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CABINET

CONVEYANCING BY EMPLOYED SOLICITORS

Memorandum by the Lord President of the Council

On 9 December 1983 (CC(83) 37th Conclusions) Cabinet considered the reduction of restrictions on conveyancing for reward. Our main concern was to introduce competition for the independent solicitor to the benefit of the consumer. We concluded on that occasion -

- a. That we should examine extending the right to conveyance outside the legal professions. The Farrand Committee was subsequently set up to examine this aspect.
 - b. That the right to conveyance should be extended to solicitors employed by banks and building societies, and that consultations on how to achieve this objective and in particular to avoid problems of conflict of interest should be initiated as soon as possible.
2. The Farrand Committee reported in September 1984; the Government accepted its proposals and in consequence the Administration of Justice Bill, at present before the House of Lords, provides for the establishment of a new profession of licensed conveyancers.
 3. The problem of employed solicitors has proved less tractable. Consultations did not reduce concern about conflicts of interest. Officials have undertaken further work but the Home and Social Affairs Committee was unable to reach agreement when they discussed the issues again on 21 February 1985. The crucial point is the degree of conflict of interest between the borrower and the lender and the extent to which this would prevent the service offered by the employee of a building society or bank from containing the same degree of protection for the consumer as that provided by an independent solicitor or conveyancer.
 4. A lending institution shares with the borrower a common interest in ensuring that the title is secure. But in respect of the mortgage terms and financial advice generally the solicitor would have a first duty to his employer - whose interest would be opposed to those of the borrower. Two possible solutions to this have been suggested: first, to exempt

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employed solicitors from the common law duty of employees always to act in the best interest of their employers, and secondly to provide a so-called "basic service" (see Annex A) which explicitly excludes advice on finance and, in particular on the terms and conditions of the mortgage.

5. The "basic service" which is proposed includes not only the actual conveyancing of the property but also the drawing up of the contract and advising in relation to the contract. On many matters concerned with the contract the employed solicitor should be able to give advice freely. But some aspects could again give rise to a conflict of interest, for example, the purchaser may wish to contest restrictive covenants, but the building society may also be concerned with the maintenance of the value of the area because it is lending on other properties. Its own interests therefore could tend to support the restrictions.

6. The other area in which there could be a conflict is the acquisition of information by the employed solicitor in the course of his duties for the purchaser which would have a bearing on the decisions of the building society in awarding the mortgage (for example that the client might be declared redundant).

7. It is, of course, true that the purchaser could choose not to take his business to the employed solicitor. There was, however, concern in the Committee that, in reality, the opening up of this market to employed solicitors would lead to a large number of purchasers succumbing to the attractions of "one stop shopping" at a bank or building society regardless of any warnings which they might be given, or restrictions which might be imposed. This would be true whether or not the building society offered only a "basic service" or had its activities constrained by a Code of Practice.

8. It would be fair to say that none of us were convinced that the consumer could be entirely protected in these circumstances. The crucial question, which we were unable to resolve finally, is whether the beneficial economic effects justify our opening up the market to employed solicitors in the face of the lack of protection which would be involved.

9. There is no point in further consultation about this issue: it is essentially a matter of judgment where the greater public interest lies. I therefore invite the Cabinet to consider:

- a. Whether solicitors employed by banks and building societies etc should be allowed to offer conveyancing services.
- b. If so, what, if any, restrictions should be imposed on the activities of employed solicitors whether by

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exempting them from the normal common law duty always to act in the interests of their employer, or by restricting what they could provide to a "basic service".

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Privy Council Office

4 March 1984

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ANNEX A

Basic service

The "basic service" seeks to minimise the risk of a conflict of interest arising by making it clear at all stages to the borrower that he could not obtain independent advice from the employed solicitor on matters where the interests of the lender and the borrower conflict. The lending institution would be required:

- i. to make it clear to the borrower that the employed solicitor is not independent of the lender, and that anything the borrower tells the solicitor is in effect told to the lender;
- ii. to explain to the borrower at the outset that the borrower cannot obtain advice from the employed solicitor about his choice of lender, or about the terms and conditions of the loan (eg the rate of interest or the reasonableness of the proposed retentions) or about any other matters on which the interests of lender and borrower may not coincide;
- iii. to inform the borrower that, notwithstanding ii., the employed solicitor may explain to him in a clear and straightforward manner the financial terms of, and the effects of the legal conditions attaching to, the loan (eg provisions concerning early repayment), but may not advise him on them;
- iv. where circumstances likely to lead to a conflict arise, to advise the borrower that it may be desirable to seek independent advice.