FEEDING THE ESTOPPEL/VACATE/ RELEASE

Standard practice requires that a Deed of Release of Mortgage should be executed prior to the execution of a Conveyance or Assignment of the property by the Mortgagor (this does not apply to a Building Society vacate which under Section 42 of the Building Societies Act 1874 operates to vest in the person best entitled irrespective of the date of execution).

The reason for this standard practice is that a Vendor will invariably be requested to assure both his legal and equitable interest in the lands. If the lands are already subject to a mortgage, the Mortgagee holds the legal estate and the Mortgagor only retains his equity of redemption. It follows therefore that if a Mortgagor wishes to dispose of the property to a third party he must first re-acquire that legal interest by obtaining a Deed of Release from the Mortgagee.

The normal presumption, in the absence of evidence to the contrary, is that Deeds are executed at the date specified in the Deed. The situation could (and does!) arise whereby on closing a sale a Purchaser's Solicitor is handed the Conveyance and the Release (both deeds undated) and later in a moment of forgetfulness and in his anxiety to have the deeds registered without delay he inadvertently dates the Conveyance prior to the Release.

When the Purchaser later seeks to dispose of his property, the incoming Purchaser's Solicitor may raise an objection that there is an outstanding legal estate vested in the original Mortgagor.

Many would argue that in this case the Mortgagor should now execute a fresh Conveyance of the outstanding legal estate in favour of the incoming Purchaser.

But is that legal estate still vested in him?

The answer often is "no"! The reason is that by virtue of the doctrine of "feeding the estoppel", the legal and equitable interest in the property can become (although at different stages) vested in the Purchaser from the original Mortgagor and he can therefore validly assure the legal and equitable interest in any further Purchaser of the property.

This arises where the Deed of Conveyance or Assignment to the Purchaser contains a clear and unambiguous recital to the effect that the Vendor is seized of the freehold or leasehold interest in the property free from incumbrances.

The principle on which the doctrine of "feeding the estoppel" operates is clearly set out in Williams "Vendor and Purchaser" 4th Edition (1936) Vol.ll at Page 1096 in the following terms:

FEEDING THE ESTOPPEL/VACATE/ RELEASE

(Contd.)

"As previously explained, if the Conveyance to the Purchaser contained a precise averment of the Vendor's seizure in fee or other right, sufficient to work an estoppel at law, then if the Vendor had not the estate specified at the time of the Conveyance but afterwards acquired it, the same would immediately pass in effect to the Purchaser and his Successors in title with out any further Conveyance, by reason of the fact that the acquisition of the legal estate "feeds" the estoppel. An estate by estoppel of this kind would be available in favour of the Purchaser and his Successor in title as against all persons claiming the whole or any part of the Vendor's after-acquired estate by any title derived from him, whether gratuitously or for value and whether for a legal or an equitable interest".

The said paragraph from "Williams" was cited and expressly approved of in Cumberland Court (Brighton) v Taylor Ch.D., 29.

UPDATE:

1. **Pursuant to Section 18 of the Housing Act, 1988 *all lenders* may now, similar to a building society, use a vacate in the same way.**
   Please note however that it is compulsory upon local authorities, but not on other lenders. However it has now become the practice for all lenders to use the vacate. There may be instances however where a release is the more appropriate document in view of the fact that the mortgage may contain a number of securities with one or more (but not all) of the securities being released.
2. **Pending the production of the vacate it is recommended that Solicitors acting for purchasers or for mortgagees shall not defer completion of the sale or registration of the purchase deed or completion of the mortgage by the purchaser provided that the Solicitors are satisfied that all monies due on foot of the mortgage have been discharged and that a satisfactory undertaking to forward same with receipt has been furnished.**
3. **Where there is a release of mortgage instead of a vacate and if it transpires that the deed of release of mortgage is dated subsequent to the deed of assignment of the property to the purchaser, it was felt that a deed of rectification was essential in order to get in an outstanding legal estate.**
   The clearly held view of the Conveyancing Committee is that the doctrine of Feeding the Estoppel applies to such circumstances and that no deed of rectification is necessary. The doctrine operates effectively to vest the entire legal interest in the purchaser as soon as the deed of release is completed (subject, of course, to whatever necessity there may be for Land Act Consents).

Published in Law Society Gazette, November 1978

DISCHARGE OF MORTGAGES OUT OF PROCEEDS OF SALE

The Conveyancing Committee of the Dublin Bar Association has for some time been considering the problems arising from the increasingly common insertion into Contracts for the sale of properties of a clause to the effect that "on closing the purchaser will accept the vendor's Solicitor's undertaking to discharge out of the proceeds of the sale the mortgage in favour of the Building Society".

While appreciating the practical reasons while give rise to such a clause, the Committee feel that the practice of inserting such clauses in Contracts is not desirable.

The Committee recommends instead, that a clause to the following effect would deal with the difficulties which arise in paying off mortgages where sales are being closed and would avoid the undesirable consequences of the clause above mentioned:

> "When furnishing the Apportionment Account for the closing of the sale, the vendor's Solicitors will furnish to the purchaser's Solicitors a statement from the Vendor's Mortgagees setting out the amount required to redeem the mortgage as at the closing date together with the accruing daily rate of interest thereafter and, on closing, the purchaser will furnish to the vendor separate Bank Drafts for the amount required to redeem the mortgage and for the balance of the purchase monies respectively and the vendor will forthwith discharge the mortgage debt to the vendor's Mortgagees and will furnish to the purchaser proper evidence of such discharge and will furnish to the purchaser such release of the mortgage as may be appropriate".

UPDATE: Difficulties are arising with regard to obtaining redemption figures from lenders. It is of the utmost importance that

1. **the request for such redemption figures should be in writing. In this regard one should never rely on obtaining redemption figures over the telephone.**
2. **the request in writing should ask for the redemption figures for <u>all</u> loans that the client may have with the particular lender.**

There have been instances where Solicitors have requested redemption figures with regard to the original loan only whereas the client had a number of other loans which were secured by way of a deed of further charge or an equitable deposit of title deeds. The vendor's solicitor, having redeemed the original loan in accordance with the written figures obtained from the lender, gave an undertaking to the Solicitor for the purchaser but when the vacated mortgage was sought from the lender the vendor's solicitor was informed that there were other loans outstanding and the mortgage could not be handed over vacated. The vendor's solicitor, having closed the sale and disposed of the monies on hand, was then in difficulty because he could not honour his undertaking unless he discharged the additional monies due to the lender which may ultimately have to come out of his own pocket unless his client acknowledged that he owed the monies and put the solicitor in funds to discharge same.

The Committee understands that the problem is arising more with building societies than with banks and accordingly, as indicated, it is of the utmost importance when requesting redemption figures that the request be made in respect of <u>*all*</u> loans affecting the property. If it should transpire that the lender did not furnish redemption figures in respect of all loans but only in regard to the original loan, it is submitted that the lender would be estopped from denying that all of the loans had been redeemed where it had furnished redemption figures in respect of only one of the loans.

Published in Law Society Gazette, June 1979

CONDITIONS IN LOAN APPROVAL

Most lenders satisfy themselves fully about all matters the subject of their security before issuing a written letter of approval. If the loan exceeds 75% of the cost of the property, it is not unusual however for the loan to be made conditional on the Borrower taking out an Indemnity Bond to cover the excess. Other lending institutions approve loans subject to survey or, in the case of loans by Life Insurance Companies, subject to the Borrower taking out an additional Life Assurance Policy.

The normal condition that Solicitors acting for the Purchaser insert in the Contract for the protection of their client is a clause to say that the Contract is subject to a loan approval being obtained. It is not usual to go on to provide that the Contract is subject to compliance with any of the conditions mentioned above, even though their compliance may be outside the power of the Purchaser. The Mortgage Protection or Life Assurance might be refused or approved on terms that would be extremely onerous to the Purchaser. Solicitors giving undertakings to Banks and completing purchases without protecting their clients against such risks may well be negligent. It is suggested that Solicitors acting for a Purchaser should use a standard type of clause and the following is suggested as a reasonable wording:

THIS CONTRACT shall be subject to the Purchaser obtaining approval for a loan of £ ..... from ..... on the security of the premises PROVIDED ALWAYS that if this loan has not been approved in writing within ..... weeks from the date hereof either party shall be entitled to rescind this Contract and in such event the Purchaser shall be refunded his deposit without interest, costs or compensation.

(If the loan approval is conditional on a Survey satisfactory to the Lending institution or a Mortgage Protection or Life Assurance Policy being taken out or some other condition compliance with which is not within the control of the Purchaser the loan shall not be deemed to be approved until the Purchaser is in a position to accept the loan on terms which are within his reasonable power or procurement),
(Delete as appropriate).

In the opinion of the Conveyancing Committee, this is a reasonable Clause to use to make a Contract subject to loan. The Committee advise strongly against a Solicitor giving an undertaking to a Bank to obtain bridging finance unless and until he is certain that all conditions of the loan can be complied with.

UPDATE:

1. **With regard to housing loans it is compulsory for all borrowers to take out mortgage protection insurance unless such insurance is refused for health or age reasons.**
2. **This note should be read in conjunction with the current Certificate of Title/ Guidelines/Undertaking as agreed with the lenders.**

Published in Law Society Gazette, December 1979

DUBLIN CORPORATION AND DUBLIN COUNTY COUNCIL MORTGAGES

The Dublin Solicitors Bar Association after lengthy discussion and consideration, has procured the agreement of the Dublin Corporation and of the Dublin County Council to the execution of Releases of Mortgage in advance of actual payment.

The practice should obviate the extensive delays, which have become standard, in procuring executed Releases after the Mortgage debt has been repaid.

For either the Dublin Corporation or the Dublin County Council to arrange the sealing of a Release of Mortgage in advance of repayment, the following must be observed:

1. There must be a specific written request from the Borrower or his Solicitor to seal the Release in advance of repayment together with an assurance that the repayment moneys are or soon will be made available.
2. The Borrower and his Solicitor must confirm in writing that if repayment is not made within three months of the sealing of the Release, the Release may be cancelled and destroyed by the Local Authority.
3. The sealed Release must remain in the custody of the Local Authority until repayment is made.

UPDATE: Pursuant to Section 18 of the Housing Act 1988 all local authorities must now execute a vacate rather than a release.

Published in Law Society Gazette, April 1980

HOUSES CONSTRUCTED BY DIRECT LABOUR

PRACTICE OF THE IRISH PERMANENT BUILDING SOCIETY

It will be of interest to members to know the requirements of the Irish Permanent Building Society where a house is constructed by direct labour.

The Society requires that the erection of the premises be supervised by an Architect or Engineer, who, on completion of the premises, will complete a Declaration verifying:

A. That the house was built in accordance with the plans and specifications.

B. That he supervised the erection of the premises and verifies that same has been completed to his satisfaction.

C. That the Building Conditions of the Planning Permission have been complied with in full.

D. That the cost of erection of the premises, including the site cost of £X, is not less than £Y.

A Declaration in the above form, supported by the usual Architect's/Engineer's Declaration required for new houses would satisfy the Society's requirements. The Society will rely on the Declaration to verify the price (construction costs plus site cost), and will not require production of invoices from the Applicant or his Solicitor in respect of construction costs, costs of materials, etc.

Supervision need not be continuous but a minimum of five inspections is felt essential so long as they include an inspection of foundations and, at completion, of roof timbering.

It sometimes happens that potential Borrowers do not advise the Society that the premises will be erected by direct labour and consequently do not find out about the need for this supervision until too late. Members acting for clients purchasing or taking transfers of sites might consider warning clients about this requirement to avoid difficulty at a later stage.

UPDATE:

1. **The Irish Permanent Building Society is no longer a building society but is now a registered bank and has changed its name.**
2. **The practice set out above is, as far as the Conveyancing Committee is aware, now applicable in regard to all lenders.**

Published in Law Society Gazette, May 1980

CHECKING IDENTITY

The Kerry Law Society suggest that applicants for loans should provide a Map prior to the Building Societies' Surveyors' first inspections and that on this first inspection, the Surveyors should check that the property is situated within the boundaries shown on the Map. They point out that this would eliminate the need for further checking on this.

The Committee considers that this would be a well worthwhile practice to achieve where possible. It is, of course, more appropriate to individual sites in the country. The Committee points out that not all Building Societies use Engineers or Architects for inspections and that in the case of the Societies who use Valuers, additional checks might require to be made on identity. They point out that a frequent cause of problems in cases like this are septic tanks and/or percolation areas being situated outside the ownership of the borrower and there not being in existence any form of documentation to confer easements on him. A valuer would, in most cases, be unable to certify authoritatively in cases like these. It was felt, however, that in cases of Building Societies who use Architects and Engineers, it would save time and expense and be generally helpful to the parties concerned. Solicitors acting for purchasers of sites and potential borrowers should remember to remind their clients of the potential time savings and financial savings involved in this useful suggestion.

UPDATE: Where in the case of once - off houses the Purchaser's solicitor is certifying title to a lender the solicitor should insist there be furnished a map showing the boundaries of the site/the location of the septic tank/water supply/rights of way and the map should be sent to the lender's valuer to confirm formal identification of the property. Before sending the map to the lender's valuer the Purchaser should be furnished the map for the purpose of confirming identification of the property being purchased and the services thereto.

Published in Law Society Gazette, June 1980. JC

BUILDING SOCIETY VACATED MORTGAGES

Pending the production of the Building Society Mortgage with receipt under seal, it is recommended that Solicitors acting for Purchasers and Mortgagees shall not defer completion of the sale nor registration of the Purchase Deed nor completion of a Mortgage by the Purchaser provided the said Solicitors are satisfied that all monies due on foot of the Building Society Mortgage have been discharged and that a satisfactory undertaking to forward same with receipt has been furnished.

This is having regard to Section 84 of the Building Societies Act 1976[1] which provides, inter alia, that a receipt under seal of the Building Society for all monies secured by the Mortgage shall:

(1) In the case of unregistered land operate to vacate the Mortgage and to vest the property comprised in the Mortgage in the person for the time being entitled to the equity of redemption.

(2) In the case of registered land for the purposes of Section 65 of the Registration of Title Act 1964 be sufficient proof of the satisfaction of the Mortgage.

Published in Law Society Gazette, December 1980. JC

1. The Building Societies Act 1976 has been repealed and replaced by the Building Societies Act 1989

FEEDING THE ESTOPPEL

Section 84 (2) of the Building Societies Act provides that a receipt endorsed on a mortgage under the Act shall operate to vacate the mortgage and shall, without any reconveyance, vest the legal estate in the person entitled. The legal profession has been crying out for years to have this simple procedure adopted for all releases and reconveyances of mortgages, but to no avail. A full Deed of Release or Reconveyance must be entered into in the case of all mortgages with any person or institution other than a Building Society. This includes Local Authorities, Insurance Companies, Banks etc. The Joint Committee has been asked to consider the problem which arises most frequently in connection with such releases, which arises where the Deed of Release of Mortgage is dated subsequent to the Deed of Assignment of the property to the purchaser. Some Solicitors felt that a Deed of Rectification was essential in such circumstances, in order to get in an outstanding legal estate, and insisted upon this being done.

This view is clearly held by a substantial majority of conveyancing practitioners and leading conveyancing Counsel that the doctrine of Feeding the Estoppel applies to such circumstances and that no Deed of Rectification is necessary. The Joint Committee considered the point and is unanimously of the opinion that no Deed of Rectification is required and that the doctrine of Feeding the Estoppel operates effectively to vest the entire legal interest in the purchaser as soon as the Deed of Release is completed (subject, of course, to whatever necessity there may be for Land Act consent).

UPDATE: The attention of practitioners is drawn to Section 18, Housing Act, 1988 (extracted infra), which provides, in effect, that a receipt under the seal of the Mortgagee is to operate to vacate the Mortgage and to "vest the estate of and in the property comprised in the Mortgage in the person for the time being entitled to the equity of redemption" without any re-conveyance or re-surrender. The outcome of this is to extend the vacate system, which was previously confined to Building Societies, to all Mortgagees, and it is understood that the majority of lending Institutions are prepared to operate on the basis thereof. Such system, which has proved to be workable and economical, applies to both registered and unregistered land, and obviates the dating problem (referred to above). It should, however be noted that it does not extend to partial releases, which must be dealt with by Deed, with care being taken as to the dating thereof.
There is also published overleaf copy of a letter issued by the Land Registry following the introduction of Section 18.

Published in the Law Society Gazette. June 1982

FEEDING THE ESTOPPEL

(Contd.)

Mr. J. Ivers,
Director General,
Law Society,
Blackhall Place,
Dublin 7.

30th August 1988

Dear Sir,

I am to refer to your enquiry relating to discharges of mortgages or charges under Section 18(2) of the Housing Act, 1988.

I am to confirm that, instead of a formal release the Land Registry will accept, as evidence of the release of a charge, a receipt as in the case of a Building Society receipt if it is endorsed on the original counterpart, or certified copy, of the charge.

If it is not so endorsed but clearly refers to the charge and identifies the registered lands charged it will also be accepted.

In all other cases evidence on affidavit will be required. Provision is also made in Section 18 of the Housing Act, 1988, for the vacate of a mortgage of unregistered land registered in the Registry of Deeds. The requisite fee applicable at present to vacates of Building Society mortgages will apply to vacates of other mortgages pursuant to Section 18 of the Housing Act, 1988.

Yours faithfully,

B. McCormac,
Manager,
Land Registry,
Central Office,
Chancery St.,
Dublin 7.

The letter reproduced above was originally published in Law Society Gazette, October 1988

UNDERTAKINGS TO DISCHARGE MORTGAGE ON COMPLETION OF SALE

The Committee was asked for its view on the practice which is becoming widespread of the Vendor's Solicitor inserting a special condition in the Contract for Sale providing that the Purchaser's Solicitor accept Vendor's solicitor's undertaking to discharge Vendor's Mortgage out of the proceeds of sale on completion. The Committee recommends that this practice be discontinued.

Vendor's Mortgage is Vendor's problem. Purchaser's problem is to secure loan approval and where necessary bridging accommodation to enable Purchaser to complete on the contract closing date without payment of interest. Vendor's problem should not become a problem for the purchaser. On payment over by the purchaser of the balance of the purchase money Purchaser should obtain an unencumbered title. The words "as beneficial owner" used in many deeds imply this.

Where purchases are completed with the aid of bridging finance a Purchaser's Solicitor who accepts aforesaid condition in the contract could be in breach of his undertaking to the lending body. Where purchases are completed on three-way closings with a Building Society loan the Building Society's Solicitor cannot accept such a condition having regard to Section 80 of the Building Societies Act 1976 which provides that a Building Society must have the first mortgage on the property.

If for any reason Vendor's Solicitor did not comply with his undertaking Purchaser's Solicitor could be found to be negligent in accepting such a condition in which case Purchaser could not look to the compensation fund.

The Committee suggests that on closing between Vendor and Purchaser only it might be mutually agreed between Vendor's and Purchaser's Solicitors that Purchaser would if given sufficient notice in advance provide the purchase money for closing by two bank drafts - one for the redemption price of Vendor's mortgage and the other for the balance of the purchase price. Purchaser's Solicitor could then undertake to transmit the bank draft to the lender.

On a three-way closing where Vendor's mortgage is in favour of the same Building Society as Purchaser's Building Society then the Building Society may be prepared to split the loan cheque (on being given adequate notice in advance) and the Building Society Solicitor could then discharge Vendor's mortgage with the Building Society's own cheque. Where a Building Society is not prepared to split the cheque or where Vendor's mortgage is not with Purchaser's Building Society Vendor should make his own arrangements to redeem his own mortgage either before or at the three-way closing.

UPDATE: The Building Societies Act, 1976 has now been repealed and replaced by the Building Societies Act 1989.

Published as a supplement to Law Society Gazette, September 1983. JC

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.l 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.

Published in Law Society Gazette, December 1983

UPDATE: This Practice Note should be read in conjunction with the Practice Notes at page 11.16 and page 11.17 hereof.

COMBINED DRAINAGE AGREEMENTS

A CHARGE ON PROPERTY

Combined Drainage Agreements occasionally turn up on titles or as acts on Searches affecting properties in the Dublin Area.

Such agreements arise in order to avoid the expense of connecting each house on the Estate directly to the main drain or sewer, by the Corporation allowing the Builder or Contractor to make an agreed connection but indemnifying the Corporation against any cost or expense arising out of such Consent, because of the liability of the Corporation to maintain such drains or sewers, and further, the Contractor or Builder agree to charge the houses on the Estate with such cost and expenses.

However, since Section 11 of the Local Government (Sanitary Services) Act, 1948, all combined drains were deemed to be drains not sewers, for the purpose of the Sanitary Services Acts, and since that enactment, these agreements have become obsolete, as the liability for the maintenance of all householders' drains, whether combined or single private drains, devolves on the owners. There is, therefore, no further liability on the Corporation to maintain householders' drains which connect into the main drain or sewer.

Notwithstanding that such agreements have now become obsolete, they still appear on the Title, and will remain on the Title until such time as a formal Deed of Release is executed by the Corporation. Such Deeds of Charge could be deemed prior Charges and so this creates a dilemma in so far as a Building Society is concerned by reason of Section 80 of the Building Societies Act, 1976, which prohibits the Society making an Advance where there is a prior Charge, unless such prior Charge is in favour of the Society.

The Conveyancing Committee has looked at the position, as has the Joint Committee and, while it is felt there should be a formal Release, the procedure should be adopted that such Deeds be ignored, because they are of no further relevance, and are now un-enforceable.

Accordingly, solicitors acting for Builders or Developers should, in the case of Unregistered Title, have the Title registered in the Land Registry, and there is no doubt but that the client will appreciate the resulting advantages.

Published in Law Society Gazette, November 1984

UPDATE: The Building Societies Act 1976 has been repealed and replaced by the Building Societies Act 1989.

COMPANIES OFFICE

REGISTRATION OF CHARGES

A recent English case of Reg.-v- Registrar of Companies ex parte Esal (Commodities) Ltd.(In Liquidation) The Times, November 26th, 1984 has cast considerable doubt on the practice of permitting applicants to present a correctly completed Form 47 in lieu of an earlier defective Form which had been rejected, while retaining the priority obtained by the lodgement of the original Form 47.

The Court held that while in ordinary litigation the certificate issued by the Registrar under Section 98(2) of the U.K.Companies Act 1948 was conclusive evidence that the requirements of registration of a charge under section 95(1) of that Act had been complied with, that was not the case in judicial review proceedings. In that case the Applicants had lodged the Form 47 and accompanying documents for the registration of a charge dated the 9th February 1984 on the 29th February 1984. These were considered unsatisfactory by the Registrar and another Form 47 with the same accompanying documents was lodged by the 29th March. The second Form 47 was dated February 29th and the Registrar recorded February 29th as the date of registration.

The Court held that the prescribed particulars delivered on February 29th were defective and rightly considered unsatisfactory by the Registrar but he then accepted further particulars outside the 21 days period prescribed.

The legislation and procedures governing the registration of charges created by companies in this jurisdiction are very similar to those in the U.K. It would seem that the Judge's reasoning is impeccable and the Companies Office would be justified in refusing to allow the practice permitted by its English counterpart. The Companies Registration Office have already adopted a practice which accords with the decision in this case.

The decision leaves open two question which immediately occur:-

1. Would the position have been any different if instead of a new Form 47 being lodged, the original Form 47, with amendments had been relodged? It is suggested that once the form is lodged outside the 21 day period it would not have been any different.
2. If the new or corrected Form 47 was in fact lodged within the original 21 day period from the date of the charge is the Registrar entitled to record the date of first lodgement as the date of registration or must the date of lodgement of the correct particulars be the date of registration? It is suggested that only the date of lodgement of correct particulars can be judged to be the date of registration.

It should be noted that the judgement of Hamilton J. in the Irish case of Lombard & Ulster Banking (Ireland) Ltd.-v-Amurec Ltd.(1976) ILTR 1 was not a case in which judicial review was involved. The liquidator in that case was not seeking to have the Registrar's

decision quashed (he was presumably too late to do so) but defending a claim for an Order of possession on the grounds that the registration of the Charge was void, the necessary particulars not having being delivered to the Registrar within the prescribed 21 days. In the Esal case the Court specifically drew a distinction between those proceedings which were by way of judicial review and what the Court described as "ordinary litigation''.

Published in Law Society Gazette, May 1985

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) lWLR 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.

Published in Law Society Gazette, May 1986

UPDATE: This Practice Note should be read in conjunction with the Practice Notes at page 11.12 and page 11.17 hereof.

MORTGAGEES' SOLICITORS AND THEIR BORROWERS

CONFLICT OF INTEREST

CLARIFICATION

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 advice 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) lWLR 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

(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.

Published in Law Society Gazette, December 1986

UPDATE: This Practice Note should be read in conjunction with the Practice Notes at page 11.12 and page 11.16 hereof.

RELEASE OF BANK MORTGAGES

House loan mortgage deeds often now secure for the lender not only the house loan but also any other monies that may be owing by the borrower to the lender, such as monies owing by a borrower on a current account with a bank lender.

A bank, on being asked for mortgage redemption figures, may simply advise the amount due on the house loan. The Bank may later decline to furnish a release of the mortgage/mortgages following receipt of the house loan liabilities on the grounds that there are other liabilities secured by the mortgage deed/deeds. By the time the vendor's solicitor realises that payment of the home loan liabilities does not discharge all liabilities secured by the mortgage deed/deeds, the purchase monies are likely to have been paid out and the vendor's solicitor may be in a position of having to honour an undertaking to furnish a release or vacate of the mortgage or mortgages which the purchaser's solicitor would perhaps have sought and accepted on the closing of the sale.

Where the vendor's property is subject to mortgage, the vendor's solicitor should obtain from the mortgagee a statement of what monies the mortgagee states are required to redeem the mortgage or mortgages and an undertaking from the mortgagee that on payment of the amount stated the mortgagee will furnish a release or vacate of the mortgage or mortgages.

UPDATE: Under the Housing Act 1988 all lenders may (but it is not compulsory except for local authority lenders) issue a vacate rather than a release.
But, as indicated above, if there are other loans apart from the housing loan affecting the property the bank will invariably insist on granting a release of the property only. A vacate on the mortgage deed is not sealed (as to do so would be to acknowledge that all monies were paid) and the mortgage deed is retained as security for any other monies due. It should be borne in mind that the release must be dated on or before the date of the deed of assurance from the vendor to the purchaser. Otherwise the legal estate is outstanding, but, in this regard, see the Practice Notes entitled "Feeding the Estoppel/Vacate/Release" at page 11.1 supra. and the Practice Note entitled "Feeding the Estoppel" at page 11.9 supra. with the respective notes updating same.

Published in Law Society Gazette, May 1989

LIABILITY OF VENDOR TO DISCHARGE LAND PURCHASE ANNUITY

The Conveyancing Committee has been requested to indicate the recommended practice in relation to the discharge of Land Purchase Annuities in the light of the provisions of General Condition 16 of the current Incorporated Law Society of Ireland General Conditions of Sale.

General Condition 16 provides:
Subject to Condition 15, the purchaser shall be deemed to buy:

(a) with full notice of the actual state and condition of the subject property, and

(b) subject to (i) all leases (if any) mentioned in the Particulars or in the Special Conditions and (ii) all rights of way, water, light, drainage and other easements, rights, reservations, privileges, liabilities, covenants, rents, outgoings and all incidents of tenure.

The Committee is of the view that a Land Purchase Annuity is a charge and does not come within the terms of General Condition 16(b). Accordingly, the Committee recommends that, in the absence of a Special Condition to the contrary, it is the Vendor's liability to discharge the Land Purchase Annuity affecting the property in sale.

Published in Law Society Gazette, July 1989

UPDATE: Please note that in the 1995 edition, the 2001 edition, and the 2001 (Revised) edition of the Law Society's Contract for Sale, General Condition 13(g) specifically provides for the discharge by the Vendor [or (as the case may be) such proportion thereof as may be allocated to the property in sale] of any Land Purchase Annuity prior to closing.

SALE BY MORTGAGEE

The guidance of the Conveyancing Committee has been sought from time to time with regard to what enquiries a Purchaser should make from a Vendor who is a Mortgagee realising his security. It is considered that the holder of a FIRST LEGAL MORTGAGE selling as a Mortgagee in possession should furnish the following:

1. *The Mortgage Deed*
   This is essential as the Power to Sell is based on the existence of a deed of Mortgage and terms thereof.
   and
2. *Evidence to show that the Power of Sale has arisen*
   A statutory right to sell arises by virtue of Section 19 of the Conveyancing Act 1881. For the right to arise the Mortgage Money must have become due. In most cases this can be established by checking the terms of the Mortgage Deed itself as it may fix a legal date for redemption. Once this date is past the right of sale has arisen. Where there is not a fixed date for redemption the Purchaser should seek evidence by way of a Statutory Declaration that in the case of a Loan repayable by instalments the Borrower was in arrears or in the case of a loan repayable on demand that a formal demand had been made and no payments received on foot of same.
3. *Evidence that the Mortgagee is in a position to furnish vacant possession*
   There is a distinction in the 1881 Act between when the Statutory Power of Sale arises (section 19) and when the Power is exercisable (Section 20). From the Mortgagee's point of view it is important that he complies with the requirements of both sections. However, by virtue of Section 21(2) the Purchaser obtains a good title once a Power of Sale has arisen and he is not obliged to enquire as to whether it is also exercisable. Nevertheless a Purchaser should be concerned to ensure that the Mortgagee is in a position to furnish vacant possession of the premises. This can be established in the first instance by a physical inspection of the property itself. However, it is suggested that in addition a Mortgagee should give some explanation as to the manner in which he obtained possession and that he has done so lawfully. The principal ways of getting possession are either on foot of a Court Order, on the exercise of a contractual right to take possession pursuant to the terms of the Mortgage Deed, on a surrender of possession by the Mortgagor or on an abandonment of the premises by the Mortgagor. It is considered sufficient for the Mortgagee to furnish a copy of the Court Order or if no Order was obtained furnish a letter setting out the circumstances under which it obtained possession.
4. *Evidence of compliance with the provisions of the Family Home Protection Act 1976*
   If the title to the property in sale is registered in the Land Registry subject to the Mortgagee's charge then the Purchaser need not seek evidence of compliance with the provisions of the Act on the creation of the Mortgage.If the title is unregistered then the normal conveyancing enquiries with regard to compliance with the Act on

SALE BY MORTGAGEE

(Contd.)

creation of the Mortgage should be made.

Once the provisions of the Act have been complied with on the creation of the Mortgage the Mortgagee in enforcing his security on foot of the said Mortgage does not require the consent of the Mortgagor's spouse to the disposal. A Mortgagee is not a spouse and the conveyance from the Mortgagee is not a Conveyance within the meaning of Section 3 of the Act. There is accordingly no need for a Family Home Declaration in respect of the Conveyance itself.

However it is necessary to enquire as to compliance with the Act on the occasion of the Mortgagee obtaining possession. Where possession is obtained on foot of a Court Order, before the Court makes the Order it seeks evidence of notification of the Mortgagor's spouse pursuant to Section 7 of the Act to give the Spouse an opportunity of paying the arrears. Accordingly the interest of the Spouse is protected where a Court Order has been made.

Where Possession is obtained on foot of a contractual right to possession and without the benefit of a Court Order the Mortgagee should furnish by way of a Solicitor's Certificate evidence that the appropriate Notice under Section 7 was served on the Spouse. If there is a surrender or abandonment of possession the Mortgagee should furnish a Solicitor's Certificate that before effecting any sale an appropriate Notice was served on the Spouse.

5. *Puisne Mortgages*

If the holder of a First Legal Mortgage is selling as Mortgagee in possession pursuant to his Statutory Powers of Sale then by virtue of Section 62 (10) of the Registration of Title Act 1964 and Section 21 (1) of the Conveyancing Act 1881 the Purchaser takes free of all Estates, interests or rights ranking in priority after the first Legal Mortgagee and there is no need to furnish formal Discharges or Releases of any Mortgages, Judgement Mortgages or other Burdens ranking subsequent to the first Legal Mortgage.

6. *Nominal Reversion*

Traditionally where there was a Mortgage by sub-demise it was the practice to include a provision whereby the Borrower appointed the Society or its Agent as his Attorney for the purpose of conveying the nominal reversion in the event of an enforced sale. Such a provision is no longer necessary as Section 80 of the Landlord and Tenant Act 1980 provides that if land the subject of a Mortgage by sub-demise, either created before or after the commencement of the Act, is being sold for the enforcement of the Mortgage then the Purchaser is deemed to have acquired the interest of the lessee for the entire of the unexpired term of the Lease including the period of the nominal Reversion.

Form of Assurance from Mortgagee

The operative part of a Deed of Assurance from a Mortgagee in possession should take the

following form:

1. *Registered Land*

   Section 62 of the Registration of Title Act 1964 deals with the Power of Sale by a Mortgagee and Form 25 of the Land Registry Rules lays down the format of the Deed of Transfer whether the property is leasehold or freehold and the operative part is as follows:

   "A being the Registered Owner of a Charge registered on the ..... day of ..... 19 ..... (or at Entry No .....) in exercise of the Power of Sale hereby transfers ..... discharged from the said Charge and from all other Burdens entered in said Folio of the Register over which the said Charge ranks in priority ..... "

2. *Unregistered Land*

   In addition to the normal recitals the Mortgage Deed should be recited and the fact that the Mortgagee is selling as Mortgagee in possession. The operative words and habendum will be as follows:

   (i) Unregistered Freehold

   "AB as Mortgagee in exercise of the Powers vested in it by virtue of the said Mortgage and the Statute or Statutes in that behalf and of every other Power them enabling hereby GRANT and CONVEY unto ..... "TO HOLD the same in Fee Simple free from all right or equity of redemption and from all claims and demands under the said Mortgage"

   (ii) Unregistered Leasehold

   AB as Mortgagee - As No.(i) above - assign rather than convey: "TO HOLD the same for all the residue now unexpired of the said term of years granted by the Lease subject to the payment of the said yearly rent and to the performance and observance of the covenants on the part of the Lessee and conditions therein reserved and contained free from all right or equity of redemption and free from all claims and demands under the said Mortgage".

Having regard to the provisions of Section 80 of the Landlord and Tenant (Amendment) Act 1980 the foregoing is sufficient whether the Mortgage was by way of Assignment of the Leasehold interest or sub-demise. There is no longer any need to join an Attorney for the purpose of passing the nominal reversion. This is the case whether or not the Mortgage Deed itself provided for the appointment of an Attorney for this purpose.

In the case of Leasehold Property (whether Registered or Unregistered) the Deed of Assurance should contain the usual covenant by the Purchaser to pay the rent reserved by the lease and to perform and observe the covenants on the part of the Lessee and the conditions contained therein.

Published in Law Society Gazette, September 1989

Where a mortgage is redeemed the title documents must be returned to the mortgagor.

REDEMPTION OF MORTGAGES AND TITLE DOCUMENTS

Bearing the foregoing in mind it is imperative that where a solicitor who has given an undertaking regarding the title documents redeems a mortgage on behalf of his client he includes with the cheque or draft redeeming the mortgage an authority from his client authorising the mortgagee to release the documents to him. *

Unless such an authority is furnished and notwithstanding that the redemption came from the solicitor, there is no onus upon the mortgagee to deliver the documents to the solicitor or to make any comment regarding same.

Accordingly for a solicitor's own protection, the foregoing should be strictly adhered to.

Please further note that where a second mortgage is outstanding the documents would usually go to the second mortgagee and it is therefore vital that a solicitor should do a search before giving any such undertaking regarding the title documents.

The purpose of Section 18 of the Housing Act, 1988 was to extend the procedure already available to Building Societies of endorsing Receipts on Mortgages in lieu of

Published in Law Society Gazette, October 1990

*** WARNING: The Solicitor should at all times get the redemption figures in writing as this is the only protection the Solicitor has in the event of a dispute as to the amount of the redemption.**

formal releases or reconveyances to all of the lending institutions. Under this Section a Statutory Receipt can now be endorsed on or annexed to the back of an original Mortgage and it is unnecessary to have either a Deed of Release and Memorial in the case of unregistered land or a Discharge in the case of registered land executed under the seal of the lending institution.

A Receipt under this Section shall operate to vacate the mortgage and shall without any reconveyance or resurrender vest the Estate of and in the property comprised in the mortgage in the person for the time being entitled to the equity of redemption.

The Receipt shall be sufficient for the purposes of registration both in the Registry of Deeds and in the Land Registry.

Section 18 will only apply however, where all monies secured by a mortgage or charge have been fully repaid irrespective of whether the mortgage or charge is for all sums due or for a limited amount. Unless the mortgagor or chargor repays everything that is owed to the Bank by him on every account, it is not appropriate for the Bank to execute a form of receipt under Section 18 for two reasons:

(a) the fact that all monies have not been repaid and may interfere with the statutory operation of Section 18 and,

(b) execution of such a receipt might prejudice the Bank in recovering the balance of what is owing.

To ensure that all monies secured by a mortgage/charge will be included in the redemption figures provided by a lending institution, a Solicitor's letter requesting redemption figures from a lending institution should include the following:

(1) A request for up-to-date redemption figures, indicating the amount necessary to redeem the loan in question and all other monies secured quoting the loan account number.

(2) A request for confirmation that the lending institution does not hold any other mortgage or other security on the property in question.

(3) A request for confirmation that on payment of the sum indicated by the lending institution as the amount necessary to redeem the loan and all other monies secured the lending institution will release the property from all encumbrances and execute an appropriate Deed of Discharge/Vacate/Receipt as appropriate.

Unless a solicitor receives confirmation of the above points in writing from the lending institution concerned, then he is not properly in a position to give an Undertaking to provide a release of a mortgage. Some lending institutions may have more than one charge on the property. A request for redemption figures quoting one loan account number only may

S. 18 HOUSING ACT, 1988

RELEASE OF MORTGAGES

(Contd.)

result in redemption figures for that account only being furnished. Also, as with some Bank mortgages, the Deed of mortgage may secure not only the monies due in respect of the home loan but also monies outstanding on foot of an overdraft facility/credit card.

It is essential to obtain the correct figures from the lending institution. A simple request for the amount due on the home loan is not enough. A simple request for the amount due to redeem one loan is not adequate, if there is more than one. The lending institution must be made aware that the request is for redemption figures, which if paid, will entitle the borrower to a release of the property from all security held.

It is felt that if solicitors adhere to the above guidelines, the pitfalls experienced by some solicitors in redeeming loans will be avoided.

Published in Law Society Gazette, November 1990

STANDARD FORM BANK DEBENTURES

Solicitors acting for borrowers are frequently presented with forms of debenture or mortgage debenture which are intended to secure their clients' liabilities to the lending bank. The solicitors should advise the client on the nature of the commitment to follow from the client's execution of the debenture.

In many cases these debentures are pre-printed and include provisions which are not appropriate to the particular loan.

In considering whether the debenture is in an appropriate form, the solicitor should have sight of the bank's loan offer to the client. The debenture should not do any more that enable the bank to take security in the form agreed to by the client. In certain forms of debenture the bank in addition to taking a floating charge will also seek to take a fixed charge over future acquired assets. Apart from the consideration of the validity of such specific provisions, particularly relating to future acquired registered land, the facility offered to the client by the bank may not in the first instance have provided for such a charge. The solicitor should protect his client from executing a debenture which reserves to the bank security over and above what was provided for by the bank in the loan offer letter and accepted by the client.

Published in Law Society Gazette, July/August 1992

When houses are sold vendors normally cancel their home insurance and obtain a refund in respect of the unexpired period of cover. In certain cases insurance cover

is arranged and paid for through the lending agency which provided the finance for the purchase of the property. In these cases does anyone think of obtaining a refund?

The Conveyancing Committee takes the view that the application for the refund is a matter between the client, the lending agency and the insurance company. However, practitioners may wish to bring the point to the notice of their clients.

When at the instigation of The Law Society Conveyancing Committee, the practice of lenders accepting Certificates of Title in lieu of the previous practice of having

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CERTIFICATES OF TITLE

their own solicitors investigate and report on title, was introduced, it clearly was envisaged that Certificates of Title would be accepted without objection or enquiry save in instances where borrowers' solicitors have qualified titles.

Before issuing Certificates of Title, there is a clear obligation on borrowers' solicitors to conduct a thorough investigation of title to enable them properly to certify that borrowers have acquired good marketable title to the properties in question having due regard to the current guideline requirements of the relevant lenders.

The responsibility of lenders' solicitors is limited to taking the necessary steps to perfect the lenders' security to the properties in question. In practice, this generally merely involves the lenders' solicitors attending to the stamping and registration of the borrowers' Deeds of Assurance and Charge unless such stamping and registration have already been completed by borrowers' solicitors.

Accordingly lenders' solicitors should not go behind properly completed Certificates of Title presented to them unless, as already indicated, borrowers' titles are being qualified in any manner. The standard Certificate of Title form consciously was drawn to include provision for the insertion by borrowers' solicitors of a qualification of title which could be accepted or rejected by lenders.

In fact, not having investigated the titles in question, lenders' solicitors would be seen to be intermeddling and putting themselves on notice of matters which could be to the detriment of their lender clients in the event of any action or proceedings being taken in relation to such Certificates of Title.

By accepting properly completed Certificates of Title, lenders' solicitors ensure that the responsibility for and any liability arising in respect of Certificates of Title will lie, where it properly belongs, with borrowers' solicitors.

The Conveyancing Committee recommends that where Vendors' Solicitors desire their clients to avoid the expense of bridging loan finance to provide funds to discharge any

Published in Law Society Gazette, March 1995

UPDATE: This Practice Note should be read in conjunction with the current Certificate of Title documentation as issued by the Law Society in agreement with the lenders and also in conjunction with the Practice Notes at pages 11.29 and 11.31 hereof.

DISCHARGE OF VENDORS' MORTGAGES ON COMPLETION OF SALES

Mortgage affecting their title, they should insert a Special Condition in Contracts for Sale requiring that payment of the balance of the purchase money be provided by the Purchasers in the form of two Bank Drafts - one to effect redemption of the Mortgages affecting Vendors' title and the other covering the balance of the purchase price. It is not acceptable for the Vendors' solicitor to simply undertake to discharge the Mortgages from the proceeds of sale.

In this regard attention is again drawn to previous recommendations at pages 11.4 and 11.13[1.] of the Conveyancing Handbook.

Published in Law Society Gazette, July 1995

1. These page references relate to the 1990 edition of the Conveyancing Handbook. The relevant Practice Notes are at pages 11.3 and 11.11 of this edition.

CERTIFICATES OF TITLE IN RESIDENTIAL (NON-COMMERCIAL) CONVEYANCING

It has come to the attention of the Conveyancing Committee that some lending institutions are requesting solicitors to sign 'acceptance of instructions' and are issuing 'instructions to solicitors' or are otherwise issuing loan packages containing documentation suggesting that a borrower's solicitor also acts for the lending institution.

Under the certificate of title system agreed between the Law Society and the lending institutions, the obligations of the borrower's solicitor are set out in the approved guidelines as issued with the approved forms of undertaking and certificate of title. No other documentation should be accepted or used by practitioners, nor should they accept or sign any documents which appear to be extraneous to the agreed documentation or which suggest either expressly or impliedly that the solicitor also acts for the lender. In the ordinary course of events, the profession will be given due notice of any agreed changes to the certificate of title system.

Solicitors are also reminded of the procedures regarding stage payments and the supplemental stage payment undertaking which requires a solicitor giving the undertaking to a lending institution to ensure that before any stage payment in excess of the amount covered by HomeBond is paid, title to the property (including the right to immediate possession) must pass to the purchaser.

To the Managing Partner

3rd June, 1998

UPDATE: This Practice Note should be read in conjunction with the current Certificate of Title documentation as issued by the Law Society in agreement with the lenders and also in conjunction with the Practice Note at page 11.31 hereof.

Published in Law Society Gazette, April 1998

SOLICITORS ACTING FOR BORROWERS

Dear Colleague,

At the Council meeting held on 8th May, 1998, concern was expressed regarding difficulties being encountered by solicitors acting for borrowers in terms of the documentation being presented to them by lending institutions.

It appears that, despite the agreement made between the Society's Conveyancing Committee and the lending institutions, notified to all members in December 1996, some lending institutions are varying the terms of the documentation, by requiring borrowers' solicitors to accept instructions to act on behalf of the lending institutions and by including other documents and forms which have not been agreed by the Society.

The attached notice[1] from the Conveyancing Committee represents the agreed position. Colleagues should reject any documentation which does not conform with the agreed package.

The Society is seeking an urgent meeting with the lending institutions to discuss a number of matters, including the Society's concerns regarding those institutions who are not conforming with the agreed procedure.

Yours sincerely,

Laurence K Shields
President

Attention Conveyancers!

Letter circulated to the profession on the 3rd June, 1998

1. Reproduced on page 11.31 hereof.

CERTIFICATES OF TITLE IN RESIDENTIAL (NON-COMMERCIAL) CONVEYANCING

It is with great disappointment that the Conveyancing Committee notes that, notwithstanding the publication in the Gazette of notices on two previous occasions since the Certificate of Title documentation as agreed with the lenders was introduced, the profession has to be reminded once again of the basis of the operation of the Certificate of Title system. It is quite clear from the numbers of queries received by the Committee that some solicitors appear to have difficulties dealing with documentation that does not conform with the agreed package.

In reiteration of the Committee's previous advices, the package consists of the following three agreed documents:- Certificate of Title, Undertaking and Guidelines.

Certain lenders are purporting to enlarge the solicitor's responsibility by way of including correspondence accompanying the above documents and by the inclusion of such words as "instructions to act", requesting solicitors to accept letters of instructions and by including other documents and forms which have not been agreed with the Conveyancing Committee.

It cannot be emphasised enough that, for the protection of the individual solicitor and of the profession, such documents should be rejected and returned to the lender pointing out that:-

1. the solicitor does not act for the lender,
2. the only documentation being accepted is that contained in the agreed package.

There is a clear onus on solicitors to read the documentation furnished to them and to proceed only in accordance with the Practice Notes already published by the Committee.

Circulated to the profession on the 3rd June, 1998

CERTIFICATE OF TITLE DOCUMENTATION

The wording of the current documentation in use in connection with the Certificate of Title System issued to the profession in December, 1996 is currently under review and the revised wording is expected to be agreed shortly. New forms of documentation will be issued in due course for insertion in the Appendix to this handbook.

August 1998

UPDATE: See the current certificate of title documentation at Appendix 7 hereof.

UNDERTAKINGS: HOUSE IN THE COURSE OF CONSTRUCTION -A REMINDER

The Conveyancing Committee would like to remind practitioners of the practice note published by the committee in the November 1990 issue of the Gazette and republished last September at page 5.10 of the new Conveyancing handbook. Once again, practitioners are reminded that a solicitor who gives a certificate of title undertakes to furnish an engineer's or architect's certificate that the property in question has been erected in accordance with the planning permission granted. In the case of a house in the course of construction, a solicitor cannot undertake this and where the lending institution is paying out the loan by instalments, the solicitor's undertaking to the lending institution should be amended accordingly. If the undertaking to the lending institution is not amended, and if a practitioner pays out a loan cheque or any instalment of a loan to his client before the house is completed, he is at risk if there is a failure by his client to comply with the planning permission granted.

Published in Law Society Gazette, April 1999

MORTGAGE REDEMPTION FIGURES

The Conveyancing Committee has received a significant number of complaints from members of the profession about difficulties being experienced in obtaining mortgage redemption figures from lending institutions. The main complaint is that provisional figures were given and lenders later revised the figures upwards, even though the solicitors had acted upon the basis of the figures furnished. In one case, a solicitor had actually parted with the sale proceeds of a property and had given an undertaking to procure a release of the mortgage which the particular lending institution refused to do without being paid further monies.

The committee would like to refer practitioners to practice notes previously published on this topic, in particular the practice note published in the Law Society Gazette in November 1990 entitled 'S18 Housing Act, 1988: release of mortgages', which has also been published in the Conveyancing Handbook.

The Conveyancing Committee proposes taking this matter up with the lending institutions in an effort to resolve the current difficulties.

In the meantime, in order to assist practitioners, the committee recommends that the following letter be used by practitioners when seeking redemption figures from lending institutions. In the opinion of the committee, a borrower is entitled to be given a redemption figure which the lender will stand over (that is, one which is not stated to be provisional). Solicitors are reminded that if they give an undertaking to procure the release of a mortgage without having secured a statement of redemption figures which are not provisional or hedged in some way, they are putting themselves at unnecessary risk.

'Re Borrowers:
Property:
Account No:

Dear Sirs,
We act for the above named borrowers who have agreed to sell their property at the above address. We expect to be in a position to complete the sale shortly and accordingly would be glad if you could let us have details of the amount due to you as of the … day of …19/20 … under the above account (or any other account or accounts that may be relevant) to enable you release or vacate all mortgages which either directly or indirectly affect the above property. When sending the figures to us, please let us also have a daily rate of interest.

Yours faithfully'

Published in Law Society Gazette, November 1999

EQUITY RELEASE FOR THE ELDERLY: PRELIMINARY INFORMATION NOTE

It has come to the notice of the Conveyancing Committee that certain lending and other institutions are offering packages whereby the over 65s/70s can raise capital on their residences either by way of loans or sales of a share therein. These are innovative concepts in this jurisdiction. While the committee welcomes the concept of equity release for the elderly in principle, it shares the concerns that practitioners have expressed to the committee.

The schemes being offered are complicated and difficult for the lay person to comprehend fully without effective and clear legal advice. Practitioners acting for clients availing of these schemes should take particular care to advise their clients of all the conditions therein, many of which differ from those in the usual standard residential loan documentation, including those relating to the interest rate charged, the involvement of executors and beneficiaries, and the events which will allow the lender/investor to call in the loan and sell the property.

The committee is in consultation with the institutions in question and a more detailed information note will issue at the conclusion of these consultations. In the meantime, practitioners should ensure that they fully familiarise themselves with the contents of these packages.

Published in Law Society Gazette, May 2001

EQUITY RELEASE SCHEMES – A FOLLOW UP

The Conveyancing Committee published a preliminary Practice Note on these schemes in the May 2001 Gazette. During the intervening period representatives of the Committee have been in negotiation with the Bank of Ireland in the hope of securing modifications in some aspects of their Life Loan Scheme. Regrettably little progress has been made in achieving such modifications. The Committee has serious concerns about some of the requirements and provisions of the Scheme, some of which appear more relevant to commercial property mortgages. The Committee appreciates that this scheme is a novel one in the Irish market, but notes that it has more stringent requirements than are imposed in a similar scheme operated by a major U.K. lending institution.

The Committee's principal concerns relate to the following aspects of the Scheme:

1. (a) The requirement that the Borrower(s) make wills and appoint executors.

While the making of a will would normally be advisable, there are circumstances where a person may decide, on a fully informed basis, that they should not make a will. Thus, for example, a person might elect to protect the estate against a claim under S.117 of the Succession Act, by allowing the intestacy rules to apply when he or she had good reason to anticipate a claim under that Section from a child disappointed by the provision made for that child.

(b) The requirement that the Borrower(s) disclose the names of their chosen Executors, and any replacement Executors to the Bank and that the Bank is entitled to contact such named executors and require them to enter into an agreement to co-operate with the Bank and to contact them further during the term of the loan, and not just after the death(s) of the Borrowers.

Apart from the basic principle that an executor has no legal status until the testator's death, this requirement involves the Borrower(s) in a waiver of confidentiality which seems quite unnecessary.

2. The requirement that the named executors enter into a consent to co-operate with the Bank after the death(s) of the Borrower(s).

It is not clear to the Committee that the Bank really needs such consent, nor what real strength such consent has. The Bank will, after the Borrower(s) death(s) be a Mortgagee with an exercisable power of sale. The Bank have indicated that their concern is to be able to sell the house speedily in order to stop the interest accruing. While this is clearly desirable the Committee believes that this object is capable of

being achieved without such a requirement which it feels is somewhat draconian. The Borrower's personal representative, whether an executor or administrator, has, in any case, to swear to administer the estate and pay the deceased person's lawful debts. Any further assurance required by the Bank on this point is superfluous.

3. The requirement that the Borrowers disclose the names of their beneficiaries and next-of-kin to the Bank.

   This requirement involves a further invasion of the privacy to which a person making a will is entitled, but appears, having regard to the obligation to make wills and disclose the names of executors to be a belt-and-braces provision in case the executors don't co-operate with the Bank. The Committee is very concerned that the consent given to the Bank to contact named beneficiaries and next of kin will in some cases create or increase pressures on the Borrowers to vary the provisions of their wills, particularly if the next-of-kin is not a beneficiary. The Committee is aware of a number of cases where elderly peoples' twilight years were blighted by wrangling between members of their family who had become aware of the provisions of a will.

4. The inclusion as one of the events of default of "the appointment of a receiver over the whole or any part of the property or any other property assets or revenue of the Borrower".

   Such a provision might well be reasonably included in a mortgage where interest and/or repayments of capital is payable at regular intervals, since such events of default would cast doubt on the borrowers ability to make such payments. It is central to this scheme that interest is rolled up until the death(s) of the Borrowers. The creditworthiness of the Borrowers during the course of the loan should be irrelevant to the Bank

The Committee's principal concerns are to ensure that solicitors acting for persons contemplating entering schemes are fully informed about the advantages and disadvantages of them, in order that they may give effective advice to their clients and that solicitors are aware of the heavy obligations that will fall on them in advising their clients, and of the importance of maintaining adequate records of their advices, bearing in mind that any questions as to the quality of such advice is only likely to arise after the death(s) of the client(s).

The Committee has in the past found it necessary to criticise mortgage packages issued by other lending institutions and will continue to offer such criticism where it believes that

EQUITY RELEASE SCHEMES – A FOLLOW UP

(Contd.)

such packages contain excessive restriction or provisions which are not in the interest of clients or are just not fair.

The Committee has had lengthy negotiations with the Bank with a view to modifying the conditions which seriously concerned it. While the Bank were prepared to make some changes the Committee's concerns were not allayed because the outstanding requirements included those about which the Committee had the most serious reservations.

The Committee believes that equity release schemes can be a useful method of releasing "dead capital" which is tied up in residential property. However, since all such schemes involve the elderly in disposing of some interest in their homes, it is critical that the procedures involved are fair and reasonable and that solicitors are able to advise their clients accordingly. The stringent provisions identifying "events of default" are not in the Committee's view fair, reasonable or necessary, while the obligation to inform the names of chosen executors, beneficiaries and next-of-kin involves the borrowers in waiving aspects of their privacy to which they are entitled are objectionable and quite unnecessary.

The Committee wishes to emphasise that it has not agreed to the use of the Certificate of Title scheme forms in connection with this scheme.

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ELECTRONIC TRANSFER OF FUNDS

Practitioners will probably be aware that a number of lending institutions offer transmission of a borrower's loan funds by way of electronic transfer directly into the borrower's solicitor's client account. It has come to the attention of the Conveyancing Committee that some lending institutions sending and / or receiving such electronic transfers automatically deduct their charges from the loan amount being transferred. If solicitors are not aware of the fact that a deduction has been made or if they do not know the exact amount of such deduction, they are at risk of breaching the Solicitors'Accounts Regulations if they draw the full amount of a client's loan from their client account in order to close a purchase transaction.

The committee raised its concerns about this practice with the Irish Bankers' Federation and was advised that the Federation does not issue guidelines to its members on whether or how fees or charges for such electronic transfers should be collected. The Federation suggested that solicitors should take the matter up with their own individual banks to ascertain the procedures used and the fees charged.

The committee therefore recommends that every solicitor using electronic transfers of loan funds (or indeed any funds) should establish with his / her bank and with the borrower's lending institution (if different):-

- what the bank's procedures are for collecting fees / charges for electronic transfers.
- how much the bank charges for sending money electronically
- how much the bank charges for receiving money electronically
- who pays the fee / charge – the sender or the receiver?

In this regard a solicitor should insist that any fees or charges to be debited by his / her own bank should be deducted from the solicitor's office account in the same way as any other bank charges arising on the operation of the solicitor's client account. The committee is aware that a lending institution that offers only an electronic transfer of funds and does not issue loan cheques or bank drafts, does not make a charge for sending the loan funds electronically, although it has pointed out that the receiving bank may levy a charge on its own customer.

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CERTIFICATES OF TITLE IN COMMERCIAL LENDING

Some lending institutions require certificates of title in commercial lending cases from borrowers' solicitors. The solicitor's packages supplied in most of such cases contain the lenders' own forms of undertaking, certificate of title and guidelines. It has been brought to the notice of the Conveyancing Committee that some of these documents contain a paragraph concerning the definition of "good marketable title" which refers to the standards of good conveyancing practice prevailing in this jurisdiction as entailing the use of the standard Law Society contract for sale, building agreement and requisitions on title as appropriate and/or a paragraph providing for the referral of disputes as to the quality of any title for a ruling by the Conveyancing Committee of the Law Society.

It appears to the committee that the use of the name of the Law Society and/or the Conveyancing Committee in these documents gives the misleading impression to some practitioners that the Society or the committee has approved the use of these certificate of title documents or has approved the content of the documents.

For the avoidance of doubt, the Conveyancing Committee wishes to bring the following to the notice of practitioners

(a) there is no certificate of title system for commercial lending agreed between the lenders and the Conveyancing Committee of the Law Society

(b) the committee has not approved the use of or the content of any commercial certificate of title documentation with any lender

(c) use of the name of the committee or the Law Society in the body of such documentation does not mean the documents have been approved by the committee or the Society

(d) if individual solicitors agree to give certificates of title in commercial cases they should be aware that

- the documents used will usually be significantly different to those agreed under the certificate of title system for residential mortgage lending
- the documents agreed under the certificate of title system for residential mortgage lending will usually not be appropriate for use in relation to a commercial loan transaction
- the basis on which they give a certificate of title to a lender, in terms of legal liability, may not be the same as that which has been agreed between the lenders and the Society in residential mortgage lending certificate of title cases.

In addition, the committee would encourage practitioners to carefully review the terms of any non-residential mortgage certificate of title documentation presented to them for completion and, in particular, would encourage practitioners to negotiate the terms of same with the lender. The solicitor will not be in a position in every case to certify every item listed in the documentation and some documentation includes matters that are more

properly for members of other disciplines, such as engineers or architects, to certify.

NOTE:

The committee has recently established a working group to explore the possibility of drafting a standard certificate of title for use in commercial conveyancing. The discussions are at an early stage and are expected to take some time. The committee will advise the profession of the outcome of the discussions in due course.

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UNDERTAKING TO FURNISH DISCHARGE - LAND REGISTRY CERTIFICATE OF CHARGE

When a vendor's solicitor gives an undertaking on the closing of a sale to furnish a discharge of a charge or other burden on the vendor's folio or a vacated mortgage/charge, it is the view of this committee that this undertaking by implication extends to and includes the certificate of charge, if one has issued in respect of any such charge, and any other document necessary for the removal of the charge or burden from the folio.

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CERTIFICATE OF TITLE SYSTEM AND LAND REGISTRY FORM 17

Practitioners may be aware that the Land Registry Form 17, including the electronic version currently in use, states that the lodging solicitor is the "solicitor for the applicant" for various registrations, including registration of a charge. The lodgement of a dealing containing a deed of charge, including the lodging solicitor's application for registration of the lending institution as owner of the charge, might be open to the interpretation that the lodging solicitor is acting in a legal capacity for the lending institution. The agreed position between the Law Society and the lending institutions under the certificate of title system is that the borrower's solicitor acts only for the borrower and does not act for the lending institution. The Conveyancing Committee sought confirmation from the lenders that the statement in the Land Registry Form 17 does not represent a derogation from or any relaxation of the agreed position of the borrower's solicitor under the certificate of title system.

The committee is pleased to advise practitioners that the Irish Mortgage Council (IMC), representing the lending institutions, recently wrote to confirm with the committee that it shares the Law Society's view that the borrower's solicitor is acting for the borrower and not the lender. The IMC further confirmed that, in registering the lender's charge, the borrower's solicitor is discharging part of the undertaking under the certificate of title system but is not specifically acting on behalf of the lender.

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DATING OF CERTIFICATE OF TITLE

The Conveyancing Committee would like to remind the profession that a certificate of title given to a lending institution in relation to a client's mortgage transaction should be dated as of the date of parting with the loan funds.

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ENDORSEMENT OF CHEQUES

The exigencies of current conveyancing practice often require that cheques made out to clients are endorsed and passed on, without being lodged to the solicitor's client account.

Any such endorsement should be made, preferably, with the written authorisation of the client or, in exceptional circumstances, on the client's oral instruction, if the prompt dispatch of the client's business requires it. A copy of the cheque and its endorsement should be given to the client without delay and, in the case of an oral instruction, a letter should be written confirming that the cheque was endorsed in accordance with such instruction.

Practitioners should also note that the provisions of the Solicitors' Accounts Regulations (and money-laundering legislation) require that a copy of such endorsed instrument be kept on the solicitor's file.

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