Legal Mortgage Monthly Update

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Case name Neutral citation	Finlayson v Caterpillar Financial Services Corporation [2025] UKPC 24
Legal points	Sale at undervalue – burden of proof
Facts	The appellants guaranteed a loan from CFS to their company to fund the construction of a yacht. Following default in payment, CFS sold the yacht, then in the course of construction on an 'as is, where is' basis, leaving a shortfall. CFS sued the appellants in The Bahamas for the shortfall. The appellants contended CFS failed in their duty to obtain the best price reasonably obtainable on sale. The trial went part-heard from Feb 20 to March 21 and judgment was further delayed until June 2022. The judge found for CFS and gave judgment for the shortfall plus interest. The appellants appealed on three grounds: (1) CFS had failed to demonstrate it took reasonable care to obtain the best price reasonably obtainable. (2) The loan agreement and guarantees had not been stamped as required by s 18 Stamp Act 1925, and as such were inadmissible in evidence. (3) The lengthy delay in giving judgment prejudiced the appellants. And the judgment contained errors which were attributable to the delay. The Court of Appeal of the Commonwealth of the Bahamas dismissed the appeal. The appellants appealed (as of right) to the Privy Council.
Held	(UKPC 29 May 2025) As to (1) – the burden of proof on an allegation of sale at an undervalue - the appellants relied on a passage in *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349 that "*the mortgagee…seeking to uphold the transaction must show…that the mortgagee took reasonable precautions to obtain the best price reasonably obtainable at the time*". However, the burden of proof in that case was reversed because of the close relationship between the mortgagee and the purchasing company, which meant that the mortgagee was subject to such a conflict of duty and interest as to make it necessary for the mortgagee to show that it had complied with the duty. Absent such circumstances, the burden of proving a breach of the mortgagee's duty rests on the mortgagor. As to (2) – the failure to stamp the loan agreement and guarantees – the Stamp Act 1925 is a revenue statute and as such does not have extra-territorial effect. Accordingly there was no requirement under s 18 of the Stamp Act 1925 for the loan agreement or the guarantees to be stamped before their could be pleaded or given in evidence. As to (3) – the delay in giving judgment – there were no identifiable errors. The case turned primarily on the documents so that the factual findings were not based to any significant extent on the recollection of oral evidence or the demeanour of the witnesses. Appeal dismissed.

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Comment	This is an interesting 'mixed bag' of points in the Privy Council which apply equally to cases in England and Wales. The main point is that ordinarily, the burden of proving a breach of duty on an alleged sale at an undervalue, rests with the borrower. It is only in those (rare) cases in which there is a sufficiently close connection between the lender and the buyer, that (because of the potential conflict of interest) the burden of proof rests with the lender, for e.g. a sale to a connected company – see the commentary in *Bradford & Bingley Plc v Ross* [2005] EWCA Civ 394 For a summary of the main principles on sale at an undervalue, see the website. Incidentally, the Stamp Act 1925 is legislation of The Bahamas. But there is a substantial amount of (similar) UK legislation concerning stamping – see eg. Stamp Act 1891 – the charge to ad valorem duty on a mortgage introduced by that statute was abolished by s 64 Finance Act 1971.

Case name Neutral citation	MTF (NH) Limited v Hevedi [2025] EWHC 1013 (Ch)
Legal points	Overriding interest – actual occupation – *Brocklesby* principle
Facts	D1 and D2 were in a domestic relationship and at various times lived together at a property in Sheffield which D2 had put in D1's sole name to disguise any interest D2 had from HMRC. There were various incidents involving threats and assaults between them, which led to D2 fleeing the country. While he was away, D1 mortgaged the property to C as lender. Following the expiry of the loan, C started mortgage possession proceedings against D1 in the County Court at Sheffield. D2 applied to be joined in as a defendant and to counterclaim that he had an overriding interest. D2 had already issued separate proceedings against D1 in London, and the Sheffield proceedings were transferred to the BPC in London. At a directions hearing, the court listed certain preliminary issues for determination (1) the nature of D2's occupation; (2) whether it would be obvious on a reasonably careful inspection; (3) whether the mortgage has priority over the claimed interest.
Held	(Master McQuail 2 May 2025) At the trial of the preliminary issues: (1) Actual occupation – D2 produced no convincing evidence he was in actual occupation of the property on the relevant date (date of mortgage); there were prolonged absences and D2 had been cagy about the nature of his accommodation outside the UK. Although a person might rely on threats of violence to explain short periods of absence from a property consistent with remaining in actual occupation, the longer the periods the less plausible it is to assert that the absence is consistent with actual occupation. Following a review of all the evidence, it was held that D2 was not in actual occupation on the relevant date.

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	(2) Obvious on reasonable inspection – D2 was not in actual occupation and the property had been emptied of his possessions. Although his brother and his wife and children also occupied the property from time to time this did not evidence occupation by D2 (they did not say in their witness statements that if asked at the time, they would have said they were occupying on behalf of D2). On a careful inspection therefore, it would not have been obvious D2 was in occupation. (3) Priority – if the court was wrong on (1) and (2), it was bound by the decision of Sales LJ in *Wishart v Credit and Mercantile Plc* [2015] EWCA Civ 655. D2 had the property registered in D1's name to disguise any interest from HMRC, but had not brought any limit on D1's powers to the attention of C, so that as between D2 and C, C bears the risk of fraud by D1. C was therefore entitled to possession.
Comment	The facts of this case are unusual, but the case may be noted for three main reasons: (1) It helpfully reviews the principles to be applied when considering whether a person can claim an overriding interest in respect of a mortgage, by being in actual occupation, in Para 2, Sched 3, Land Registration Act 2002. (2) It flags up the specific point about absences being attributable to something – in this case the threat of assaults etc. A more common example is about absences through ill-health and hospitalisation. (3) It reviews the particular issue about a beneficial owner giving someone else authority to deal with the property, with the result that a mortgage entered into by that person will often end up being binding on the beneficial owner. This is based on the *Brocklesby* principle (after the case of *Brocklesby v Temperance Permanent Building Society* [1895] AC 173) which has been held, variously, to give rise to broader principles of agency, authorisation and estoppel. There is a useful review of the principles in *Atkin's Court Forms, Vol 28(1), Mortgages, para 112.*

Case name Neutral citation	Principal Bridging Ltd v Lewis (Unrep, HHJ Monty KC, Central London County Court, 30 June 2025)
Legal points	Mortgage enforcement – bridging loan – regulatory compliance – whether default rate a penalty – whether an unfair relationship
Facts	In Nov 2022 a bridging lender lent L £170k for 4 months at a standard rate of 2% p/m and a default rate of 5% p/m compounded, secured by a second charge on a property. L defaulted in repayment at the end of the term. Lender issued proceedings for possession. At the date of trial the balance due inclusive of interest and costs was £760,764.54. L defended the claim on three grounds: (1) A regulatory point – it was a regulated mortgage entered into by an unregulated lender and was therefore unenforceable (save for repayment of principal); (2) A penalty point – the default interest is irrecoverable as a penalty; (3) A CCA point – there was an unfair relationship with the lender under the CCA 1974 and the amount of the loan should be reduced.

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Held	(HHJ Monty KC 30 June 2025) Following a review of the applicable law and evidence: (1) The regulatory point: L had initially obtained a short-term bridging loan from another lender of which he intended to use half the funds for business purposes but had signed a form of declaration to the effect that he was entering into the agreement wholly or predominantly for the purpose of a business being carried on by him. By the time he came to re-mortgage to the present bridging lender, he no longer intended to use any funds for business purposes, but signed another declaration in similar form. The court accepted that to the extent funds were used to discharge the earlier loan, only half of which was used for business purposes, it cannot fall within the terms of the declaration that the [later] loan was being used wholly or predominantly for business purposes. Nonetheless, the presumption that it is a business loan applies unless it is rebutted (referring to *Campbell v Tyrrell* [2022] EWHC 423 (Ch) and *Kumar v LSC Finance Ltd* [2024] EWCA Civ 254). As to whether the lender should have known or suspected that this was not a business loan, the court reviewed the evidence, but concluded that it did not know or have reasonable cause to suspect that this was not a loan for business purposes. In any event, even if this was a regulated mortgage contract (which was unenforceable under s 26 Financial Services and Markets Act 2000 – agreements made by unauthorised persons) the court was satisfied it would be just and equitable to allow it to be enforced under s 28 – the lender reasonably believed it was not contravening the general prohibition (following *Jackson v Ayles* [2021] EWHC 995 (Ch)). (2) The penalty point: Considering *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67, *Vivienne Westwood v Conduit Street* [2017] EWHC 350 (Ch), *Ahuja Investments Ltd v Victorygame Ltd* [2021] EWHC 2382 and *Houssein v London Credit Ltd* [2024] EWCA Civ 721: (a) The provisions of the loan agreement impose the default rate as a secondary obligation, triggered in the event of non-payment, which is the primary obligation. (b) The provision for default interest was in furtherance of the lender's legitimate interest in the performance of the primary obligation. (c) The rate is not extortionate, extravagant or unconscionable – it was not open to L to challenge the rate on the basis of how much is now owed and/or by a comparison with what was originally lent and/or by contrasting it with how much is now said to be due (the court has to review the relevant provisions at the time they were entered into). (3) The CCA point: The court reviewed the applicable principles in *Smith v Royal Bank of Scotland plc* [2024] AC 955 per Lord Leggatt at [12]-[29]. The unfair relationship provisions in ss 140A-C only apply of the loan is unregulated (s 140A(5)). This was an exempt agreement and the Mortgage Conduct of Business Sourcebook (MCOB) did not apply. Having reviewed L's allegations there was nothing which rendered the relationship unfair. Order for possession and money judgment.
Comment	The regulatory issues resolved themselves (as they often do) in terms of (a) the effect of a declaration for the purpose of the second charge business loan exemption in Art 61A of the Regulated Activities Order, and (b) whether (in any event) the court would permit an otherwise unauthorised loan entered into in breach of the general prohibition (in s 19 FSMA 2000) to be enforced as being just and equitable under s 28.

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	Of particular interest to bridging lenders is the analysis of the default rate of interest on the question of penalty. The court now adopts a fairly uniform approach to the questions it has to answer in accordance with established caselaw and also weighed the expert evidence (which is routinely called on rates and practices) – in this case noting the range of factors that goes into setting a default rate; the fact that this was a re-bridge of an existing bridging loan; recognising the common practice of setting a default rate at twice the standard rate (saying 2.5-3% is an average rate; 4% the average rate charged by some lenders with higher risk borrowers; and some charging 5%; and noting that compound interest for default rates is standard market practice, whereas simple interest would be unusual.

Case name Neutral citation	Ciddy Ltd v Natalia [2025] EWHC 1616 (Ch)
Legal points	Bankruptcy petition – whether debt disputed on substantial grounds – whether unfair relationship – whether default rate of interest a penalty
Facts	N's husband arranged a loan for her with C - £562,500 for 12 months at a standard rate of 10% pa and a default rate of 2% p/m compounded, secured on a property. N signed the documents in the presence of a solicitor, including a declaration for exemption relating to business in Art 60C and 60O of the FSMA 2000 (Regulated Activities) Order 2001. Following default, receivers were appointed who sold the property leaving a shortfall due in respect of interest and costs of £590,418.86, which was subject to continuing interest at the default rate. C subsequently presented a bankruptcy petition against N. N disputed the petition on two grounds: (1) the relationship between N and C is unfair under s 140A-C CCA 1974 and the loan is unenforceable, (2) the default interest is a penalty and is unenforceable.
Held	(ICC Judge Agnello KC 4 July 2025) The court reviewed the legal principles for challenging statutory demands and bankruptcy petitions (being the test for summary judgment – whether the debt is disputed on grounds which appear to be substantial: *Collier v P&MJ Wright Holdings* [2007]) EWCA Civ 1329). Dealing with (2) the penalty interest point first – there is a dispute on substantial grounds relating to the default interest clause and whether it amounts to a penalty. There is no evidence to support the calculation of the default interest rate being in some way aligned to a particular borrower risk. Furthermore, this was a secured loan. There is a good argument the default rate is exorbitant and unconscionable and the petitioner did not explain whether/how the interest was compounded.

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	As to (1) the unfair relationship test, N's case was that this required full consideration in the county court and could not be assessed on a summary basis. The court agreed – the issues raised demonstrate that the relationship was beyond that of a normal borrower/creditor relationship and there were related issues about the enforceability of the default interest. As to the petitioner's argument that even if the default interest is determined to be a penalty, it will still leave a substantial sum outstanding for standard interest and costs which was above the bankruptcy level (£5,000), and that it is clear from the caselaw that a debtor is not to receive a windfall under s 140A-C CCA 1974, the court acknowledged that it was open to determine a sum which is clearly due and which could remain subject to a bankruptcy petition (*Re Field* [2021] EWHC 2474 (Ch)) but held it was not for this court to predetermine exactly what sum would be due under the CCA proceedings. It is for the county court to determine the sum due, which will create a liquidated debt. Petition dismissed.
Comment	We do not often cover insolvency cases, but the issues on this disputed bankruptcy petition were effectively the same as the threshold test in mortgage possession proceedings under CPR 55.8(2) – whether the claim is genuinely disputed on grounds which appear substantial. The decision is, perhaps, notable for two reasons: (1) The court refused to predetermine an undisputed level of debt which might survive scrutiny under the unfair relationship provisions. That is not to say the court will not do this in every case, but it is indicative of the court's reluctance to predetermine the issue without a trial to test the unfair relationship allegations. The same is likely to be the case in mortgage possession proceedings. (2) When considering whether the default rate of interest amounted to a penalty, the court noted there was no evidence to align the default rate to the particular borrower risk. In practice, there is rarely going to be any such evidence.

Case name Neutral citation	Waypark Commercial Mortgage 1 Ltd v Vanguard Number 1 Ltd (in Liquidation) [2025] EWHC 1786 (Ch)
Legal points	Whether sale by fixed charge creditor caught by stay in s 130(2) Insolvency Act 1986
Facts	In 2002 V granted a debenture to W to secure its indebtedness to it, which included a legal charge over a property. W demanded payment and proceeded to exercise its power of sale over the property. In the meantime, V was wound up (on a petition by a different creditor).

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	A question arose as to the application of s 130(2) Insolvency Act 1986: "When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of the court and subject to such terms as the court may impose." The issue was whether the stay imposed by that section applied to the sale of a property by a secured creditor pursuant to a power of sale contained in a fixed charge.
Held	(Deputy ICC Judge Baister 14 July 2025) No. The terms "action or proceeding" are not defined in the Insolvency legislation but the caselaw suggests that 'action' in s 130(2) refers to court proceedings against the company, and that non-court proceedings will only be within s 130(2) if they are similar to court proceedings (*Financial Conduct Authority v Carillion Plc* [2021] EWHC 2871 (Ch)). While 'proceeding' can include execution and distress (because those remedies are likely to have the effect of giving an advantage to creditors who avail themselves of them, thereby offending the *pari passu* principle) that is not the case where a secured creditor seeks to exercise its power of sale. Secured property, and the proceeds of its sale, do not form part of the general pot available for *pari passu* distribution to the general body of creditors, unless the security is impugned, which is not the case here. The court granted a declaration that the stay imposed by s 130(2) did not apply to the particular sale by a fixed charge secured creditor (although even if it had, the court would have granted leave to enforce).

Case name Neutral citation	Armstrong v Harrow [2025] EWHC 1790 (Ch)
Legal points	Equity of exoneration
Facts	Mr & Mrs were the joint registered proprietors of property A subject to four secured loans. The first three were secured only on property A. The fourth was also secured on property B in Mrs' sole name. The net proceeds of sale after discharge (£152,447) were paid to Mrs. Mr was subsequently made bankrupt, and his trustees sought to recover half the net proceeds paid to Mrs (£76,223.50) which they claimed was due to Mr's bankruptcy estate and also half the amount paid in discharge of the fourth secured loan, which raised questions about the operate of the doctrine of exoneration.

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Held	(ICC Judge Mullen 18 July 2025) The court reviewed the principles to be applied on the doctrine of exoneration in *Armstrong v Onyearu* [2018] Ch 137: "Where property jointly owned by A and B is charged to secure the debts of B only, A is or may be entitled to a charge over B's share of the property to the extent that B's debts are paid out of A's share. This is known as the equity of exoneration." The availability of the equity is a question of intention, usually the presumed intention of the parties (*Re Pittortou* [1985] 1 WLR 58). Whether the presumed intention is that the liability should fall on the debtor's share depends on the facts of the case and whether the other party obtained a benefit from the money. It was not necessary that the loan be made to them personally (*Day v Shaw* [2014] EWHC 36 Ch)). Following a detailed review of the evidence, on the particular facts, the loans in issue was made to a separate company (Callian) of which Mr and Mrs were shareholders and directors who the court considered were "the owners and the decision makers", and were to be regarded as the joint principal debtors for the purposes of determining the existence of an equity of exoneration in relation to the loans to Callian. There was no agreement as to how the liability should be apportioned between them and there is no basis to imply one. There was thus no basis to depart from the default position of equal liability. Save for one item of lending, Mrs was not entitled to an equity of exoneration.
Comment	This is a fairly lengthy and detailed decision. It helpfully reviews the authorities on the equity of exoneration but (as most cases do) the decision turns on its own particular facts about whether and to what extent a person may be deprived of the right to exoneration as result of having taken a benefit from the particular lending. In simple terms, exoneration applies where two persons are liable to a creditor for the same debt, but as between themselves one of them is primarily liable and the other is only secondarily liable, in which case the debtor with the secondary liability is entitled to be exonerated from liability by the primary debtor – so the debt is repaid first out of his share. For a review of the principles, and a number of related principles including contribution and indemnity, consolidation, and marshalling, see the website – Apportioning the Mortgage Debt.

Case name Neutral citation	Lloyds Bank Plc v Cook [2025] EWCC 43
Legal points	Appeal against strike out - mortgage possession proceedings – securitisation – whether a defence to claim for possession

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Facts	The defendant borrower (C) obtained a number of loans from the claimant bank (Lloyds) and its predecessors, secured on mortgage. After the expiry of the mortgage term, the bank issued proceedings for possession, which C sought to defend by raising issues about the securitisation of the mortgage and whether the bank retained any enforceable rights. At a hearing on 9th Sept 2024, a deputy district judge struck out the defence and made an order for possession. C appealed, contending: (1) The Land Register should present the current state of the registered title including the proprietorship of any charge. (2) Regulated mortgage contracts should only be entered into by regulated lenders. (3) Securitisation (the onward sale of a mortgage by a lender) may offend both these principles on the basis: (a) a borrower cannot identify their counterpart with any certainty; (b) securitisation constitutes a 'transfer of a registered charge', and where it is not registered, the register is not up to date; (c) the entity acquiring the mortgage (most likely a mortgage trustee) is a party to the mortgage for the purposes of s 26(1) FSMA 2000 and Art 61 of the RAO. If the mortgage trustee is not authorised by the FCA the mortgage contract is unenforceable. (4) Although C accepted Lloyds held all the rights under the charge, there was a dispute about what those rights actually were. (5) C's defence, and the legal principles, could only be dealt with after disclosure and evidence. The DDJ should not have made an order for possession on a summary basis.
Held	(HHJ Malek, Burnley County Court) Allowing the appeal: At a hearing fixed under CPR 55.8 the court may either determine the claim or give case management directions. The test for whether the matter should proceed to trial is whether the claim is genuinely disputed on substantial grounds. The test is, in substance, the same as the test for summary judgment under CPR 24. The question before the DDJ was whether the appellant had shown a real prospect of success in defending the claim. The answer to this question, in reality, is dependent on whether the DDJ erred in law. The argument appears to be that the effect of securitisation could be that the bank had lost its right to sue in respect of the debt. The court noted the rival contentions about this between (1) *Three Rivers DC v Governor and Company of the Bank of England* [1996] QB 292 and *Bexhill UK Ltd v Razzaq* [2012] EWCA Civ 1676 – that it is the equitable assignee who has the right to sue and should be joined in, and (2) *Paragon Finance Plc v Pender* [2005] 1 WLR 3412 – that the registered proprietor of the charge has the right to possession of mortgaged property, and that it is not necessary to join in an SPV. The issue boils down to whether the bank as the legal owner and equitable assignor of the mortgage was entitled to bring proceedings without joining in the beneficial assignee. There is a tension between *Three Rivers* and *Pender* on the point and it was wrong for the DDJ to come to a conclusion. The issue was not suitable for summary determination.
Comment	Hmmm… There is no doubt that securitisation is a difficult issue for any deputy district judge to get his head around in a block listed possession list but the short point is that it's the registered proprietor of the charge (the legal owner) who retains the right to possession, not an equitable assignee (the bank's evidence was that there had been securitisation involving an equitable assignment only of the mortgage to an SPV). *Pender* is good law and should have been followed.

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Publication	The Mortgage Prisoners Inquiry Bill (HL Bill 33) had its third reading in the House of Lords on 4th July 2025.

Publication	In July 2025, the UK Government introduced a new, permanent, mortgage guarantee scheme (replacing the former rules which were time limited to June 2025). See the UK Government guidance and the new scheme rules. Details The government recognises the difficulties that many aspiring homeowners face in getting on the housing ladder – in particular, the challenge of raising a sufficient deposit for a home. Consistent availability of 95% loan-to-value mortgage products helps to support prospective homebuyers with a small deposit. The new Mortgage Guarantee Scheme will be permanently available from July 2025, aiming to incentivise and sustain availability of 91-95% loan-to-value mortgages by providing participating lenders with a government-backed guarantee, insuring them against a portion of their potential losses on those mortgages. Mortgages offered through the scheme will enable eligible first-time buyers and home movers to buy a home with a deposit as small as 5% throughout the United Kingdom. [The guidance] provides further information about the scheme, including its terms and conditions and relevant information for lenders who wish to join the scheme.

Publication	On 22 July 2025 the Financial Conduct Authority published a Mortgage Rule Review: First steps to simplify our rules and increase flexibility. The FCA policy paper PS25/11 sets out measures to make it easier for borrowers to reduce their mortgage term, remortgage with a new lender, access cheaper products, discuss options with their mortgage providers, and get advice. Chapters of the policy statement relate to: mortgage advice and interactive dialogue, affordability assessments, equity and diversity, implementation and cost benefit. The changes, which will primarily impact mortgage lenders and administrators, home purchase providers and administrators, and mortgage intermediaries, take effect from 22 July 2025.

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