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The Law Reform Commission

Speech by Mr. Rory Brady SC
Attorney General.

Consultation Papers on: Judgment Mortgages and The Court Poor Box

1.00 - Introduction.

1.01 I wish to start by commending the work of the Law Reform Commission. They have, yet again, under the Presidency of the Mr. Justice Declan Budd demonstrated immense industry. Since I was as appointed as Attorney General I have not ceased to be amazed at how prolific this Commission is. Whether in the publication of reports or consultation papers the Commission has set a very high standard both in relation to speed and quality. While I was not involved in the launch of the paper on DNA it was one of the first legal issues that I referred to the Commission. I wish to commend them for the speed with which they have reported on that issue.

2.00 Judgment Mortgages

2.01 As noted in the consultation paper the foundation of our law on judgment mortgages is the Judgment Mortgage (Ireland) Acts 1850 and 1858. The language that is, used in that legislation is archaic. Indeed it was quite accurately described by Mr. Justice Kenny in *Re Flannery* (1971) I.R. 10 as being "perplexing". Notwithstanding that this is so, I think it is only fair to acknowledge the change in judicial attitudes. The first stage of the judicial approach was one characterised by cases being decided on ultra technicalities. Inaccuracies in description or omissions in a judgment mortgage affidavit were fatal. The judgment mortgage was thereby void even in the absence of prejudice to the judgment debtor. But the second and modern phase (although some older cases also showed a liberal strain) favoured the primacy of substance over form. The Law Reform Commission has admirably chartered this change in judicial attitudes. It probably reached its apogee in the dictum of Mr. Justice McCarthy in *Irish Bank of Commerce -v- O'Hara* (7th April 1992) where he said of Section 6 of the 1850 Act as follows:-

"In construing a Statute and in particular the effect, if any, of non compliance with express wording there are a number of accepted cannons of construction. An unstated one is that common sense should not be abandoned."

I respectfully agree with this observation.

2.03 This preference for substance over form reflects the growing sophistication of society and our legal system. At the time when the Judgment Mortgages Acts were enacted one of the principal sources of wealth was land. But it still remains a great store of wealth for the vast majority of our citizens. It is thus typically the asset against which a creditor seeks execution of his or her judgment. With the explosion in economic activity in Ireland – over the last decade – it is timely that we should reflect upon the judgment mortgage as a method of judgment enforcement.

2.04 To cherish a punctilious approach to the contents of a judgment mortgage affidavit is to sacrifice the efficiency of this most important remedy. Technicality does not serve the interests of justice but rather the delaying tactics of unscrupulous judgment debtors. Hence, I wholeheartedly commend the appeal, contained in this paper, for a real recognition of substance over form in this arcane area of the law. Thus the recommendation (at page 16) that the description of unregistered land that identifies the land " with reasonable certainty" is one that accords with the common sense identified by McCarthy J. Likewise the other recommendations in relation to costs and interests seem sensible.

2.05 Consistent with the theme of avoiding technicality I subscribe to the tentative view of the Commission with regard to limitation periods. I can see no good reason for requiring a renewal of a judgment mortgage every five years. On the contrary the Government Policy for Better Regulation is, in my view, satisfied by not requiring any such renewal. It is difficult to see how the interests of the judgment debtor can in any way be prejudiced by the omission of any supposed statutory obligation of five yearly renewal. Hence, it seems to me that there is no

compelling case for not acceding to the suggestion (page 22 of the Commission's paper) clarifying the law in the area.

2.06 I believe that one of the most important recommendations contained in the consultation paper is that concerning Section 291 of the Companies Act, 1963. The law is clear with regard to judgment mortgages and the effect of liquidation. Unless the judgment creditor has "completed the execution" of his judgment by seizure or, where there is an equitable interest, by the appointment of a receiver judgement he/she is treated as an unsecure creditor. The practical problems that attend completion of execution speak for themselves and are set in the consultation paper. Again I take the view that – given the widespread use of incorporated entities in commercial transactions – we should not undermine but rather we should improve the existing mechanisms of enforcement. That includes the use of the judgment mortgage against a company. Section 291 of the Companies Act, 1963 serves to undermine rather than support the rights of the judgment creditor. Hence I consider the recommendation of the Commission, to amend this section, to be both prudent and practical.

2.07 There is no doubt that the Commission has prepared its consultation paper with a view to improving the law for the benefit of creditors. As our legal system provides remedies for the private citizen in lieu of private vengeance streamlining of procedures and remedies – for the benefit of creditors – is to be commended.

3.00 <u>The Poor Box</u>

3.01 It is to be noted that the Poor Box system had a parallel in the Brehon Laws. Moreover, it is also interesting to observe that other jurisdictions have a similar phenomenon. The position in Germany and New Zealand is helpfully analysed in the consultation papers. It is to be noted that the equivalent procedure in New Zealand in on a statutory basis. Whatever the precise legal origins of the Poor Box one thing is clear. It is now well established as a feature of the practice and procedure in the District Court and is this firmly entrenched as part of the common law. But the question that we have to ask ourselves is as follows; what

function is served by the Poor Box and can that be better served by legislative intervention?

3.02 The fact that other legal systems operate a system similar to the Poor Box proves one thing. That is that a system of law must be flexible. There are situations where to proceed to a conviction – and to have that on one's record – may be disproportionate to the crime and, more importantly, the circumstances of the accused. Any system of justice that is incapable of reflecting these variants runs the risk of being unjust due to inflexibility. But how are we to cater for the situation, that may arise from time to time, that a conviction should not be imposed. It is unquestionably the case that most criminal law offences (with the notable exceptions of drunk driving, drug related offences and murder) give a discretion to the sentencing judge. The legislature does not prescribe how that discretion is to be exercised. It merely sets the limits within which it is to be exercised. If therefore the position is that the legislature recognises the importance of judicial discretion can the Poor Box be objectionable in principle. I do not think so. However, in my view it is a discretion that requires to be subjected to some limitations and qualifications by the Oireachtas.

3.03 The greatest problem confronting the Poor Box is the perception that an acquittal may be purchased by a financial contribution. In this regard I note that the amount of monies paid into the Poor Box, last year, was quite substantial. It is quite clear that the only accused, before the District Court, who can make a payment of several thousand euro are those who are relatively prosperous. It is also clear that the vast majority of accused – who are on legal aid – are probably excluded from the benefits of the Poor Box. This in my view, creates, at a minimum, a perception of inequality before the law that now justifies regulation of this power by the Oireachtas so that its exercise is seen to promote the common good.

3.04 There are further reservations about the Poor Box other than the perception of inequality. The notion of the courts being involved in the collection of monies for designated charities does not sit easily with the administration of justice. Fines and penalties are, by legislation, paid for the benefit of the State. It is difficult to

understand why there should be a special category of funds such as those originating from the Poor Box. Moreover, I do not see why any specific charities should benefit from the largesse of a particular District Judge directing payment to the benefit of some charity or other. Aside from the tax complications that arise (that are referred to in the consultation paper) surely it is the victim of a crime - who has suffered a loss - who should be compensated. If there is no individual victim then monies must surely be held for the benefit of society and be part of the central funds of the State. I consider that the complications that arise – as set out in the paper - point towards the necessity for measures to regularise the uncertain legal implications of the Poor Box. The recommendations in the consultation report seem sensible but further reflection on those who should benefit from the Poor Box is required.

3.05 The case for some substitute statutory mechanism – that does not require the imposition of a conviction – is clear. But the limits within which it is to operate should be strictly confined. Thus for instance, given the social scourge of drunk and disorderly behaviour (particularly by young people) is the Poor Box ever the correct way to deal with this situation. On page 9 of the consultation paper it is stated that the Poor Box is "most frequently applied in respect of public order offences" which include disorderly conduct in a public place. Are there certain categories of crimes that have collectively serious social consequences that should be excluded from the proposed Poor Box system. I do have a reservation about the provisions of Section 2 of the draft Bill which allows the Poor Box to be applied to offences of "a trivial nature". Unfortunately, each individual event of being drunk and disorderly may not be all that significant but collectively the prevalence of these minor offences can be a real societal problem. Hence I would urge the Commission to consider the categorisation of offences to which the proposed statutory Poor Box will not apply. These could include drunk and disorderly behaviour in a public place.

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