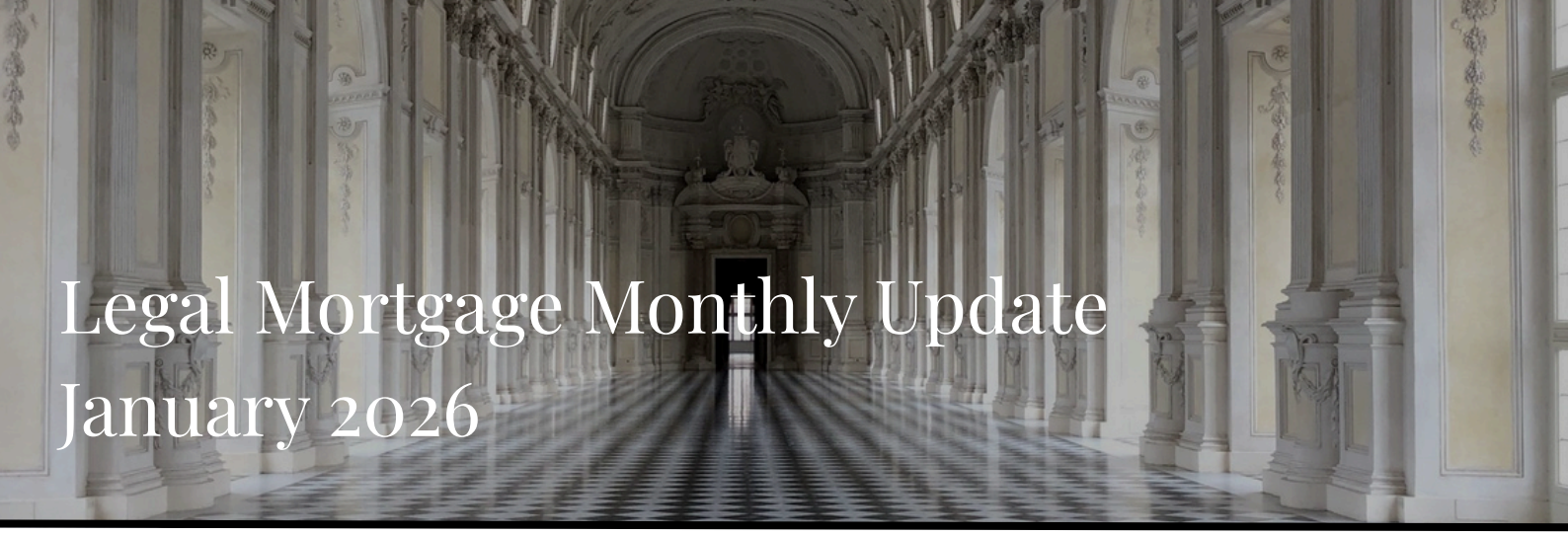

Legal Mortgage Monthly Update January 2026

Contents	**Ashrafi v Belmont Green Finance Ltd [2025] EWHC 3247 (Ch)** A High Court decision (15 Dec 2025) dismissing an appeal by occupiers against a possession order, confirming that beneficial ownership interests do not override a lender's security obtained via apparent authority. **Fairmont Property Developers UK Ltd v Venus Bridging Ltd and others [2025] EWCA Civ 1513; [2025] EGCS 192** The Court of Appeal considered the exceptional circumstances in which a mortgagor may be permitted to take control of the sale of property in receivership. **Afan Valley Ltd (in administration) and others v Lupton Fawcett LLP [2026] EWCA Civ 2** The Court of Appeal considered the scope for professional negligence claims arising from investor losses in failed investment schemes. **Anderson and another v Curtis and others [2025] EGCS 207** This is a recent decision highlighting the financial consequences of disputed property rights, including potential liabilities and costs arising from contested land transactions.

Case name Neutral citation	Ashrafi v Belmont Green Finance Ltd [2025] EWHC 3247 (Ch)
Summary	The High Court has dismissed a wide-ranging appeal against a possession order made at a CPR 55.8 hearing on the basis that the occupiers, who were the beneficiaries under a trust created by the legal owner and mortgagor, could not assert their interest against the mortgagee. By furnishing the legal owner with the means of holding himself out as the owner of the asset, the occupiers were bound by the principle in Brocklesby v. Temperance Permanent BS [1895] AC 173.

Facts	Mr and Mrs Ashrafi were the occupiers of 79 Lyndhurst Gardens, Barking, Essex, IG11 9YA. The legal owner was Mr Shabir, who was Mrs Ashrafi's brother. It was Mr and Mrs Ashrafi's case and evidence that they had given Mr Shabir the deposit and instructed him to obtain a mortgage for the purchase of 79 Lyndhurst Gardens on their behalf because they did not have sufficient credit to obtain a mortgage in their own names. Mr Shabir later remortgaged on their instructions with Belmont Green Finance Limited, although there was a dispute as to whether he obtained the right product. During previous proceedings at the County Court at Central London, Mr and Mrs Ashrafi obtained a declaration that Mr Shabir held the legal estate to 79 Lyndhurst Gardens on trust for them in equity absolutely. An order for sale was made, with which neither party complied. During this time, the mortgage instalments were not paid. Belmont was made aware of the declaratory relief claim by Mr Shabir, and gave the parties about two years to redeem the mortgage. They were unable to do this. Belmont then brought mortgage possession proceedings against Mr Shabir on the basis of arrears and breach of the buy-to-let terms caused by Mr and Mrs Ashrafi's occupation. He applied to join Mr and Mrs Ashrafi, and at the first hearing the judge joined them to the claim, heard and dismissed their proposed defence, and made a possession order.
Issues	Could Mr and Mrs Ashrafi maintain an interest which overrode Belmont's mortgage? Had the money judgment for the arrears against Mr Shabir caused the mortgage to merge in the judgment, such that Belmont could no longer seek possession under the mortgage? Were Mr and Mrs Ashrafi a "mortgagor" within the meaning of section 36 of the Administration of Justice Act 1970? Had Belmont behaved unconscionably, such that it would not be entitled to a possession order?
First instance	The judge at first instance, His Honour Judge Holmes, decided: 1. Mr and Mrs Ashrafi did not have an interest which overrode Belmont's mortgage. It was apparent from the previous declaratory relief proceedings, which ordered the mortgage to be repaid before remaining funds from the order for sale were distributed to Mr and Mrs Ashrafi, that the mortgage had priority. Mr and Mrs Ashrafi were aware of the remortgage with Belmont and could not maintain any interest.

	2. Mr and Mrs Ashrafi were not mortgagors within the meaning of section 36 of the Administration of Justice Act 1970. 3. Belmont had not behaved unconscionably. It gave Mr Shabir and Mr and Mrs Ashrafi time to pay and should not be forced into a contractual relationship with people against its will. The merger argument was not made at first instance.
Decision on appeal	The judge on appeal, Mr Justice Adam Johnson, dismissed the appeal and decided: 1. Mr and Mrs Ashrafi did not have an overriding interest against the bank. If anything, the first instance "undersold the point" about such a defence being very difficult to succeed. Mr and Mrs Ashrafi had given Mr Shabir authority to remortgage, and the dispute as to whether he had exceeded his authority was irrelevant; all that was needed for Brocklesby to apply to prevent Mr and Mrs Ashrafi raising an argument against Belmont was that they knowingly put Mr Shabir in a position where he was able to represent himself as the owner of the property during the remortgage. 2. The security did not merge in the money judgment. Quite apart from the fact that there was case law, in the form of Cheltenham & Gloucester Building Society v. Guttridge (1993) 25 H.L.R 434, that a mortgagee can exercise all its remedies concurrently, Mr and Mrs Ashrafi's arguments were inconsistent with the nature of a mortgage and the terms of the same. 3. Whether Mr and Mrs Ashrafi were mortgagors within the meaning of section 36 of the Administration of Justice Act 1970 was a difficult question with no apposite case law having arisen in the last fifty years. The court therefore had to approach the issue from first principles and with reference to the definition in section 39 that the word includes people who "derive title" under the mortgagor. In Menon v Pask [2020] Ch. 66, the High Court had decided that receivers derive title under mortgagees, and that "title" in this context meant the right to possession. Given Mr and Mrs Ashrafi's could not maintain such a right against Belmont, they were not mortgagors. In any event, because their occupation was unlawful, they could not remedy their breach within a reasonable time or at all and so take advantage of the section anyway. 4. There was no unconscionability on behalf of Belmont. Further, a generic assertion based on perceived unfairness does not provide a basis for resisting an order for possession.

Comment	The appeal is significant as an application of the Brocklesby principle at a CPR 55.8 hearing, where essentially a summary judgment test is applied, and for its analysis of section 36 of the Administration of Justice Act 1970. It is not uncommon for banks to discover that the purchase of a property was pursuant to an informal arrangement whereby the true owner in equity was not the borrower. This decision provides welcome clarity for banks that such occupiers will not, even at an early stage in the proceedings, be able successfully to argue that they have an overriding interest. Judges across the country hearing mortgage possession claims consider their powers to adjourn the proceedings, stay or suspend warrants, etc. under section 36 on a daily basis. That power requires the mortgagor, as defined, to be able to pay the arrears or remedy the breach of the mortgage within a reasonable period of time. Cases are frequently adjourned to allow time for this, before being relisted and a possession order made when, for example, the borrower has not been able to refinance or sell the property themselves. The High Court's decision that occupiers whose interest does not bind the bank are not mortgagors will be of comfort to lenders. If it were otherwise, then people with whom the bank had no contractual relationship, and whose occupation was not envisioned or permitted by the bank, would be able to delay possession. As the law stands, judges can simply look to the legal owner in this situation, which provides a far simpler basis for determining what, if anything, to do under section 36.

Case name Neutral citation	Fairmont Property Developers UK Ltd v Venus Bridging Ltd and others [2025] EWCA Civ 1513; [2025] EGCS 192
Summary	In this case the Court of Appeal explored the exceptional circumstances required to enable the court to exercise its discretion to give the conduct of the sale of property in receivership to a mortgagor.
Facts	The property in question was a freehold warehouse/light industrial unit and offices on the outskirts of Milton Keynes. The property was owned by Fairmont and let to a commercial tenant. Two charges were secured on the property: 1. A first mortgage granted in January 2020 to Coutts & Co, securing a loan of £3.85m which had not yet been called in.

2. A second mortgage granted in March 2023 which secured a short-term loan of £810,500.

Fairmont failed to repay the second loan on the due date. It was assigned to Venus, who appointed the second and third respondents as receivers in September 2024. The receivers then marketed the property, seeking offers in excess of £4.75m.

Fairmont considered this to be too low – it would not clear both charges – and that a sale price of £6m or more could be achieved.

As a result, Fairmont sought an order under Section 91 of the Law of Property Act 1925, which provides that at the request of the mortgagee or any person interested in the mortgage money or the right of redemption – and notwithstanding that anyone dissents or the mortgagee or any interested person does not appear in the action – the court may direct a sale of the mortgaged property on such terms that it thinks fit.

There was no dispute that the property should be sold. The issue was who should have the conduct of the sale.

The receivers:

- Were fully aware of their obligation to obtain the best price reasonably obtainable at the time of sale.

- Believed their marketing strategy was thorough, comprehensive and in adherence with their duty.

- Had obtained comprehensive initial marketing advice from two agents (who advised putting the property on the market at £4.75m-£4.8m) and two red book valuations from chartered surveyors (who valued the property at £4.8m-£5.3m and £4.6m-£5m).

- Chose to market the property, seeking offers over £4.75m; they believed it would ultimately sell for over £5m. By the date of the hearing, they had received an offer of £5.025m, which they proposed to accept.

Fairmount had obtained a valuation of the property at £7.23m and argued that the receivers' strategy of marketing at a low price to stimulate interest was not a standard method for disposing of such an investment and could be detrimental.

A sale by private treaty was preferable.

The Law	Case law confirmed that it is only in exceptional circumstances that a mortgagor will be given the conduct of the sale. In Palk v Mortgage Services Funding plc [1993] Ch 330, the mortgagee wished to let the property in the hope that the market would recover before a sale. The claimant obtained an order for sale because it was manifestly unfair to her to underwrite the risk the mortgagee intended to take, since the mortgage arrears would accumulate much faster than the rent from letting the property. In Barrett v Halifax Building Society [1996] 28 HLR 634, the mortgagors had negotiated a sale at a price which would still leave a significant shortfall on the mortgage debt. The Halifax refused to permit the sale to proceed. The court decided there was no discernible advantage to them in doing so and permitted the mortgagors to complete their sale. The Court of Appeal had questioned the decision in Barrett in Cheltenham and Gloucester PLC v Krausz [1997] 1 WLR 1558, on the basis that it tended fundamentally to undermine the value of the mortgagee's entitlement to possession. In later cases, including National Westminster Bank v Hunter [2011] EWHC 3170 (Ch), applications by mortgagors to have conduct of a sale have been refused.
First Instance	The court dismissed Fairmont's late application to adduce expert evidence of the property value for which there was no permission. The evidence was not necessary in any event, as it would not assist the court and was not reasonably required to resolve an issue (British Airways plc v Spencer [2015] EWHC 2477 (Ch)). The substantive application was also dismissed. While Section 91 provides unfettered discretion, Palk and Krausz are the authority for the proposition that it should only be exercised in exceptional circumstances for policy reasons. The Court of Appeal agreed with the first instance decision. The judge was entitled to reach the view she did on the expert evidence, which was not being submitted as the basis for finding that the receivers' strategy was flawed. Also, on the substantive appeal, the court supported the trial judge, who it held was entirely right in her conclusions. Fairmont had granted a second charge which contained the usual powers for the mortgagee to realise its

	security in the event of default. Fairmont was in default, and receivers, duly appointed, had taken steps to sell. Fairmont was not alleging that the receivers' strategy was flawed. It required something out of the ordinary for the court to override the well-understood contractual scheme and take away the receivers' right to sell the property. The possibility – as distinct from the likelihood – that the proposed sale by the receivers would be at an undervalue was not sufficient.

Case name Neutral citation	Afan Valley Ltd (in administration) and others v Lupton Fawcett LLP [2026] EWCA Civ 2
Summary	In this case the Court of Appeal had to consider the potential for professional negligence arising from losses sustained by investors in collapsed investment schemes. The respondent solicitors had advised on collective investment schemes, exposing the appellants to potential liability under the Financial Services and Markets Act 2000.
	The appellant insolvent companies were involved in investment schemes under which investors were offered the opportunity to buy long leasehold interests in individual rooms in hotels, care homes or student accommodation, either off-plan or in a pre-existing building. The issue for the courts to determine was whether the schemes were collective investment schemes (CISs) within sections 235 and 417(1) of the Financial Services and Markets Act 2000 prohibiting the appellants from carrying on regulated activities unless they were authorised or exempt: Section 19 of the 2000 Act. Since none of the appellants was an authorised person, if the schemes were CISs, investors could elect to choose between enforcing their contractual rights and claiming their rights to reclaim investments under Section 26(2): See in re Whiteley Insurance Consultants (a firm) [2009] Bus LR 418. In November 2017, the respondent firm of solicitors advised the appellants that the schemes were CISs, and the appellants should become regulated by the Financial Conduct Authority.

	The appellants claimed damages for alleged professional negligence and breach of duty. They argued the respondent should have advised much earlier that the schemes were CISs, which would then not have been promoted and no investments made.
First Instance	The High Court granted the respondent's application to strike out the claim and granted summary judgement on the basis that the claims failed to establish that the appellants had suffered any loss from alleged negligent advice: [2024] EWHC 909 (KB).
Decision on Appeal	In dismissing the appeal, the Court of Appeal held: 1. The appellants' application for permission to rely on a further draft of the amended particulars of claim and further evidence was dismissed. It was incumbent on a person who was facing an application to strike out their statement of case, or an application for summary judgement, to give careful consideration to how they were going to answer the application, whether by way of pleading or evidence, before the application was heard by the judge, not after it had been decided against them: Aylwen v Taylor Johnson Garrett [2001] EWCA Civ 1171; [2001] PLSCS 162. 2. It was an accepted principle in negligence that a defendant found to be in breach of a duty of care was not liable for all the losses which the claimant sustained as a result of acting on their advice, but only for those within the scope of their duty. It was always necessary to determine the scope of the duty of care by reference to the kind of damage from which A had to take care to save B: South Australia Asset Management Corporation v York Montague Ltd [1997] AC 191 and Hughes-Holland v BPE Solicitors [2017] PLSCS 70; [2018] AC 599 applied. When a claimant sought damages from a defendant in the tort of negligence, a series of questions arose, including: what were the risks of harm to the claimant against which the law imposed on the defendant a duty to take care (the scope of duty question); and whether there was a sufficient nexus between a particular element of the harm for which the claimant sought damages and the subject matter of the defendant's duty of care (the duty nexus question): Manchester Building Society v Grant Thornton LLP [2021] EGLR 34 applied. 3. On the facts, the duty of care imposed on the respondent concerned the impact of the 2000 Act if the schemes, about which the respondent

was advising and seeking advice from counsel, were CISs. The risks of harm to the claimant against which the law imposed on the defendant a duty of care had to be limited to the impact on the appellants of the schemes being CISs. The risk of being exposed to claims under section 26 was undoubtedly a risk of harm which the respondent's duty of care was intended to guard against, and hence within the scope of the duty of care.

4. The trial judge was right that the implications of the schemes being CISs were limited to the fact that the claimants were exposed to various risks under the 2000 Act. In the counterfactual world in which the schemes were not CISs, the sums contributed by investors would have been lost in the same way, and the appellants would have been in the same position (save for not being exposed to potential claims under Section 26 of the 2000 Act). Those losses had nothing to do with whether the schemes were CISs or not and were not within the risks of harm which the respondent's duty of care was intended to guard against.

5. If the schemes had not been CISs, it was likely the investors would have valid claims against the appellants in the tort of deceit, which would include the amount of investment lost (less any investor returns), but also either interest or, if the investors could establish what they would have done with the monies invested otherwise, damages for the loss of use of them.

Such claims would be at least as good as the claims that such an investor could make under Section 26. Under Section 26(2)(a), an investor would be entitled to claim return of any money invested, but the effect of Section 28(7)(b) was that if they did so, they would have to repay any money received by them under the agreement, so Section 26(2)(a) would not give them any more than the amount they could claim in deceit (namely, investment lost less any investor returns).

In addition, they could claim compensation under Section 26(2)(b), but that was "compensation for any loss sustained by him as a result of having parted with it" (i.e., the money paid under the agreement). But it was only if their Section 26 claims were greater than their tortious and contractual claims that the respondent's (assumed) negligence in failing to advise that the schemes were CISs would make a difference to the appellants.

In all the circumstances, even if the appellants had established negligence, the loss claimed was not in law attributable to that negligence.

Case name Neutral citation	Anderson and another v Curtis and others [2025] EGCS 207
Facts	The second defendant developer and the first defendant, its sole director, commenced a development project to convert a redundant church, St George's Church, in Kew, West London, into residential units. Funding for the development was provided, in part, by the claimants, by way of a loan, in the sum of £2,348,655. The core agreement was that, in consideration of the loan, the second defendant would repay the loan and pay the claimants one half of the profit arising from the development. The loan was not repaid, and a contractual claim for the recovery of the sums advanced, or any profit to which they might have been entitled under the loan arrangements, was time-barred. The claimant brought proceedings against the defendants, contending that the sum loaned was for the purpose of carrying out the development and procuring the repayment of the loan and the claimant's agreed share of the profit to be derived from the development. The contention was that this gave rise to a "Quistclose" trust, meaning the beneficial ownership of the funds advanced remained with the claimants until the funds had been applied for the purposes for which they had been advanced. Where the purpose was not achieved, beneficial ownership remained with the claimants or reverted back to the claimants.
Decision at First Instance	On an application under CPR 24.2, the defendants sought a determination that the proceedings had no realistic prospects of success and judgement be entered in their favour. The court granted the application, holding: (a) A "Quistclose" trust was an orthodox example of a resulting trust, under which, subject to the power given to the borrower, as trustee, to use the funds advanced for a particular purpose, those funds remained in the beneficial ownership of the lender. If the power was properly exercised, in that the funds were used for their specified and intended purpose, the exercise of that power extinguished, or discharged, the beneficial interest previously retained by the lender, such that the lender retained no interest in the funds advanced and was left with his normal remedies in debt.

(b) Trusts of that type were not intended to provide security for the repayment of the loan but to prevent the lender's money from being applied otherwise than in accordance with the lender's wishes: Twinsectra Ltd v Yardley [2002] PLSCS 203; [2002] 2 AC 164 applied. Where the power was improperly exercised, or not exercised at all, and if the funds were not used for their intended and particular purpose, such as to discharge the lender's beneficial interest, that beneficial ownership was retained by the lender, and the funds, until repaid, were held on resulting trust for the lender.

(c) The existence of such a trust depended on the intention of the lender that the monies advanced would not be at the free disposal of the borrower but had to be used for a particular purpose. That particular purpose had to be defined with sufficient certainty to enable a court to determine whether the monies advanced had, or had not, been put to the particular purpose for which they were advanced. Where the use to which the money was to be put was uncertain, because it had not been used for the given purpose but was not at the free disposal of the borrower, under the resulting trust arising from the advance, the monies advanced had to be returned to the lender.

(d) As regards the intention to create a Quistclose trust, the court only had to consider that the lender intended to enter into the arrangements and was not concerned with the subjective intentions of the lender, or even whether the lender appreciated or subjectively intended to create such a trust.

(e) There was no documentary material setting out the basis on which the loan was advanced or the specific or particular purpose for which the loan monies were to be used. The defendants accepted that, as the monies were advanced against an appraisal of the costs and potential profits of the development, it was a realistic inference that the monies were advanced only for the purposes of making good the development.

(f) On the facts, there was sufficient clarity to enable the court to determine whether or not the monies were put to the particular purpose in respect of which they were advanced. In that regard, it was not disputed that the monies advanced were utilised, in their entirety, for purposes of the development.

Accordingly, for the purposes of the current application, a valid Quistclose trust came into being at the point when the loan monies were advanced, and, at that point, the lenders' beneficial interest in the monies was not extinguished or exhausted.

The question as to when title passed, in cases falling under the Quistclose umbrella, continued to be dictated, or determined, by a consideration as to the intended purpose for which money had been advanced and whether that intended purpose had been achieved.

(g) This was, in essence, a straightforward commercial loan concerning a property development, in respect of which the claimant's expectation was that they would receive repayment of their loan, together with a share in the profit of the development. There was no intention that the claimants would take a share in the development, as a joint developer, or as a party to a joint venture, or that they would share in the risk of the development. Nor was there anything in the material before the court to suggest that the repayment of the loan together with the prospective profit was agreed as a charge on the development, such that the development, or its assets, stood as security for the loan.

(h) There was nothing to take this case, taken at best for the claimants, outside the usual ambit of a Quistclose trust, or to enable the claimants to assert a trust interest in the development, or the assets of the development, or to preclude the second defendant from dealing, in any way it wished, with the assets of the development. Consequently, the claimants' claim had no realistic prospects of success and would be dismissed.

This month's edition of Legal Mortgage has been supported by contributions from Richard Miller of Falcon Chambers and Ian Quayle of IQ Legal Training and Property Law UK. We are very grateful to both authors for sharing their expertise and would like to thank them for their time, insight, and continued commitment.

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