



MORTGAGEES' SOLICITORS AND THEIR BORROWERS

CONFLICT OF INTEREST

Increasing attention is being paid to situations in which solicitors may find themselves faced with a conflict of interest. The Conveyancing Committee has recently been asked to advise a firm of solicitors acting for a bank in a provincial town, as to the propriety of their acting for the bank's customers in connection with the completion of mortgage documentation.

Not so many years ago there would not have been any documentation beyond a deposit of the Land Certificate or title deeds, often made directly to the Bank Manager without the intervention of any Solicitor. The inadequacy of the equitable deposit in the absence of satisfactory collateral, as an enforceable security, has been only one of a number of factors which have encouraged banks to insist on mortgages or charges being in writing.

Three separate difficulties arise where the customer does not wish to enlist the assistance of his own solicitor, two for the bank's solicitor and one for the bank itself. The Solicitor's first problem is that of conflict of interests, if he does agree to act for the customer - which he would be foolish to do - and the second arises if the customer insists on not engaging a solicitor, in ensuring that the queries on the title which must, in the light of the Northern Bank -v- Henry (1981) I.R.1 case, be raised are answered with a sufficient degree of responsibility.

The bank's difficulty, particularly if its own solicitor arranges for the completion of the mortgage and spouse's consent, whether acting for the customer or not, is the allegation of undue influence. Recent cases in England, where the doctrine of undue influence does not seem to have been as frequently relied on as it has been in Ireland, principally Lloyds Bank -v- Bundy (1974) 2 All E.R.757 and most recently National Westminster Bank -v- Morgan (The Times, July 5th 1983) have shown that the Courts there are likely to view banks as having such a fiduciary duty to the person executing the document in favour of the bank as to require such person to have independent legal advice.

Accordingly, solicitors acting for banks should not merely advise the customer that it would be unwise for the solicitor to act for or advise him in the matter, but should also advise the bank of the wisdom of ensuring that the customer and the bank receive adequate independent advice.