

# Debt Management and Debt Enforcement: Law Reform Commission's Recommendations

## *Reforming the Law on Debt*

Sixth Annual Conference of the Law Reform  
Commission

Dublin Castle, November 18 2009

# Background to the Project

- **Why it is in the Commission's *Third Programme of Law Reform 2008-2014***
  - Submissions received during the consultation process for the *Third Programme*
  - Free Legal Advice Centres of studies of the law on debt enforcement: *An End Based on Means?* (2003)
- **Other national and international studies**
  - *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe 2007)
  - *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008)
  - *A Policy Framework for Addressing Over-Indebtedness* (Combat Poverty Agency 2009)

# European Commission's 6 'Essential Building Blocks'

- Preventative Measures
  - Responsible Borrowing
  - Responsible Lending
  - Responsible Arrears Management
- Remedial Measures
  - Debt Counselling
  - Personal Insolvency Law
  - Holistic Court Procedures

# Overview of Consultation Paper

- Paper examines all aspects of the 6 “Building Blocks”
- Suggestions for consideration: implementation by other bodies, eg IFSRA
- Provisional recommendations for reform: Commission will make final recommendations in Report

# Provisional Recommendations for Reform Discussed in this Presentation

- Personal Insolvency Law
- Enforcement Procedures

# Personal Insolvency Law

## Personal Insolvency Law: The Current Position

### – *Bankruptcy Act 1988*

- Three different procedures, all of which take place in High Court
  - Full Bankruptcy
  - Composition
  - Arrangement



## – Problems with the *Bankruptcy Act 1988*

- Excessively Expensive

- All procedures take place in High Court at great cost
- Deposit of €650 and assets of €1900 required – this will exclude most consumer debtors.

- Punitive Nature

- Fails to draw distinction between financial failure and immorality.
- Discharge conditions are extremely onerous by international standards:
  - » European average of 3-5 years.
  - » 12 month discharge period in UK.
  - » *Grace v Ireland* [2007] IEHC 90: the effect of this provision:

- Further punitive provisions:
  - Limitations on trading/obtaining future credit/travel outside country
  - Prohibition on acting as company director or solicitor
  - Postal correspondence may be intercepted by Official Assignee
  - Prohibition on sitting as member of the Dáil, Seanad or European Parliament



# Conclusions on Personal Insolvency Law:

- Outdated and ineffective
- Wholly inappropriate for realities of consumer debt
- *Bankruptcy Act* almost never used:
  - Number of bankruptcies in Ireland:
    - 2007: 4
    - 2008: 8
  - Number of bankruptcies in the UK:
    - 2008: 106,544 personal insolvencies (67,428 formal bankruptcies, 39,116 Individual Voluntary Arrangements)
    - One official insolvency for every 400 adults in the UK

- **Voluntary debt settlement initiatives provide partial solutions, but legislation is necessary:**
  - Voluntary debt management plans are not legally binding on all creditors - no relief from enforcement proceedings
  - Only some creditors agree to participate in voluntary plans - currently no *right* to a solution for debtors
  - No guarantee of debt discharge/composition – creditors can set the terms
  - No guarantee of reasonable standard of living, reasonable duration – many informal plans fail due to unrealistic conditions
  - Voluntary plans provide less legal certainty for creditors
  - Statutory schemes can assist creditors by preventing repeated requests for voluntary rescheduling arrangements from debtors

# Provisional Recommendations

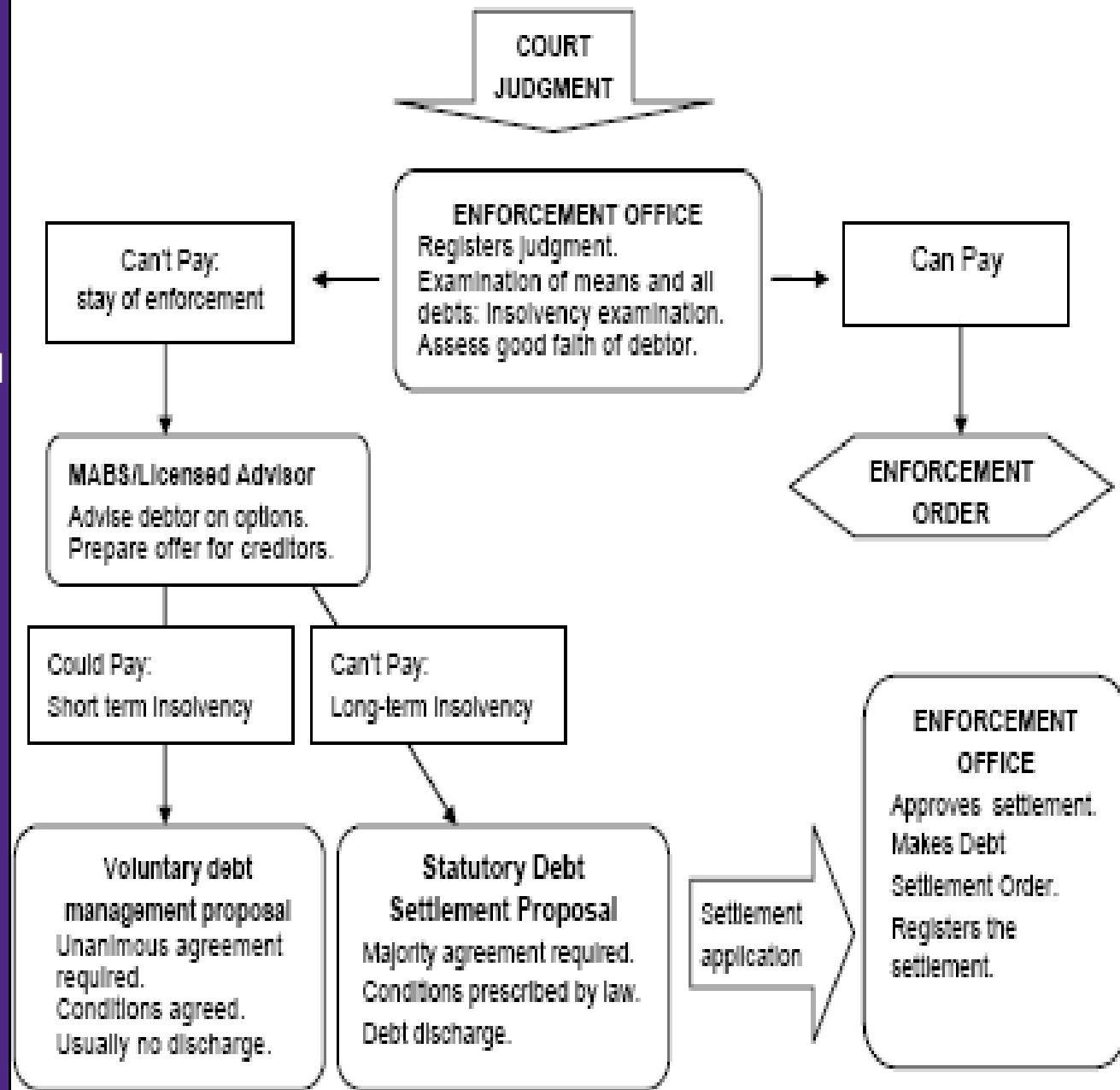
- Reform of judicial bankruptcy system
  - Commission recommends comprehensive review of *Bankruptcy Act 1988*.
- Introduction of non-judicial debt settlement system
  - Commission proposes framework and key principles for a statutory non-judicial debt settlement system.

# Provisional Recommendations

- Non-judicial debt settlement more suitable to consumer debt than judicial bankruptcy:
  - Reduced costs.
  - Reduced stigma: encourages debtor participation.
  - Non-legal debt issues can be addressed: money advice
- Legally binding non-judicial debt settlement
  - Statutory debt settlement rather than voluntary debt rescheduling.
  - Power to compel participation of creditors who unreasonably refuse a settlement offer.
  - A legal right to a solution for over-indebted individuals.

# Structure of the proposed debt settlement system:

- Money advisors
- Supervision of settlements by a proposed Debt Enforcement Office
- Links to debt enforcement proceedings under the supervision of this office – all enforcement proceedings stayed to allow debt settlement: no creditors allowed to “cheat”



# Key principles of the Debt Settlement System

- “Earned start”
  - Repayment plan
    - Reasonable duration: 3-5 years
    - Exempt income – reasonable standard of living
    - Exempt assets – difficult question of the debtor’s home
    - Exceptions for “no assets, no income” debtors
  - Other obligations/“good behaviour period”?
    - Financial education programmes
- Open access
  - Access criteria:
    - Insolvency test: continued insolvency over a period of time
    - Good faith test - Act honestly and full disclosure
  - Inexpensive – costs should not unduly prevent access
  - Access limited to “once in a lifetime”, with certain exceptions



# Key principles of the Debt Settlement System

- Mortgage Loans
  - How they should be treated
  - Secured debt
- Consumers v small business debtors
- Promotion of awareness of legal options among debtors
- Non-discrimination:
  - the fresh start principle and restrictions on future access to credit.

# “Holistic” Enforcement Procedures

# Debt Enforcement – the Current Law

- Court judgment
  - Usually undefended proceedings
- Enforcement Mechanisms:
  - Registration of Judgments
  - Execution against Goods
  - Judgment Mortgage
  - Mortgage Suits/Possession Orders
  - Instalment Order
  - Attachment of Debts/Garnishee Order
  - Equitable Execution

# Problems in the Debt Enforcement System

- A pre-“credit society” framework
  - Enforcement law predates deregulation of consumer credit.
  - Antiquated view of debt default.
- Lack of Information concerning a debtor’s financial circumstances
  - Impossible to separate “can’t pays” from “won’t pays”.
  - Impossible to assess most appropriate and proportionate method of enforcement
- Low Participation Rates and Lack of Understanding among Debtors

# Problems with individual enforcement mechanisms

- Execution against Goods
  - Inefficient:
    - In 2007, only 30% of execution orders lodged with County Registrars enforced, with 35% returned marked “no goods”.
    - Contrast with Revenue Sheriffs: 45% yield in 2007
  - Exempted goods:
    - Exemption levels date from 1926 and are set at just £15: outdated
  - Complicated procedural rules and outmoded terminology:
    - *Fieri facias*

# Problems with individual enforcement mechanisms

- Instalment Orders:
  - Instalment orders made without an examination of means
  - The role of imprisonment in debt enforcement
- Garnishee Orders and Equitable Execution
  - Insufficient information available about debtors' assets
  - Not applicable to future earnings – no attachment of earnings
  - Outmoded terminology



# Provisional Recommendations for Reform

- *A centralised enforcement system under a dedicated Enforcement Office:*
  - Separate judgment from enforcement: enforcement should not be “automatic”.
  - Obtain information (at an early stage) about the debtor’s means and assets
  - Increased efficiency and consistency through specialisation and the supervision and prioritisation of enforcement.

# Provisional Recommendations for Reform

- Method of obtaining debtor information
  - Debtor declarations: discovery in aid of execution
  - Data-sharing: tax records, social security databases, credit reports
  - Comprehensive register of judgments/enforcement proceedings
  - PPS tracking number?

# Provisional Recommendations for Reform

- Organisational structure of the Enforcement Office:
  - Entire new agency with new enforcement officers?
  - Transfer enforcement functions of County Registrars to Sheriffs and Revenue Sheriffs, under a centrally supervised system?
  - Private enforcement agents, supervised by the Enforcement Office?

- Interaction of the Courts, Enforcement Office and the Non-Judicial Debt Settlement System
  - Judgment v enforcement: judicial v executive functions
  - Increasing the efficiency of the procedure for obtaining judgment:
    - A single procedure for commencing debt claims in all courts?
    - Harmonisation of the documents needed to make a debt claim in all courts?
    - Simplification of the documentation required
    - Online claim applications?
    - Bulk claim processing?

# Debtor Participation

- Pre-Litigation Notice – plain language documentation
  - Information on money advice services
- Discontinue practice of issuing draft summonses
- Express requirement to serve notice of judgment on debtor
- Examination of means otherwise than in public

# Proportionate and Balanced Enforcement

- How to choose the most appropriate method of enforcement in each case
- Implications of *McCann* and proportionate enforcement.
- First step: greater access to information about the debtor's assets
- Enforcement Office to choose proportionate and appropriate method of enforcement?
- Enforcement Office to present a range of appropriate and proportionate methods of enforcement to the creditor?



# Individual Enforcement Mechanisms

- Instalment Orders:
  - Generally the least restrictive method of enforcement: should be first step in most cases
  - Need for greater efforts to facilitate consensual instalments
  - No instalment orders to be made in the absence of adequate information about the debtor's means
  - Consolidation of multiple instalment orders?
  - Information on right to vary the instalment order

# Garnishee Order/Attachment of Debts

- Attempted execution against goods should not be first required
- Legislation should ensure debtor not deprived of essential living funds: how to achieve this?
- Should joint bank accounts be capable of being attached?
- Update rules, procedures, terminology

# Execution against Goods/Seizure of Debtors' Assets

- Reduction in reliance on execution against goods as the primary method of enforcement:
  - Physical goods no longer a primary source of wealth
  - Seizure of goods as a “default” method of enforcement does not satisfy the principle of proportionate enforcement
- Who should carry out seizures?
  - Structure of enforcement office: Sheriffs/Court Messengers/private enforcement agents?
- Code of practice for enforcement officers
  - Outline duties of enforcement officer and of debtor
  - Outline responsibilities of creditors
  - Complaints procedure

- Exempt goods
  - Rationale:
    - Protect dignity of debtor and family
    - Move external costs of indebtedness from society to creditors
  - Current limit of £15 is outdated (1926)
  - Lists of exempt goods v more flexible rules
  - Cars?
- Reports to creditors: monitoring the efficiency of the procedure
- Update terminology
  - Archaic and confusing language:
    - “*Fieri facias*”, “*nulla bona*”, “bailiwick”
    - Execution/seizure/distress
- Codify rules: update the rules governing the seizure/execution procedure

# Attachment of Earnings

- Arguments in favour
  - Targets assets of debtor most likely to yield proceeds for creditors: debtor's future income
  - Future income considered by lenders when making creditworthiness assessments: therefore should be available to creditors in case of default
  - Facilitates payment amongst disorganised “could pay” debtors
  - Less coercive and more proportionate alternative to imprisonment

# Attachment of Earnings

- Arguments against
  - Negative impact on employment relationship: need for employee protection legislation and proportionate use of the procedure
  - Risk of depriving debtor of sufficient income to maintain reasonable standard of living: need for protected levels of income
  - Risk of reducing employment incentives: need to ensure protected income level high enough to provide incentives
  - External costs to third parties: need for compensation for employers to cover costs of administering attachment of earnings orders



# Attachment of Earnings

- Issues
  - Exempted income levels
  - Social welfare
  - Employee protection
  - Proportionate use
  - Suspensions/Variations
  - Rules of priority as between attachment orders

# The role of imprisonment

- *McCann + Enforcement of Court Orders (Amendment) Act 2009:*
  - Imprisonment because of inability to pay a debt abolished
  - Imprisonment retained for “won’t pay” debtors, as a last resort where other enforcement mechanisms have failed
- A continued role for imprisonment?
  - *McCann*: imprisonment of “won’t pay” constitutionally permissible if confined to a last resort
  - Can imprisonment be justified even in the case of “won’t pay” debtors?

# Conclusions

- Holistic approach
- Acknowledge reality of consumer debt: “Can’t Pays”, “Won’t Pays” and everything between
- Prevent and cure the social problem of over-indebtedness
- Transform the law’s attitude from a judicial, legalistic approach to a non-judicial, pragmatic approach with clear and relevant rules and principles
- Provide relief, rehabilitation and a fresh start for the over-indebted
- Ensure balance and proportionality in enforcement

Thank You

Submissions

by

31 December 2009