

Rough justice proof of two-speed system

By Ian Verrender for The Sydney Morning Herald September 3, 2011

It's an apocryphal tale, one where the anti-hero has assumed various well-known guises over the years.

A heavy-set, tattooed convict with broken teeth and flattened nose sits forlornly on a cell-room bunk, no neck and with shoulders the size of hams protruding from a blue singlet, menace exuding from every pore.

Crowded into the spartan room is a group of youngsters, first-time juvenile offenders who have been marshalled together in an effort to strike enough fear into their hearts and return them to the straight and narrow for good.

"Is this how you wanna end up?" our hero begins. "Think you're tough, that you can rob banks, use a gun and terrorise people? Well, if you do, this is your future, locked up for the best years of your life.

"You want my advice? Give up the extortion, the violence, get rid of the guns. If you really want to fleece people, get yourselves a degree and go into banking, or broking, any kind of business. You'll make a hell of a lot more and there's hardly any chance you'll get busted."

A cute joke, perhaps, but one that bears a remarkable resemblance to reality, particularly after the extraordinary events in the Federal Court this week when Justice Middleton sentenced Centro Properties six guilty non-executive directors to ... absolutely nothing. No fines, no banning orders, nothing.

A small fine was doled out to the chief executive, Andrew Scott, along with read something like a character reference.

In late June the same judge found the entire board of Centro Properties guilty of breaching the Corporations Act and not fulfilling their duties as directors after major errors in the company's accounts mortally wounded the company, torching billions of dollars in investors' funds.

It was a strongly worded and well-argued decision that rocked the business world.

In his 186-page judgment, Justice Middleton systematically demolished all the arguments put forward as a defence to the lax behaviour of the errant directors, who clearly failed to read the company's accounts before signing them.

Almost \$3 billion of short-term debt had been categorised as long term, an accounting error that disguised serious liquidity problems faced by Centro, particularly as the financial crisis gripped global markets, when lenders were demanding the return of their money rather than simply rolling loans over.

If the directors didn't know or didn't understand the accounts misrepresented its financial position, then it was their duty to know, the judge said.

In essence, his judgment made it clear that the buck stopped with the directors. Perhaps it was supposed to read: "All the bucks stop with the directors."

For his sentencing this week was far more conciliatory, and a departure from his June judgment. It now seems that in the unlikely event one will be found guilty, if indeed the corporate regulator even bothers to take action, you can walk out of court practically unscathed.

Much has been written lately about the emergence of a two-speed economy. In law, there has been a two-speed system for generations.

There's crime. And then there's "white collar crime", a more genteel form of criminal activity where the amounts of money are infinitely larger and the penalties commensurably smaller.

The Australian Securities and Investments Commission, jubilant at a rare win - having secured guilty verdicts against all the directors - sensibly called for the judge to impose hefty financial penalties along with banning orders, preventing each of the directors from holding public office for between three and 10 years.

Not surprisingly, barristers for the guilty directors argued long and hard that their clients should not be punished for their negligence, that they had suffered enough merely by being dragged through the courts.

It was a "one-off" failure, a "substantial shock" and a "terrible experience" for the six non-executive directors, claims that appeared ludicrous on any reading of the verdict.

That argument, however, appears to have struck a chord with the judge. While he went to great lengths to point out in his guilty verdict that he didn't believe the directors dishonest, his language suggested there might be harsh penalties to deter others.

That was not to be. Only Andrew Scott, the bombastic Zambian-born Centro chief executive, copped a fine, a mere \$30,000 which will come, not from his pocket, but from the insurance policy Centro took to indemnify him. He's now become a living embodiment of the term Scott Free.

Amazingly, even Scott was spared a banning order. Instead, the judge lauded Scott's credentials.

"Mr Scott has abilities and skills as with the other directors, that the public should not be deprived of in the future," he said. One would have thought that after Centro, the public would best be protected from the said "abilities and skills".

And the non-executive directors? Banning them for even a short period would cause them "reputational damage ... that cannot be under-estimated", the judge said. Er, isn't that the idea?

There was a collective sigh of relief in boardrooms across the land when the sentencing was made public. A sensible decision, was the consensus.

It should, however, be noted that the tolerance we Australians extend to corporate crime is unique in the western world.

In America, that bastion of free-market capitalism, regulators and courts adopt a ferocious attitude to high-end crime. Offenders regularly are arrested in their offices, hand-cuffed and paraded before staff (and usually television cameras) for the ritual "perp walk". In court, they often find themselves on the receiving end of jail sentences.

It is also worth pointing out that, in an amazing coincidence, other companies made the very same accounting error as Centro. Allco Finance, the brainchild of David Coe and the company that attempted to wrest control of Qantas in 2006, made a similar mistake.

It shifted \$1.9 billion of short-term debt into the long-term column of its 2007 accounts, which again gave investors the false impression that it could withstand the financial head winds buffeting the debt-heavy group.

Coe and some of his cohorts will be examined this week in public once again. Not by the corporate regulator. Instead, it has been left to the collapsed group's liquidator to probe the reasons for the company's ignominious fall from grace.

Like Babcock & Brown, which torched close to \$10 billion of investor funds, there has been no public sign of any action by the corporate regulator since its collapse three years ago.

Those who sent it broke are back in business and the only action, again, has been taken by the liquidator - a damages case the collapsed company's insurers will be forced to cover.

That's justice for you.

Read more: <http://www.smh.com.au/business/rough-justice-proof-of-twospeed-system-20110902-1jpsb.html#ixzz1X2KYxtyP>