

'The Experience of the Civil Debtor in the Legal Process and Experience of Imprisonment'

Free Legal Advice Centres Ltd

Paul Joyce

Background to Research

- Flac as a legal support for Mabs
- Low appearance rate of debtors in debt enforcement proceedings apparent for a number of years
- May, 2003, Flac published 'an End based on Means' critical of current system with particular focus on Instalment Order procedure
- Voice of the debtor unheard

Main forms of debt enforcement

- Instalment Order procedure
- Registration of a judgment mortgage against debtor's property
- Execution Order – Sheriff seizing goods of debtor for resale
- Creditor files for debtor's bankruptcy
- Registration of judgment – effect on debtor's credit rating

Possible steps in Instalment Order procedure

- Creditor obtains a court judgment for a sum of money against a borrower, usually undefended
- Creditor goes to 'enforce' judgment by service of Debtor's Summons, seeking to examine the debtor's financial situation
- Debtor asked to send in statement of means form and attend hearing

Possible steps in Instalment Order procedure

- Purpose of hearing (in open court) to examine means and set an appropriate instalment
- Frequently, debtor does not attend and instalment is made without accurate details of his/her finances
- If there is a default in payment, creditor can issue a summons for arrest and imprisonment

Possible steps in Instalment Order procedure

- A further hearing is scheduled for debtor to explain that default is not due to 'wilful refusal' or 'culpable neglect'
- No appearance - Committal Order issued and sent with warrant to execute to Gardai
- Potential committal to prison for up to 3 months, usually a few weeks
- Instalments continue to run – possibility of a second term of imprisonment after release

State/Creditor arguments in relation to the procedure

- The imprisonment is not for debt but failure to meet terms of the Instalment Order
- The debtor gets three opportunities to defend their position and has not availed of any of them
- The process must bite at some point for creditors to recover their money

Methodology

- Mabs service countrywide requested to participate – Eventually 30 of the services volunteered
- Detailed draft questionnaire devised to cover each of the possible stages in the process
- Meetings held with money advisors to explain the purpose of the study and to discuss draft questionnaire

Methodology

- Advisors agree in principle to seek to interview two clients each
- Questionnaire revised in light of meetings with advisors
- Clients approached to agree to conduct interviews
- Many potential clients reluctant to relive their experience – a finding in itself?

Methodology

- Ultimately 38 clients interviewed
- Statistics on the process also examined from Courts Service Reports and Irish Prison Service
- Compliance with international human rights norms, in particular Ireland's state reports to the United Nations under International Covenant on Civil and Political Rights (ICCPR)

Some background data

- Close to 80% of clients had dependant children
- 66% were in receipt of some form of social welfare at time of the proceedings
- 70% did not own or were not in the course of buying their own homes
- Approx 80% had multiple debts in arrears

Some background data

- 90% of clients cited one or more of the common debt triggers – illness, accident, unemployment, relationship break up, business failure – as a reason for arrears.
- 20% cited over extension of credit, nearly 40% accepted that they had over borrowed

Some comments

'Partner and client split 3 weeks before wedding. Client had borrowed for wedding costs and car. She then became ill with breast cancer and was unable to work, thus debts were the last thing on her mind'

'We were struggling to survive on our farm income. We borrowed from family at times to pay household bills. The farm was too small to be financially viable'

Some background data

- 24 clients described their attitude to payment as couldn't pay, 14 as could pay but needed more time. None accepted that they would not pay.
- Money advice was accessed too late in many cases. For example, nearly 30% made contact after a committal order had been obtained, 10% after a term of imprisonment had been served

Reasons for delay in seeking help

- Over 85% felt they had delayed
- 50% cited lack of awareness of services that were there as a reason
'I didn't have any backup or advice until it was too late'
- 20% cited fear of being judged
'I was too afraid to discuss the matter. Felt too ashamed'

Reasons for delay in seeking help

'I feel it makes no sense to expect someone in such financial difficulties to act rationally. Through ignorance and fear of the power the system wields it is easier to pretend it is not happening'

Data on legal proceedings

- Over 50% claimed to have received a draft summons in advance
- 30% claimed not to have received the original summons although served by registered post
- Nearly 80% of those who received this summons claimed not to understand their options and this was echoed throughout the process

Some comments

'No I didn't know my options and didn't think of the consequences. I couldn't afford to pay, that's all I knew and couldn't afford a solicitor'

'It just seemed like a lot of letters and I didn't read or understand them. I was hiding them so they would disappear'

Data on Instalment Orders

- None of the 38 clients defended the initial claim against them
- 2 cases settled just prior to the service of a Debtor's Summons
- Of the remaining 36, **11** claimed not to have received the Debtor's Summons and an order was made
- Of the remaining 25, **12** did not respond to the summons or attend the hearing and an order was made

Data on legal proceedings

- Of the remaining 13, **2** went to court on their own on their own and instalment orders were made
- The remaining 11 contacted Mabs, 8 cases resulted in agreed instalments without a hearing, one case adjourned without an order and **2** cases in a court ordered instalment
- Thus, there were **27** instalment orders made in total

Instalment Orders

- Of the 27 Instalment Orders, only one was paid in full leaving 26
- No payment in 15 cases, part payment in 11 cases
- Part payment accepted in 4 cases on proposal of a money advisor
- Leaving 22 applications for committal to prison

Committal Applications

- Of the 22, 4 claimed not to have received the summons
- In total, 16 did not attend the hearing leaving 6
- 4 settled through Mabs intervention
- 2 appeared themselves, one to pay off the order via a loan and the other who was already in prison!!
- 16 Committal Orders made

Committal Orders

- Of the 16 Committal Orders, 8 cases settled through Mabs with 6 of these involving reduced payments, invalidating the order
- 3 were appealed successfully to the Circuit Court (one of these settled)
- 5 cases resulted in terms of imprisonment, one for the full term of 3 months

Committal Orders

- All five served the full term ordered by the judge
- All five were on a social welfare payment at the time of the committal
- Of the five, 4 cited illness (2 psychiatric), 3 business failure and 3 unemployment as a reason for the arrears

Some comments

'It was a horrible experience. I stayed in the cell for 11 days, day and night. I couldn't eat or sleep'

'Very frightened initially, claustrophobic and scary. I was mixed in with a junkie and an armed robber'

'Cost to state of putting me in prison far higher and cannot raise money in a prison cell'

Attendance at court hearings

- 27 clients (of 28) attended none or only some of the hearings
- When asked why, 16 said too embarrassed/frightened, 14 was not aware that I should, 13 did not want to go to an open court hearing
- 'I don't think that debt cases should be held in a public court. It is very embarrassing in a small town where everybody knows each other'*
- 'I didn't understand it. So broken at the time, it meant nothing to me'*

Some conclusions

- Inability to pay was apparent from the outset but not uncovered until too late in many instances
- Many clients did not understand the process or were in difficult personal situations to attempt to address it
- Having to appear in open court hindered participation in the process and lack of access to legal assistance did not help
- The attitude of creditors changed when a money advisor became involved

Some potential recommendations

- Earliest possible reference to legal advice and money advice essential
- Creditors should at all times encourage access to money advice with all debts taken into account
- Debt enforcement to take place in private – debt rescheduling tribunal an option
- Full financial disclosure should be compulsory where necessary
- Imprisonment should end with attachment of earnings as a potential option instead