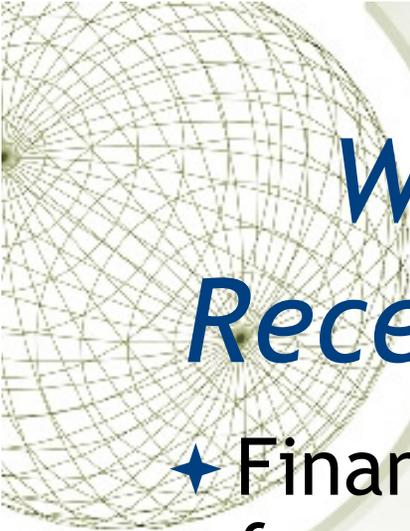


INVESTIGATING, PROSECUTING AND SENTENCING CORPORATE CRIMES: *KEY ISSUES*

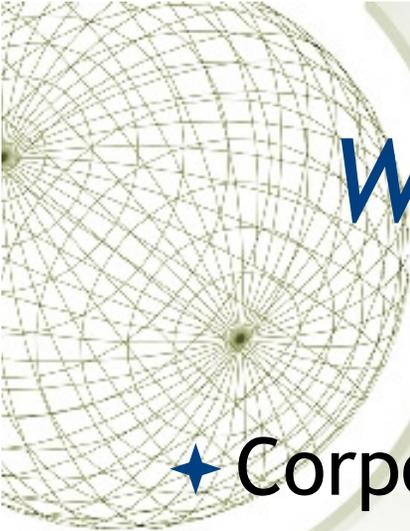
SHELLEY HORAN, Barrister-at-Law
Author of *Corporate Crime* (Bloomsbury Professional, 25 March 2011)

**30 MARCH 2011: IWLA/ACJRD Joint Conference -
the Second in the Series on White Collar Crime**



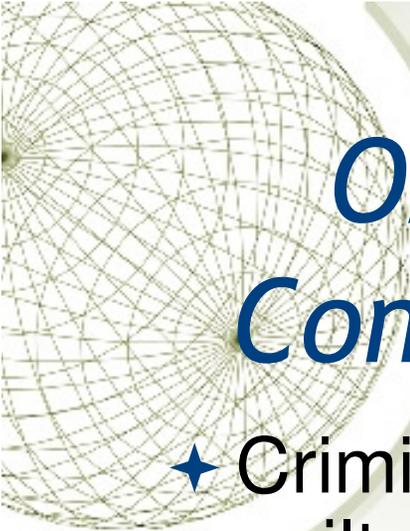
Why Is Corporate Crime Receiving So Much Attention?

- ★ Financial crises often uncover widespread fraud:
 - ★ “Ponzi schemes” in Glenageary / Donegal.
 - ★ Perceived illegal conduct in licensed banks.
- ★ Moriarty Tribunal Report = corrupt affiliation between business and politics for the purpose of securing a valuable licence.



Who Pays for Corporate Crimes? You Do.

- ★ Corporate Crime is not “Victimless”.
- ★ Taxpayers pay for
 - ★ economic consequences of insolvent banks,
 - ★ tribunals of enquiry,
 - ★ expensive investigations, and
 - ★ lengthy prosecutions.
- ★ However, you may also have:
 - ★ had shares in a collapsed bank,
 - ★ had your savings/pension wiped out,
 - ★ paid the higher price when price-fixing occurred, etc.....



Objectives Of Targeting Companies & Their Officers

- ★ Criminal law exists to punish those who are guilty of blameworthy conduct.
- ★ In modern society, corporate actions frequently result in grievous wrongs and social harm.
- ★ These wrongs take many forms, including:
 - ★ damage to the environment,
 - ★ injury or death of employees in the workplace, or
 - ★ by causing consumers to suffer losses from fraudulent financial or commercial conduct, such as price-fixing/market manipulation.



The landscape is Changing.

- ◆ Heightened public and political awareness of the harms corporate crime can have on society.
- ◆ Even greater will to detect and prosecute white-collar crimes.
- ◆ Multiple changes and much legislation intended for this area.



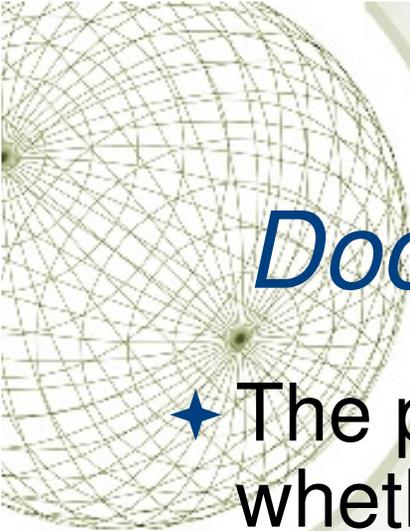
Issues: Investigating Corporate Crime

- ★ Expensive and lengthy process.
- ★ Investigators have to produce a:
 - ◆ coherent,
 - ◆ accessible, and
 - ◆ traceable record of the files of and interactions between suspects.
- ★ “3 separate investigations are ongoing into Anglo...which is expected to cost the taxpayer €25bn.” Irish Indo 25/03/11
- ★ Investigation is in its 4th year.



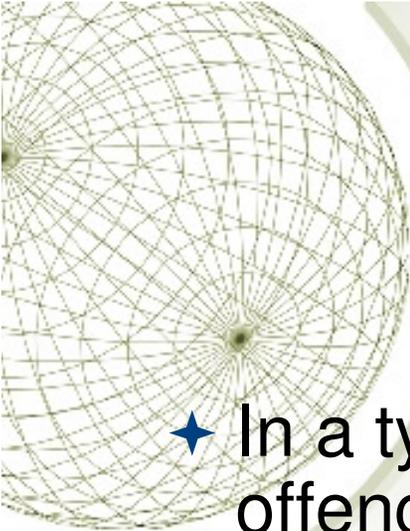
Barriers to Investigations

- ★ Finding and following a paper and/or electronic trail.
- ★ Identifying culpable individuals within a large corporate empire.
- ★ Structuring of corporate activity, eg keeping key information offshore.
- ★ Legal privilege.
- ★ Privilege against self-incrimination.
- ★ Numerous witness statements -some may be abroad -can take many days per person.
- ★ Processing numerous records contained in electronic data.

A decorative wireframe globe is positioned in the upper left corner of the slide. The globe is composed of a grid of thin, light-colored lines that form a spherical shape, with a central point from which the lines radiate outwards. The background of the slide is a light green color with a subtle, abstract pattern of curved lines and shapes.

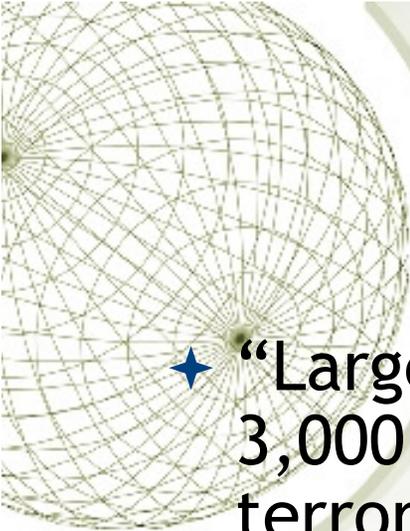
Documents and Investigations

- ★ The pervasiveness of documentation, whether in electronic or paper form, in corporate life is unquestionable.
- ★ Companies bear obligations to keep proper books of account, to file annual returns and to submit a directors' report each year.
- ★ Documentary evidence provides a window into the affairs of a company, displaying its day-to-day activities, which otherwise would be difficult to ascertain.



Documents Delay Investigations

- ✦ In a typical prosecution for fraud / financial offences, most of the evidence will be in documentary format:
 - ✦ Resolution of such cases hinges on the collection and analysis of documentary evidence.
 - ✦ Forensic accountants are frequently required.
- ✦ In 2009, the ODCE acquired **several million hard copy documents** in the Anglo investigation.
 - ✦ This has presented challenges in evaluating and managing the material.



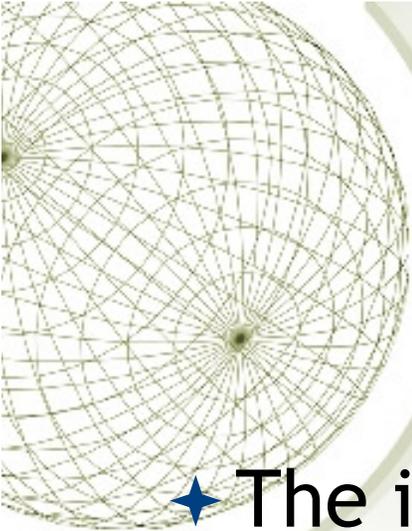
BCCI Investigation

- ★ “Largest bank fraud in world history” (over 3,000 criminal customers, money laundering, terrorist financing, etc)
- ★ 100 million documents found in London.
- ★ 9,000 boxes containing several million pages of documents (some handwritten notes in various arabic dialects) found in New York and Miami.
- ★ Even more documents in the Grand Cayman Islands.
- ★ And...most of the documentation had in fact been shredded, destroyed or removed from the bank’s head office in London and flown to Abu Dhabi in 1990.



ACCESSING COMPUTERS

- ★ Often investigators are faced with situations where documents are protected by very detailed password encryption.
- ★ Working out passwords can be a very time consuming process, which in turn may impede access to key files.
- ★ Personnel who hold the requisite information may have left the company, further inhibiting access to the documentation.
- ★ This issue arose in the investigation into certain financial conduct at Anglo.



Issues: Prosecuting Companies

- ★ The intangible nature of a company was considered to present obstacles to the prosecution of companies
- ★ Judges have unhelpfully referred to a company as:
 - ★ “an abstraction”
 - ★ “an impalpable thing” or
 - ★ a “metaphysical entity”.



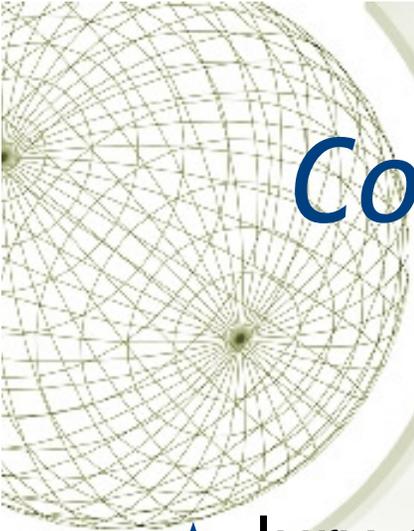
Historical Approach to Corporate Criminal Liability

- ★ Old adage that:
 - ★ Corporations cannot be expected to have a conscience when they have “**no soul to be damned and no body to be kicked**”.
- ★ It was once held that:
 - ★ By its abstract nature a company could not appear before a court.
- ★ Lord Holt in 1701:
 - ★ “A corporation is not indictable but its particular members are”.



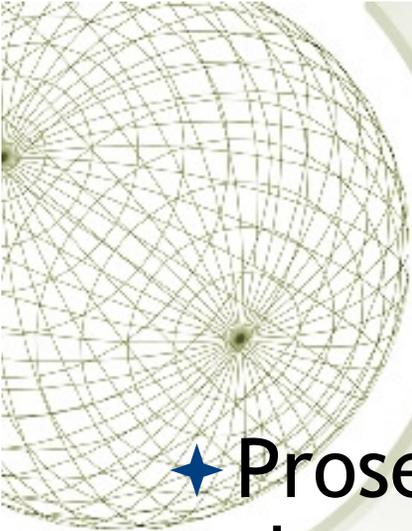
Criminal Code is not Geared Towards Companies

- ★ **Recognisance:** even though a company cannot technically be put on bail because it cannot be imprisoned -it may be required to enter into a recognisance -if the directors don't agree to do it, a prosecution could collapse.
- ★ **Legal Representation:** Companies cannot be represented other than by a legal rep in the DC.
 - ★ Historically, the requirement that prisoners 'stand at the bar' prevented an appearance on behalf of a corporation by an advocate, which in turn meant that a company could not be prosecuted.
- ★ **Legal Aid:** are companies entitled to criminal legal aid? This issue is unclear.



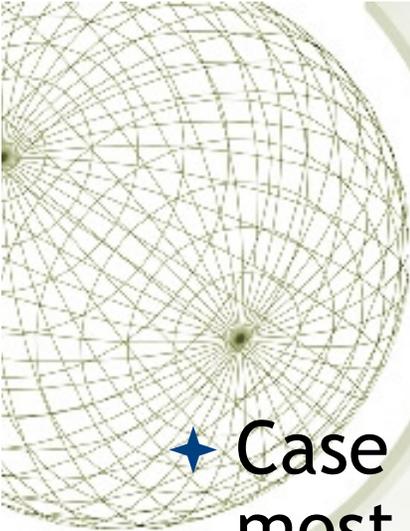
Complex Fraud Cases and Jury Trials

- ★ Jury system = right of the community at large
-permits the public to judge the offence charged -but it is also a Constitutional right of an accused.
- ★ Concerns have been expressed to the extent that the jury trial system may not be as robust in cases involving complex commercial frauds as it is in the context of prosecuting the more traditional criminal offences.



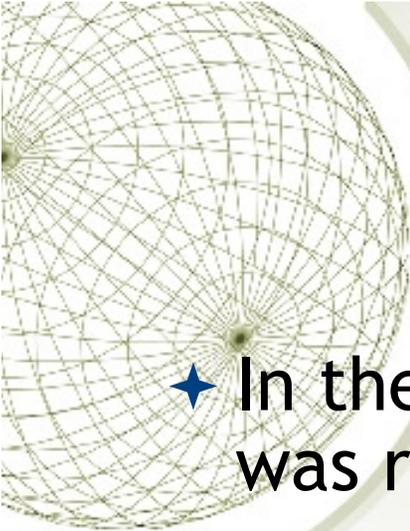
R v Rayment

- ★ Prosecution arose from allegations that the defendant conspired to defraud London Underground Ltd (re collusive tendering for Jubilee Line extension).
- ★ An inquiry ensued upon the collapse of the £60 million trial and the acquittal of 6 men.
- ★ The TJ ended the proceedings 2 yrs after they began.



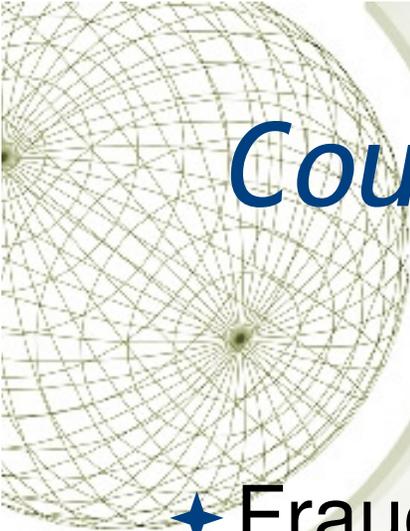
R v Rayment, Ctd (2)

- ★ Case described as one of the costliest and most inefficient prosecutions in British history.
- ★ 6 defendants acquitted by direction of the TJ.
- ★ Proceedings hindered by many obstacles: jury sickness, lengthy delays and disruption.
- ★ Counsel argued that it was impossible for the accused man to have a proper hearing.



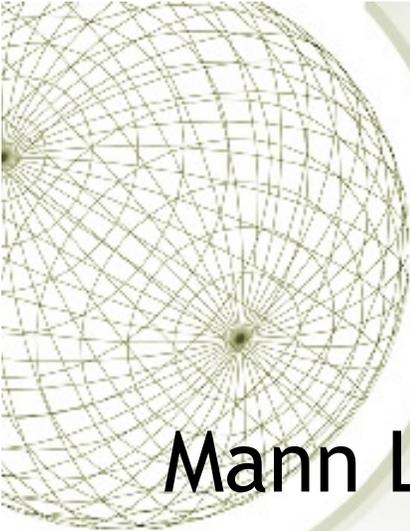
R v Rayment, Ctd (3)

- ✦ In the midst of the prosecution case, jury was reduced to 10.
- ✦ One became pregnant. Other arrested for alleged benefit fraud.
- ✦ Fresh concerns arose when another complained about falling behind in their career.
- ✦ Later, another juror had worries about falling behind in pension contributions.
- ✦ The failure to return a jury verdict prompted renewed calls for complex fraud trials to be heard without a jury.



County NatWest Blue Arrow (R v Cohen)

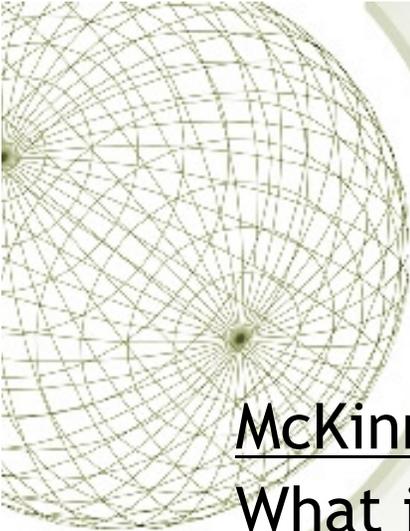
- ★ Fraud trial (fraudulently inducing persons to buy shares).
- ★ Often cited as an indication of the problems of involving juries in lengthy and complex financial fraud prosecutions.
- ★ 8 individuals and 3 companies had their convictions overturned on appeal after a 184 day trial which cost £40 million.



R v Cohen, Ctd (2)

Mann LJ (Ct of App):

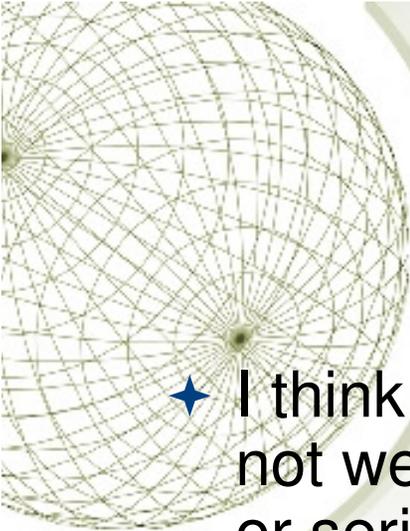
- ★ “The trial will rightly be regarded by the public as a costly disaster”.
- ★ “We are told that this is the second longest trial in English history”.
- ★ “The Court has had to play the role of a dentist -extracting teeth”.



R v Cohen, Ctd (3)

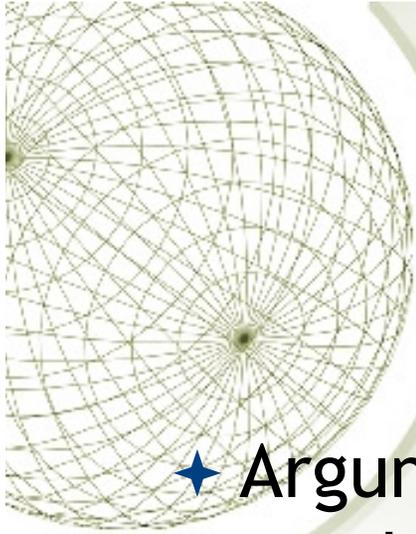
McKinnon J (trial ct):

What is beyond all doubt is that all involved in this case have had to endure what no one in our courts should be called upon to cope with. That includes the defendants, their families, and the jury and me. I can certainly speak for myself. No jury should be asked to cope with what this jury has had to endure. No Defendant or his family should have to suffer through month after month after month all that these defendants have had to suffer. There must be some other way.



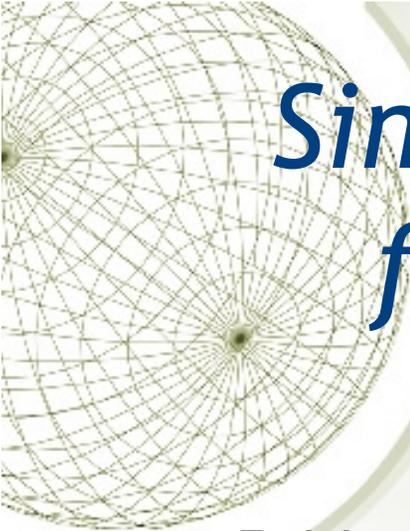
DPP's Concerns

- ★ I think we have to look at the question of whether or not we should have juries in relation to serious fraud or serious commercial crime. Modern financial transactions and, consequently, the manner in which people commit fraud, have become much more complex and therefore difficult for the lay person to understand. Yet, we still select juries at random or, indeed, as I have suggested on other occasions, not entirely at random in that we tend to exclude a large proportion of the population who might actually understand such complexity by reason of their educational background or training, and then expect juries to be able to make a sensible finding in relation to such matters.



Converse Argument

- ★ Argument is that even though fraudulent conduct within a company can take many forms -juries are capable of understanding.
- ★ Eg, complex Guinness Share Trading Fraud Trial which returned verdicts after 6 months.
- ★ Suggestion that fraud is beyond ability of juror to comprehend is not borne out by experience.



Simplicity of Trial Derives from Simplicity of the Indictment

- ✦ Bridge LJ's aphorism from the case of *R v Novac*,
- ✦ '[i]n jury trial brevity and simplicity are the handmaidens of justice. Length and complexity its enemies...' and
- ✦ 'nothing short of the criterion of absolute necessity can justify the imposition of the burdens of a very long trial.'

Trial lasted 47 days and had been adjourned for the 4 weeks of August.



A number of alternative options have been suggested

- ★ **Segregate criminal trial**: all legal issues determined at the outset to the exclusion of the jury and all factual matters are dealt with afterwards in the presence of the jury.
- ★ **Specialist juries** or for **special courts** (with an expert panel of judges) (specialist juries were abolished by the Juries Act 1927).
- ★ **Special Criminal Court** could be extended to corporate fraud cases. Competition Cases are heard in the Central Criminal Court given their complexity.



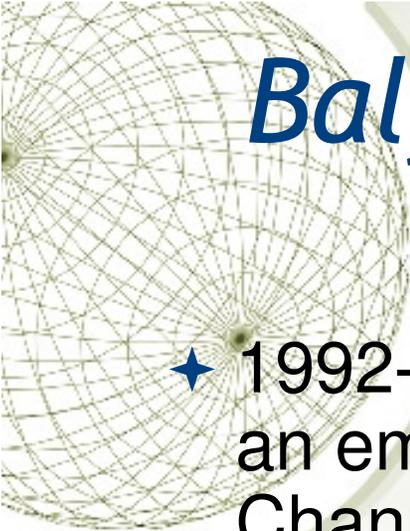
Making it Easier for Jurors...

- ★ Specific provisions re information provided to juries at trial have not yet been given legislative force:
 - ★ s 10 of the Competition Act 2002, s 110 of the CLEA 2001 and s 57 of the CJ(TFO)A 2001.
 - ★ The similar provision in s 1078C of the TCA 1997 has come into effect - not been invoked in practice to date.
- ★ 6 years ago it was stated that the Govt was waiting for Ct Services to have the necessary equipment.....
- ★ Govt Advisory Committee on Fraud advised that glossary of key terms be available to jury.



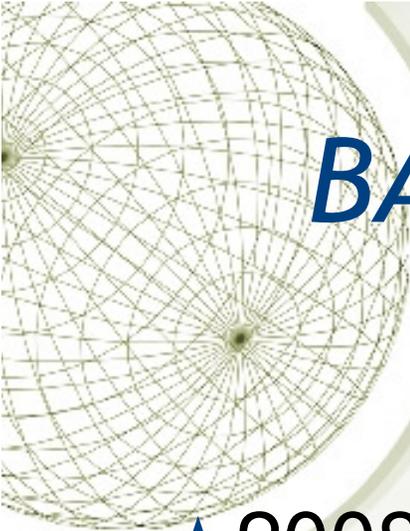
SENTENCING COMPANIES

- ★ Companies cannot be subject to corporal punishment such as imprisonment and historically, a sentence to the pillory or hanging.
- ★ **“What, Must they hang up its common seal?”** (17th Century Trial).
- ★ Therefore -there is a need for innovative sanctions for companies.



Balfour Beatty - Health and Safety Offences

- ★ 1992- fined £18,000 -guilty plea-beam crushing an employee during the construction of the Channel Tunnel.
- ★ 1999- fined £500,000 -guilty plea- derailment of a freight train -company pleaded guilty.
- ★ 1997 - fined £1.2 million -guilty plea -collapse of the Heathrow tunnel used by the Heathrow Express service at Heathrow Airport.
- ★ 2006 -fined £7.5 million -Hatfield Train Crash - 4 people died and 102 passengers were injured.
- ★ 2007 -fined £180,000 -fatal electrocution of a track worker.



BALFOUR BEATTY -Other Offences

- ★ 2008 -fined £2.25 million after a Serious Fraud Office investigation alleged inaccurate accounting practices.
- ★ 2009 -fined £5.2 million by the Office of Fair Trading for alleged bid-rigging offences in the construction industry.



BALFOUR BEATTY EXAMPLE

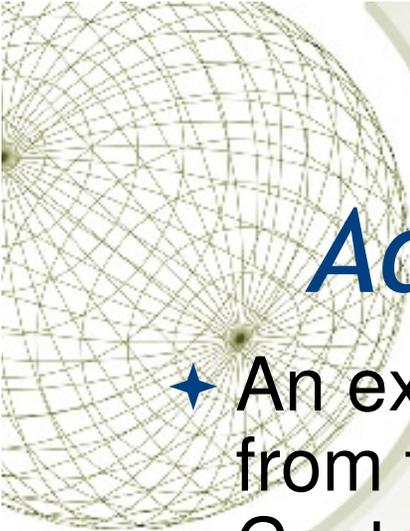
- ✦ Fines may do little to deter recidivism.
- ✦ Balfour Beatty have been fined repeatedly.
- ✦ Yet profits remain high and the companies still receive government contracts.



SENTENCING ALTERNATIVES

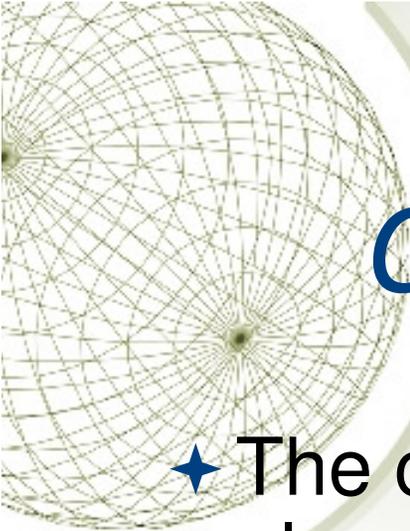
Company cannot be imprisoned....Fines alone sufficient?

- ◆ Adverse Publicity Orders
- ◆ Corporate Probation
- ◆ Community Service Orders
- ◆ Remedial Orders
- ◆ Eg, the as yet not-enacted Corporate Manslaughter Bill



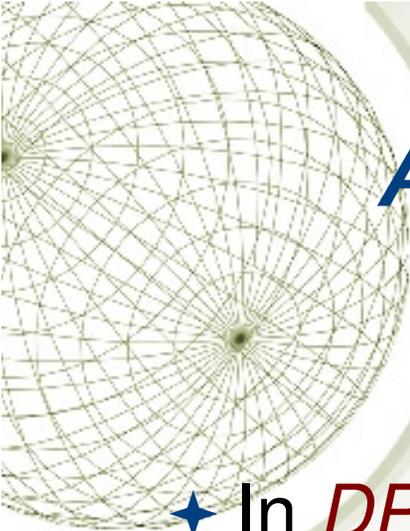
Adverse Publicity Orders

- ★ An example of a publicity order can be seen from the advertisement placed by American Caster Corporation in the *Los Angeles Times* on 12 February 1985:
 - ★ ‘Warning: The illegal disposal of toxic waste will result in jail. We should know. We got caught! We are paying the price. Today, while you read this ad, our president and vice president are serving time in jail and we were forced to place this ad’.



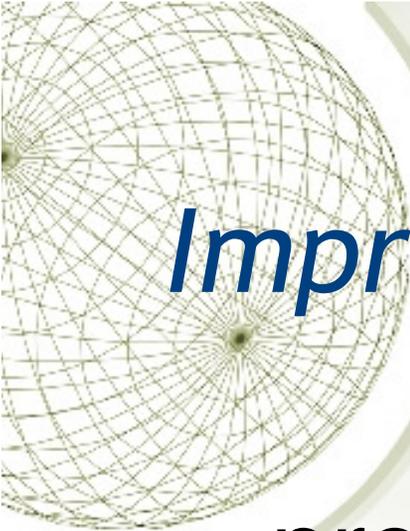
CASTER CORPORATION

- ★ The company, whose officers entered a plea of no contest to the charges, took out the advertisement in The Los Angeles Times at a **cost of USD \$15,000** as part of its sentence.
- ★ It also had to **pay for cleaning up the site** and was **fined USD \$20,000**.
- ★ Its president and vice president were each sentenced to **6 months imprisonment**.



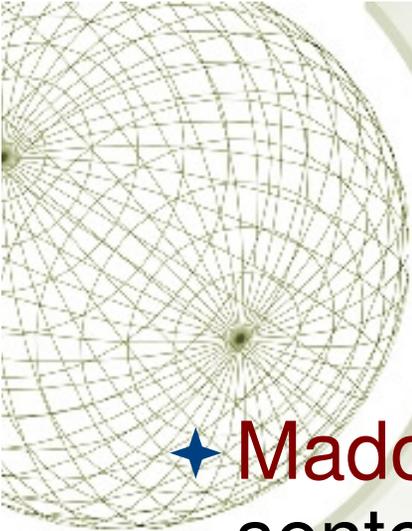
Adverse Costs Orders: Implications

- ★ In *DPP v Bourke Waste Removal Ltd* CCC awarded costs against the DPP following the acquittal of the defendant companies and some of their officers in relation to alleged competition law offences.
- ★ The adverse costs award imposed upon the acquittals will undoubtedly impact upon future decisions of the DPP to prosecute complex corporate criminal cases.



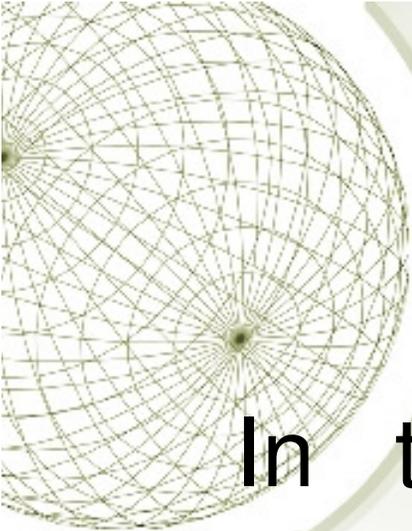
Imprisonment & White-collars

Even if a successful prosecution is achieved, one further issue that looms over prosecutors is the widely held belief that the Irish courts are reluctant to impose immediate custodial sentences on white-collar criminals.



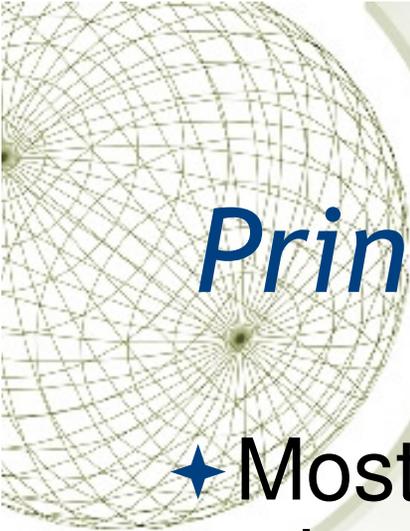
US Comparisons

- ★ **Madoff** is serving a 150-year prison sentence for his Ponzi scheme,
- ★ **Schmidt** received 330 years for his role in a huge investment scam, and
- ★ **Weiss** was served with a 845-year sentence in addition to almost \$300 million of fines and restitutionary orders (racketeering, wire fraud and money laundering - collapse of National Heritage Life Insurance).

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DPP v DUFFY

In the 2009 decision the CCC observed that there were very strong reasons to impose custodial sentences on individuals who were guilty of acting as part of a criminal price-fixing cartel.



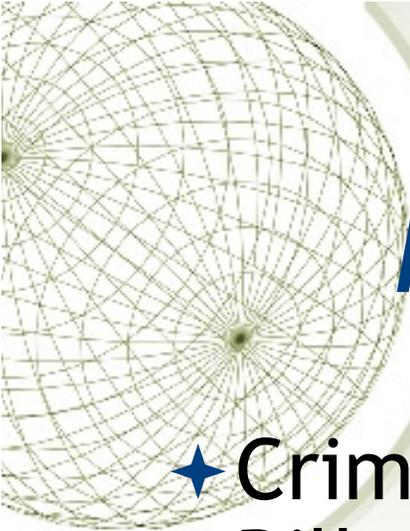
Principles Of Sentencing Law

- ★ Most often the white-collar offenders who are brought to book in this jurisdiction have:
 - ★ no previous convictions,
 - ★ have a previous record of good character, and are
 - ★ deemed as being unlikely to re-offend.



Sentencing White-collar Offenders

- ★ Financial crimes:
 - ★ large settlements with the Revenue or CAB, or
 - ★ suffered financially themselves as a result of the attendant risks of their financial offences.
- ★ Of course, the perception that Irish white-collar offenders enjoy immunity from custodial sentences arguably does little to deter such potential criminals from offending.
- ★ Deterrence is also a well-established principle of sentencing law.



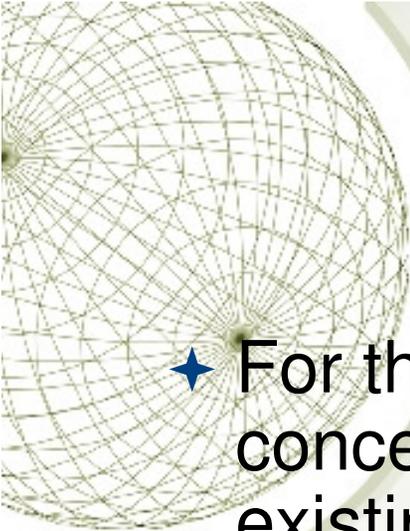
Proposals For Reform

- ★ Criminal Justice (White Collar Crime) Bill - Alan Shatter Announcement - 25 March 2011
- ★ Corporate Manslaughter Bill
- ★ Department of Justice White Paper on White Collar Crime
- ★ EU Reforms of the Structure of the Financial Markets and Banking Regulation



Proposals for Reform, Ctd

- ★ Whistleblower Protection is in the programme for Government.
- ★ Intention to Strengthen Powers of CAB.
- ★ EU-level examination of administrative sanctions vs criminal sanctions and the principle of double jeopardy.



RESOURCES

- ★ For the public, the core and pressing issue of concern lies not with the adequacy of the existing law but is whether the law relating to white-collar crime is simply window-dressing which is not put into use as often as it should be.
- ★ The successful investigation and prosecution of complex corporate offences requires time and resources.
- ★ This, perversely, comes at a time when the strain on public finances is greater than has been felt for decades, while the patience of public opinion is wearing thinner by the day.



THANK YOU VERY MUCH FOR LISTENING

✦ PLEASE CONTACT ME IF YOU HAVE ANY
QUESTIONS:

✦ SHORAN@LAWLIBRARY.IE