

## CHAPTER 11

### LOANS, MORTGAGES AND CHARGES

# LAW SOCIETY CONVEYANCING HANDBOOK



## MORTGAGEES' SOLICITORS AND THEIR BORROWERS

### CONFLICT OF INTEREST

### FOLLOW UP

A practice note published in a recent issue of the Gazette pointed to the dangers attaching to any transaction, wherein solicitors for a lending bank would also be involved in representing or advising a borrowing customer in the same matter. Such note highlights the wisdom of ensuring that the parties should receive adequate independent advices, and referred specifically to an English decision vis. *National Westminster Bank Limited -v- Morgan*.

While the House of Lords has since reversed the decision of the Court of Appeal in the Morgan Case, which was based on the earlier Court of Appeal decision in the case of *Lloyds Bank Limited -v- Bundy*, it should not be assumed that Irish Courts would automatically follow the English line of authority. The High Court of Ontario, and perhaps, more significantly, the High Court of Australia, Australia's highest court, have both followed the Bundy decision, and their authority might at least be persuasive to our Supreme Court.

In the recent case of *Kings North Trust Ltd -v- Bell and others* (1986) 1WLR 119, the Court of Appeal in England was faced with a situation where a lending institution, through its own solicitors and the borrower's solicitors, had entrusted to the borrower the execution of a consent to a mortgage by the borrower's spouse. It held that, in the circumstances, the borrower had acted as agent of the lending institution, which was accordingly, bound by his actions, and therefore could not enforce the Mortgage Deed against the spouse, who had been induced to sign by the fraudulent representation of the borrower. This line of authority clearly suggests that, if either the lending institution's solicitor or the borrower's solicitor had procured the consent of the spouse, without explaining to her the precise reason why the security was being sought, the institution would not be able to enforce the security. This decision confirms the Conveyancing Committee in its earlier recommendation, which was that solicitors acting for banks should not merely advise the customer that it would be unwise for the solicitor to act for or advise the customer in the matter but should also advise the bank of the wisdom of ensuring that the customer and the bank receive adequate independent advice.