelstand companies are held up as paragons of financial and commercial virtue. And maybe there are some very good reasons why they perform so much better.

A recent report by the CBI highlights some key differences between UK SME's and German Mittelstand companies. Only 10% of German family-owned companies are run by the eldest son, compared to 50% of UK SME's. Only 32% of the managers of middle-sized UK businesses (MSB's) hold a university degree. In Germany, 38% are graduates. And in an increasingly globalised business world where 46% of the UK's MSB's are exporters, only 3% of their managers were educated abroad, compared to nearly 10% in Germany and 6% in France.

So if UK SME's are suffering by comparison with some of their European counterparts, then the problem may be as much cultural as financial. But whatever the cause, 2012 looks like being a very bumpy ride for all but the cash-rich multi nationals, as Europe plunges back into recession and the USA economy wallows. For many family owned businesses, it will be the survival of only the fittest in a very unhealthy business world and there will be many more casualties.

## 5.3 | The Irish Property Market Outlook for 2012

*John Moran* - Managing Director, Jones Lang La Salle



Forecasting should always be treated with caution. At this point last year, we predicted an increase in transactional activity for 2011 suggesting that the prime investment market would lead the way. What actually happened was markedly different, as the

investment market was almost non-existent in 2011, compared to previous years. Upon writing this outlook, only €30m has been transacted in 2011, although a few schemes are close to transacting before the year end.

The Upward-Only Rent Review (UORR) hiatus was the main cause for investment market stagnation which no-one could have predicted. With the proposed introduction of a ban on UORR's in existing leases potentially impacting capital values by 20-30%, investors paused, awaiting further clarity before committing to investing in Ireland.

The market was forced to wait almost a year for clarification, effectively crushing the market up to December. Now that proposals have taken a U-turn with the government confirming in the Budget 2012 that UORR legislation will not be changed, it is hoped that investors will resume activity on Irish soil. The announcement in the Budget of a reduction in stamp duty for commercial property and capital gains tax incentives going forward should also encourage transactional activity to resume.

Over the last 12 months, property values across all sectors have continued to decline but at a significantly slower rate and hopefully they are close to bottoming out. Peak to trough prime capital values have decreased by 64% overall, with falls as great as 95% for development land. Hopefully, we can draw a line under 2011 and in

2012 values will start to at least stabilise so that the market can begin to recover.

Falls in values and activity are particularly apparent for retail, industrial and development land sectors which have not performed strongly this year. Lack of availability of finance, economic uncertainty, poor occupier demand and reductions in sentiment and spending have significantly impacted performance. We do not expect quick recovery of these sectors, and indeed at the start of 2012 we may see additional business closures and increasing pressure exerted on the market.

We are still hopeful that by this point next year the market will have picked up some momentum, although this will probably be at a slow pace. For offices, activity has remained strong for 2011 with strong levels of take-up exceeding totals for 2010 and a falling vacancy rate has continued throughout the year. Take-up has been driven by both new start-ups and FDI, particularly technology firms and we anticipate that this trend will continue into 2012. It is expected that the office market will remain steady throughout next year.

We are also witnessing a pick up in transactions generally via the Auction route and there are encouraging signs that if priced correctly, properties finally have a market.

With significant amounts of property currently under the arms of NAMA and non-NAMA banks, we expect the continued release of distressed assets onto the market in 2012. With low values and high yields across the sector, the returns currently available are hard to ignore and it will be interesting to see these tested by market activity in 2012.

## 5.4 | The Irish Market - A Borrower's Perspective

*Bernard Somers* - Principal, Somers & Associates



It's 2005 and the wife has purchased her much desired pied-à-terre in France with some of the proceeds from the equity release on the Leitrim property. Joint and several guarantees with the other guys in the consortium for the big Dublin development

investment seems a small risk particularly as zillionaire Pat will be around to pick up any shortfall. Anyway not much chance of a shortfall there because Pat knows all there is to know about property and he is such a great character. The economy is going gangbusters and it is the right time to expand the business. Halcyon days, a new economic paradigm has been discovered.

Halcyon days indeed. It's 2012 and the business is struggling but alive. Pat wasn't as wealthy, crafty or as knowledgeable as he let on, there is no market for the Leitrim property and the wife hates everything about the place in France. Even the cat has sloped off, the kids say it was one kick too many. It no longer feels like Groundhog Day, more like Groundhog Year. Got through 2009, stumbled through 2010, staggered through 2011 but 2012 and beyond looks impossible. Only a perusal of *The Ballad of Reading Gaol* relieves the feeling that it could not be worse. Oscar could do misery well. Is it all hopeless?

Not necessarily, despite impressions to the contrary the financial institutions are generally supportive of businesses and individuals, even those in distress. The support may be difficult to achieve and temporary in nature. It is often criticised as kicking the can down the road. However, support is better than the alternative and can offer some hope for the future.

The problem is cash or more accurately the lack thereof. There is no chance that a bank is going to lend further into a bad situation. Being able to pay interest and also amortise some debt is to be in a good position and just being able to pay interest is unlikely to cause a borrower to be turfed out on the street. The real problems bite when there is just no cash to pay anything. No cash and being uncooperative makes for an impossible situation. The absolute minimum criterion for some relief is cooperation. It can go a long way.

The long awaited radical reform of the bankruptcy laws is still long awaited but there is a reasonable expectation that change is on the way. Some borrowers have gone to the UK with the intent of establishing their COMI there. A small number have entered bankruptcy in the UK as they can see no future in continuing to try to resolve their difficulties in Ireland. Not a great solution but a solution nonetheless. It would be better if it could be done sensibly in Ireland.

Lurking in the shadows is the likelihood that Irish loans, particularly distressed loans, will be bundled and sold by some financial institutions to distressed debt specialists. It can be expected that this will occur later in 2012. Best to avoid being bundled.

If you have a serious debt issue you should take specialist advice and speak to and be cooperative with your lender. You will feel better and so will your cat.

## 5.5 | Bank Restructuring - Ireland and Europe 2011

*Tom McAleese* - Senior Director, Alvarez & Marsal Europe



Lehman Brothers hardly gets talked about anymore. It is a sign of how much has changed over the last three years that the Lehman collapse, which most people consider triggered the financial crisis, has largely disappeared from public consciousness.

Few people even noticed that Lehman passed a huge milestone recently, when the final scheme of arrangement of the failed banking giant was approved in a New York court.

It was a grim reminder of the scale of the Lehman catastrophe but also a reminder of the role of the bankruptcy system in dealing with such a far-reaching event.

“This is the biggest, the most incredibly complex, the most impossibly challenging international bankruptcy that ever was,” said presiding judge James Peck.

“Lehman may once have been a too-big-to-fail systemically significant global financial institution. But it was not too big to resolve in Chapter 11.”

### Crisis shifted to Europe

In Europe, however, the focus has long since shifted from the Lehman collapse to once-unthinkable questions surrounding the solvency of its banks – and even its governments. The epicentre of the global turmoil is now firmly established on European soil.

The picture across Europe is a mixed bag. Some countries are leading the way with proactive initiatives. Others, however, are relying on a more reactive approach and, in truth, not really dealing with the crisis. The recent European Banking Authority stress tests have again highlighted weaknesses in the banking system. Unfortunately, investors still fret that these weaknesses continue to be understated – as the tests did not take into account potential haircuts on banks’ holdings of sovereign debt.

### UK and Ireland leading the way

The UK and Ireland are leading the way on bank restructuring, although they have taken markedly different approaches.

The UK took full or partial control of a number of banks, including Northern Rock, RBS and Lloyds. It complemented these efforts with an Asset Protection Scheme to address loan losses and forced the sale of some banking assets to viable institutions.

Ireland, meanwhile, set up the National Asset Management Agency (NAMA) to acquire toxic property loans from banks. It nationalised all the country’s banks (excluding Bank of Ireland); created a two-pillar banking strategy built around Bank of Ireland and a merged AIB/EBS and instigated major deleveraging programmes.

## 5.5 | Bank Restructuring - Ireland and Europe 2011

*Tom McAleese* - Senior Director, Alvarez & Marsal Europe

### European lessons

The rest of Europe has yet to see intervention of this scale. Greece and Portugal are now being subjected to the rigorous stress-testing carried out in Ireland in early 2011. This will give clarity on loan losses, the additional capital required and the level of restructuring/consolidation needed.

With the crisis in its fourth year, inadequate capital and liquidity remain the key issues. We are likely to see European banks seeking more capital from governments; extensive deleveraging across the system; and wholesale bank consolidation and restructuring.

There is still much work to be done. It is to be hoped, however, that the lessons from Lehman and the actions taken by the UK and Ireland can be used as a road map to greater stability.

## 5.6 | Investing in Distressed Businesses in Ireland

*Jon Moulton* - Chairman & *Rob Asplin* - Director, Better Capital LLP



*"Children begin by loving their parents. After a time they judge them. Rarely, if ever do they forgive them." Oscar Wilde*

One of Ireland's most famous exports could quite easily have been talking about the aftermath

of the current economic crisis. In such times, the only certainty seems to be the fact that the fallout of recent times' extraordinarily irresponsible lending will be borne by our children and quite possibly our grandchildren and indeed outside of Ireland too.

The volume of corporate lending in Ireland between 1999 and 2007 increased by 528%, the rate of corporate insolvencies was below expectations and interestingly the birth rate decreased as well. The equilibrium shifted; greed outweighed the motivations of sex and fear.

This dire backdrop to the Irish economy should, in theory, create fertile ground for turnaround investors. It hasn't. Lenders' leverage tests don't matter, only cash generation seems to. The staggering disparity between Enterprise (debt + equity total value) and Equity Value means that share certificates are worthless and even though the power vests in the (in-breach) banking facilities, lenders are too concerned with the political fallout to act on them. This lack of supply, and the lack of acquisition finance reducing the demand, is resulting in stagnation – companies that need action are not getting it.

The relative reduction in corporate insolvencies highlights the fact that Darwinian Theory is not being allowed to take effect. It is no coincidence that the European countries with higher rates of corporate failure are those with the (relatively) stronger balance sheets – being Germany and France.

The volume of troubled businesses changing hands in Ireland is low, but infrequently deals are happening. Better Capital completed the acquisition of Calyx in September 2010 – a business which has undergone a successful turnaround and one which was, on any test distressed!

### Better Capital

Better Capital looks for turnarounds where operational realignment or change is required. In many cases, the necessary restructuring steps are already known to the management but they lack either the backbone or capital to make the difficult decisions.

A handful of profit-enhancing steps need to be identified very early on. If they aren't easily identifiable, then they may not exist.

Identifying the process to profit may well be easy, but successfully implementing it is most definitely not. Skilled and experienced turnaround operators are hard to come by. That's why Better Capital both employs them and calls on them, repeatedly. Most of the investment is to sort the companies out rather than to simply acquire things.

Whilst the economic, political and financial landscape is gloomy, opportunities do exist, but in the event that you can't find them – use your imagination...

*"Anyone who lives within their means suffers from a lack of imagination." Oscar Wilde*

## 5.7 | Investing in Distressed Assets in Ireland

*Justin Bickle* - Managing Director, Oaktree Capital Management (UK) LLP



Since the onset of the financial crisis very few assets in Ireland have actually traded, causing some short-term investors to lose interest in the market in favour of more executable transactions elsewhere in the Eurozone.

Experienced distressed assets investors ultimately seek certainty of execution and comfort that their 'margin of safety' or downside is protected, which can be difficult to achieve in a non-functioning or declining market. Establishing whether asset values have genuinely reached a floor is an almost impossible feat for any investor and the different value expectations of sellers may also prevent assets trading even at these low levels.

Confidence is key to the functioning of any market. In Ireland, there are recent examples of commercial and residential assets being offered for sale, often with vendor financing, and sometimes not. Staple financing can be essential to facilitate a transaction as otherwise it is difficult for distressed investors to make an equity type return. The relative scarcity of vendor financing has impeded successful transactions to date and is more to do with the non-functioning of the traditional bank lending market in Ireland since the financial crisis, rather than issues involving the quality of the assets in question.

Undoubtedly investors' different agendas will also determine which assets eventually transact. There are some international investors whose relatively low-return thresholds over the longer term mean that they are prepared to purchase 'dry' assets primarily for yield. Such investors are likely to target prime assets within the greater Dublin area given the strategic importance of the capital and the concentration of population and business activity there, rather than targeting assets in secondary locations or rural areas.

Other investors such as Oaktree are comfortable targeting distressed assets with an operational element which are likely to require additional working capital to complete their construction and/or require active asset management post-acquisition. Such additional capex and resources often result in lower initial entry levels than 'dry' assets, although including an overage payment or equity participation instrument to the vendor is often essential to bridging the valuation gap. The best distressed assets acquisitions are often tripartite arrangements between seller, purchaser and asset manager with a genuine ability to create and share value once the underlying market normalises or recovers over the longer term.

The problem of single asset sales where the seller is a financial institution and holds multiple assets of the same type is the 'read across' which the sales valuation then implies for the seller's other similar assets. The seller's provisioning (or lack thereof) and/or the impact on the seller's portfolio generally of creating a 'mark' on the seller's inventory of assets are factors which can often prevent a sales transaction occurring at all.

## 5.7 | Investing in Distressed Assets in Ireland

*Justin Bickle* - Managing Director, Oaktree Capital Management (UK) LLP

To mitigate this portfolio effect, distressed assets acquisitions are often undertaken on a 'pool' or portfolio basis. The attraction for the seller is the ability to sell more assets in one transaction, with a higher aggregate cash return for them, and a greater de-leveraging effect. The attraction for the buyer is often to gain access to higher quality assets which might not trade alone without having to acquire, and work out, lower quality assets. Portfolio sales of this type have been most prominent for assets held by Irish sellers outside Ireland and the question is whether this approach will also be adopted for assets within Ireland in the coming year as well.

The factor which differentiates Ireland from all other markets in the Eurozone from the distressed investors' perspective is of course the presence of NAMA. NAMA obviously controls more relevant assets than any other party in the Irish market and in certain asset classes, NAMA effectively *is* the market. How NAMA transacts and approaches assets disposals and over what timeframe is therefore central to how much assets acquisition activity takes place in practice.

NAMA have made it clear in recent months that they have no intention to conduct 'fire sales' of distressed assets in Ireland. This is perfectly understandable. NAMA have also confirmed that they have no wish to transact with asset purchasers at values below the level at which NAMA acquired those same assets (namely the NAMA transfer value). As asset values, however, continue to decline in an uncertain economic environment, both within Ireland and across the Eurozone, maintaining this discipline will be no doubt an important consideration for NAMA, but is likely to result in less transactions for distressed assets purchasers in the short term.

NAMA is also important to the functioning of the market from an exit perspective. The sheer size of NAMA and the weight of assets it holds also gives rise as to what might be characterised as 'NAMA flooding risk'. For the distressed investor, acquiring assets in Ireland from non-NAMA financial institutions might initially be attractive, although the risk of such assets acquisition without knowing exactly how NAMA will manage and/or dispose of its own assets and when, brings significant uncertainty both from an asset management, and an exit perspective.

Each of these considerations is likely to influence market behaviour in the coming year.

Note: The views expressed herein are personal to the author and do not necessarily reflect those of Oaktree Capital Management (UK) LLP and its affiliates

## 5.8 | Mergers and Acquisitions - Drivers of 2011 and 2012 Dealflow

*John Sheridan* - Director, Key Capital



On the whole, M&A activity in Ireland during 2011 has remained at a level similar to that of 2010. In total, 74 transactions (>€1m) were completed in 2011 with a cumulative value of €20.4bn.

This is on par with the 76 transactions completed in 2010

for an aggregate value of €18.7bn.

2011 saw increased economic uncertainty within the global financial community and in particular within the Eurozone countries. The reorganisation of the Irish banking sector continues to account for a substantial proportion of the €20.4bn worth of transactions in Ireland. Disposals and mergers within the Irish banking system totalled over €13.2bn in 2011 with the 98% acquisition of Allied Irish Banks plc by the National Pensions Reserve valued at €5bn alone.

As with 2010, trade buyers completed significantly more transactions than their financial counterparts. Unfortunately, this points to continuing difficulties with financial buyers having limited access to debt financing to part fund transactions. However, for cash flow positive growth and export oriented Irish companies, there will continue to be a strong demand within mid market Private Equity seeking to deploy funds raised in 2006/07. The sale of Cartrawler to ECI Partners for €100m is testament to this model.

From a sectoral perspective we expect to see a continuing trend in 2012 of M & A activity within the Irish food sector. Recent transactions include the sale of Premier Foods' Irish portfolio to Boyne Valley for €41m and the sale of Jacobs Fruitfield to Valeo Foods, both examples of a consolidation of strong consumer food brands.

Despite the recession, the Irish export economy has grown steadily leading to a number of notable transactions in particular stemming from the pharmaceutical and technology sectors. Strong valuations were achieved in the disposal of Elan Drug Technologies to Alkermes, Inc. for €668m, the acquisition of Norkom by BAE Systems for €180m and the sale of Data Electronics to UK listed Telecity for €100m. Earlier in the year, Key Capital advised on the export led 3rd party Apple accessory distributor, TNS Distribution to Irish owned PCH International for €28m. This deal demonstrated that strong prices can be achieved where local Irish entrepreneurial skills can be harnessed across a much larger global footprint.

## 5.8 | Mergers and Acquisitions - Drivers of 2011 and 2012 Dealflow

*John Sheridan* - Director, Key Capital

In the financial services sector, given the c.5.3% fall in the size of Irish Stock Exchange during 2011, we expect to see further consolidation particularly in the stockbroking space with a rationalisation of up to 50% of the current number of independent brokers within the next 12 months. However, there remains a strong interest in niche financial services companies particularly where a high degree of recurring income is achievable. For example, in 2011, Key Capital advised N.M. Rothschild on the acquisition of Elgin Capital LLP, the manager of four European CLO's with €1.4billion of leveraged loan assets. Following the acquisition of Elgin, Rothschild will manage over €2 billion of leveraged loan assets.

The Irish retail sector saw relatively few transactions given the austerity measures impacting on consumer spending. Hence, any transactions tended to be more of a distressed nature. Examples include the disposal by IBRC of its loan to Champion Sports to JD Sports and more recently the sale of A-Wear to the global retail restructuring house Hilco. We expect to see further consolidation and capacity taken out of the Irish Retail market in 2012.

Across all sectors within the domestic Irish market, the key driver of transactions in 2012 is likely to be one of consolidation where buyers will focus on the potential to extract cost synergies rather than making aggressive revenue growth assumptions.



**ABOUT**  
KAVANAGHFENNELL

## 6 | About kavanaghfennell

kavanaghfennell is a specialist Corporate Restructuring, Insolvency and Business Advisory Firm. Our firm has the largest dedicated Corporate Recovery & Insolvency teams in Ireland, with 3 Partners, 3 Directors and over 35 specialist insolvency professionals. The firm's partners – Tom Kavanagh, Ken Fennell and David Van Dessel have over 70 years combined experience in Corporate Recovery & Insolvency.

Our Business Advisory Division specialises in preparing Independent Business Reviews, Debt Restructuring and Forensic Accounting services to our clients. We are on all the major banks and NAMA panels.

On behalf of our institutional clients, we manage a distressed property portfolio at various stages of completion, with an associated debt of several billion euro. This demonstrates to our institutional clients our proven ability to deal with both large complex cases and small-to medium-size cases. Our portfolio of distressed asset spans nearly every county in Ireland and in the UK, demonstrating our ability to deal with a geographic spread of assets.

Over the last three years, we have been involved in over 450 insolvency and corporate recovery projects including Receiverships/Court Liquidations/Creditor Voluntary Liquidations/Examinerships and Informal Schemes of Arrangement.

We do not engage in audit services, thereby significantly strengthening our independence and reducing the risk of any potential conflicts of interest that may arise, particularly with larger borrowers.

### International Associations

kavanaghfennell is registered with the Chartered Accountants Ireland (CAI) and is licensed to carry out insolvency assignments in the UK. kavanaghfennell is the Irish Associate of leading UK Insolvency firm, Begbies Traynor, and is a member of Begbies Global Network (BGN).

kavanaghfennell is a member of the Turnaround Management Association (TMA) and 'R3', the London-based Association of Business Recovery Professionals.

### Expertise

- In association with the Chartered Accountants Ireland (CAI), this firm were the Authors of the Book 'A Practical Guide to Insolvency'
- We tutor on the Chartered Accountants Ireland, Diploma in Insolvency
- GradIreland Best SME Recruiter 2009 and 2010
- We are Associate Partners of Ireland's Annual 'Corporate Restructuring Summit' [www.corporaterestructuringsummit.ie](http://www.corporaterestructuringsummit.ie)
- Speakers at the CAI and Irish Taxation Institute Annual Conferences
- Regular speakers at CAI Insolvency Day Seminars

For further information on our firm, please go to:  
[www.kavanaghfennell.ie](http://www.kavanaghfennell.ie)  
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