



In the May 1986 issue of the Gazette the Conveyancing Committee re-iterated an earlier recommendation that solicitors acting for Banks should not merely advise the customer that it would be unwise for the Bank's solicitor to act for or advise the customer in the lending transaction, but should also advise the Bank of the wisdom of ensuring that the customer and Bank receive adequate independent advice. The Practice Note referred to the recent case of *Kings North Trust Limited -v- Bell and Others*(1986) ICLR 119, where the Court of Appeal in England 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 a Mortgage Deed against the spouse, who had been induced to sign the Deed by the fraudulent representation of the borrower.

The Committee has been requested to clarify its view expressed in the above recommendation, having regard to its current view in relation to "The Third Solicitor", i.e.that it should be possible for the same solicitor to be utilised by the borrower and the Building Society, provided the "common" solicitor is the borrower's.

The recommendation which appeared in the May,1986, issue of the Gazette was made after a full consideration of the Kings North Trust Limited case, the facts of which, briefly, were as follows:

The first and second Defendants, husband and wife, agreed to execute a second mortgage on their matrimonial home as security for an advance by the Plaintiffs to the first defendant for a partnership business in which the second defendant was not involved. The Plaintiff's solicitors sent the documents to be executed to the first Defendant's solicitors who entrusted to the first defendant the responsibility of procuring execution by the second Defendant of the Mortgage Deed. In reliance upon the first Defendant's false representation of the purpose of the advance, the second Defendant signed the Deed without independent advice. The Plaintiffs sought an order for possession against both Defendants in order to enforce the mortgage. It was held in the Court of Appeal that since the Plaintiffs, through the two firms of solicitors, had entrusted to the first Defendant the execution of the Mortgage Deed by his wife, he had acted as their agent and they were bound by his actions; that, accordingly, they could not enforce against the second Defendant the Mortgage Deed which she had been induced to sign by the fraudulent misrepresentation of the first Defendant.

It was stated in the Judgement of the Court of Appeal, per curiam, that where a creditor (or intending lender) desires the protection of a guarantee or charge on property from a third party and the circumstances are such that the debtor could be expected to have influence over that third party, the creditor ought for his own protection to insist that the third party has independent advice.

MORTGAGEES' SOLICITORS AND THEIR BORROWERS

CONFLICT OF INTEREST

CLARIFICATION



**MORTGAGEES’
SOLICITORS AND
THEIR BORROWERS**

**CONFLICT OF
INTEREST**

CLARIFICATION

(Contd.)

When the Committee considered the Kings North Trust Limited case, it was generally agreed that the problems posed by that case and the rationale of its decision were not of any great significance in the context of the normal Building Society first mortgage. In the case of a Building Society first mortgage the spouse, either as co-owner or as consentor, is involved in a transaction which normally involves the funding of the purchase of a dwellinghouse in which the spouse is going to reside and, accordingly is gaining considerable benefit from the transaction. Furthermore, a Building Society Home Loan is invariably made on the standard terms which are not negotiable. In the case of Bank Loans, some form of negotiation of the terms of the loan is often involved.

In the Kings North Trust Limited case the Borrower was borrowing money for the purpose of a business transaction of which the borrower’s spouse was totally ignorant. On the facts of that case the spouse was, in effect, a third party to the lending transaction between the Bank and the Borrower. The Court of Appeal decided the case on the general law of principal and agent stating that “the principal”(the creditor), however personally innocent, who instructs an agent (the husband) to achieve a particular end (the signing of the document by the wife) is liable for any fraudulent misrepresentation made by the agent in achieving that end, including any continuing misrepresentations made earlier by the agent and not corrected.

In the case of the first mortgage of a dwellinghouse to a Building Society, the consenting spouse is not, in the sense indicated in the Kings North Limited case, a third party to the lending transaction. Accordingly, it is the view of the Committee that there is no necessity for separate solicitors to act on behalf of the Building Society and the borrowers, provided that the “common” solicitor is the borrower’s.