

LAUNCH OF FINAL REPORT OF THE LAW REFORM
COMMISSION ON PERSONAL DEBT MANAGEMENT AND
DEBT ENFORCEMENT

As a Judge of the High Court who sits from time to time on the Bankruptcy List, and also the Special Summons List, dealing with home repossession orders, I am acutely aware of the importance and timeliness of this Report.

It follows upon extensive consultations with experts and others working in the area of Personal Insolvency and Debt Enforcement. Following upon the Commission's Consultation Paper on Personal Management and Debt Enforcement in September 2009, the Commission received a large number of submissions, which are reflected in this Report, confirming the need for radical reform of the law in this area.

During 2010, the Commission held consultative meetings with interested parties, including representative bodies that had assisted in the preparation of the Commission's Interim Report.

The Commission's proposals for reform in the area of Personal Debt Management and Debt Enforcement takes place against a background of recession at both national and global level and a banking crisis which has given rise to reduced solvency and liquidity. The years of the Celtic Tiger economy were years of plenty, which were fuelled, to a great extent, by consumer credit. Low interest rates, a largely unregulated

banking sector, together with low unemployment rates and ever higher wages, fuelled a massive borrowing spree.

An interesting statistic contained in the Commission's Report is that of a study which estimated that the ratio of household debt to disposable income rose from a level of 48% in 1995 to 175% in 2009.

Reference is made to the Central Statistics Office Survey on Income and Living Conditions 2008, which found that 20.3% (or one-fifth) of Irish households were in arrears on at least one of the following five forms of credit: an overdrawn bank account; an outstanding credit card balance; mortgage, rent or utility arrears; arrears on other bills and arrears on other loans.

On the flipside, this indicated that almost 80% of Irish households surveyed in 2008 were free from arrears, notwithstanding the very high average levels of debt being carried by Irish households.

One does not have to be working in the courts to know that more and more people are finding themselves in difficulty when it comes to discharging their debts.

The collapse of the Construction sector has led to substantial unemployment. People who had been earning good wages and taken on substantial financial commitments now find themselves unemployed and without the financial resources to meet their liabilities.

People in all walks of life who bought property at inflated prices are now left in negative equity. There was a time when these people could pay off what they owed the banks by selling the property, but that is now no longer an option for most. Many people who are still in employment are facing difficulties due to shorter working hours or enforced pay cuts, and higher levies and taxes on their income.

The result of all these factors is that we have, as a society, major issues of personal debt to deal with, and we have to, as a society, try and deal with this problem by means of an efficient and credible form of debt enforcement, and a system which allows for the orderly payment of creditors out of what are frequently insufficient assets available in the hands of the debtor.

While substantial strides have been taken in the area of Corporate Insolvency, the same cannot be said for Personal Insolvency. The Examinership process, which is provided for in the Companies (Amendment) Act 1990 (as amended) has proved to be a successful and efficient vehicle in helping certain insolvent companies to get back on their feet by means of a reorganisation of their debts under a scheme of arrangement operating under tight deadlines.

The maximum period of protection within which an Examiner must present his report is one hundred days from the date of presentation of the petition. This is in marked contrast to the Bankruptcy regime, which

operates under the 1988 Act. The Bankruptcy process in this country has been likened to a lobster pot, which is easy to get into but very difficult to escape from. It is an expensive and time consuming process and many have questioned its efficiency in achieving an orderly repayment of creditors.

The proposals in this Report for a form of non-judicial personal insolvency and debt settlement process is much to be welcomed. This holistic approach ensures that an appropriate balance is in place between the creditors and the debtor in a specific case. To quote from the report :

“This approach is also intended to ensure that creditors and debtors do not become involved in expensive, and often fruitless, personal insolvency and debt enforcement processes that are currently in place, and which were developed long before the advent of the consumer society.” (Para. 24, Report).

Week after week in the courts, we see debtors appearing who have limited assets and huge liabilities. The spectrum of debtors is very representative of society in general. Some of them have been reckless or foolish, but many others have, until recent times, always been in control of their financial affairs and met their responsibilities as they fell due, and are now carrying substantial amount of debt due to circumstances which are beyond their control and were not foreseeable when they took on the debt.

While creditors must, of course, be entitled to recover what is due to them, where possible, there are many cases coming before the courts where the proceedings are futile and where at least as good, if not a better result, could be achieved, by some negotiated arrangement. From my experience as both a Barrister and a Judge, many of these cases would be better dealt with by other debt settlement arrangements or mediation, rather than through the courts and, in particular, the Bankruptcy code, as it presently exists.

In this Report, the Commission recognises and emphasizes that the judicial Bankruptcy process remains a suitable mechanism to deal with some forms of personal insolvency, including large and complex cases or those which have not been resolved using other non-judicial process. The Commission cites by way of example a debtor who did not act in good faith.

In such cases, there is a role for the courts in supervising an orderly collection of the assets of the debtor and an orderly distribution by way of dividend to creditors within the Bankruptcy regime. But in most cases of personal debt, it seems to me that the Bankruptcy regime is of little benefit to the creditor and unduly harsh and restrictive on the debtor.

The shortcomings in the Bankruptcy Act 1988, are reflected in the number of bankruptcies in this jurisdiction compared to other developed economies. At paragraph 3.03 of the Report, the Commission states:

“The failure of the 1988 Act was highlighted by reference to the extraordinarily low numbers of bankruptcies in Ireland when compared with similar legal systems, indicating that Irish bankruptcies mechanisms serve little if any purpose and do not provide any benefit to Irish society. This contrasts significantly with the economic, social and humanitarian purposes which Personal Insolvency laws serve in other countries, all of which provide strong justifications for the reform of Irish law. In 2009, just seventeen people were adjudicated bankrupt in Ireland (in the year up to 30th September, 2010, the figure was nineteen) which contrasts hugely with the statistics for Northern Ireland, where there were 1,237 bankruptcies during the same period.”

Anyone who has experience of the Bankruptcy system in this jurisdiction is all too aware of the shortcomings of the Bankruptcy Act. I think it is of some significance that in recent times, a number of debtors in this jurisdiction with significant liabilities have moved to other countries to avail of their less stringent Bankruptcy regimes.

I do not propose to outline the perceived weaknesses of the Bankruptcy process in this jurisdiction as they are amply set out in the Report. But I would invite people with responsibility in this area to consider whether there is any useful purpose to be served by keeping

debtors in a state of bankruptcy for twelve years before conditional discharge.

The present regime results in many bankrupts never getting out of that situation, even by the time they die. Sadly, this is the reality for some debtors who get trapped in the Bankruptcy process.

The recommendations of the Commission in this Report are comprehensive and far-reaching. Anybody reading this Report cannot but be convinced of its importance and of the justification for the recommendations contained therein. Some of the obvious changes proposed in the Bankruptcy code involve an increase in the minimum debt level required to found a creditor's petition. It is recommended that this be increased from €1,900 to €50,000.

A recommendation that bankrupt debtors should be automatically discharged on the expiry of a period of three years from adjudication is most welcome. I mention these as the headline recommendations and, in doing so, I am not doing justice to the comprehensive nature of the Report, which has so many other valuable recommendations, both in the area of Bankruptcy law and debt settlement arrangements and debt enforcement.

The Commission is to be commended on this most important Report, which is of immense relevance to the times in which we live. The implementation of the recommendations contained in this Report will

provide a solution to problems arising out of personal debt in a way which is reflective of the society in which we live and the role of consumer credit in the modern economy.

The proposals in this Report, if acted upon, would also, I believe, go a long way towards reducing the stigma which has attached to bankruptcy in the past.

In the course of our lives, we all assume debt. It is a sad fact of human life that some people get into unmanageable debt, and while creditors have to be paid and debtors must meet their obligations, we, as a society, have to decide whether people who do not have the means to fully discharge their debt are to be given a reasonable opportunity for a second chance without being drawn into some expensive labyrinthine process which condemns them to an existence where they have lost control of much of their financial destiny and suffer real restrictions for many years.

I do not believe that this is the type of society that most of us want to see. The recommendations contained in this Report map out a great new way forward to deal with the problems arising out of personal debt management and debt enforcement in a way which is both modern and humane.

I very much hope that the recommendations contained in this most valuable report are taken up by the legislature and acted upon without delay.