Legal Mortgage Monthly Update
October 2025

Contents	

Case name Neutral citation	JAK Property Jersey Ltd v Together Commercial Finance Ltd [2025] EWHC 2442 (Ch)
Legal points	First and second charges – Deed of Postponement – contractual interpretation - rectification
Facts	Two lenders, JAK and Together, lent money to Mulberry Homes on the security of legal charges over land owned by Mulberry, subject to a Deed of Postponement. Despite being first in time, JAK agreed to postpone their charge (referred to as the Second Charge) to Together (referred to as the First Charge). Clause 13 of the Deed of Postponement provided as follows: Expiry of Term It is hereby agreed and declared between the First Chargee and the Second Chargee that if the term of the loan agreement associated with the Second Charge comes to an end before the term of the loan agreement associated with the First Charge all sums due and payable by the Chargor pursuant to the Second Charge will be paid to the Second Chargee in accordance with the loan agreement associated with the Second Charge notwithstanding the priority of the First Charge provided by this deed

	Following default in payment, both lenders made formal demand in respect of the outstanding balances due to them. JAK followed through with a winding up petition and obtained a winding up order. Together appointed an LPA Receiver who sold the property leaving a shortfall debt due to the second ranking creditor, whoever that was. The question was which party had priority.
Held	(HHJ Cawson KC sitting as a Judge of the High Court) The court reviewed the rival contentions and the caselaw on contractual interpretation, including the helpful summary of the relevant principles set out by Birss LJ in *Adaptive Spectrum and Signal Alignment Inc v British Telecommunications plc* [2023] EWCA Civ 451 at [18] to [20]. The wording of clause 13 was not clear and unambiguous. There were two possible reasons for it being included in the Deed of Postponement (1) to change the order of priority in the Deed in the particular circumstances of the JAK loan being determined before the Together loan, (2) to make clear that the order provided for in the Deed should not affect JAK's ability to recover its debt otherwise than by enforcement of the JAK charge should the JAK loan agreement be determined before the Together loan (the court noting that it was not uncommon in a deed of priority regulating priorities as between creditors to provide not only for security to be subordinated, but also for the underlying debts to be subordinated such that the junior creditor is not entitled to recover their debt until the senior creditor has been paid in full). If anything, the wording of clause 13 points against an intention to affect the order of priority provided for in the Deed. Clause 13 does not, in terms, talk about the enforcement of the relevant charges but rather in terms of payment of the underlying debt. Clause 13 also talks in terms of the parties declaring a certain state of affairs which points to confirming something for the avoidance of doubt rather than altering priorities. Overall, a consideration of the commercial circumstances and notions of commercial common sense point firmly in favour of the interpretation contended for by Together so that the Together Charge has priority over the JAK Charge in relation to its entitlement to be paid out of the proceeds of sale of the property. The court went on to consider Together's alternative counterclaim for rectification (on the footing that JAK was correct in its interpretation of clause 13), again following a review of the legal principles and the evidence and held that clause 13 ought to be rectified in a way which gave effect to the parties' common intention (the court declared the appropriate wording as set out in para [63] of the judgment). Accordingly, Together has first call on the proceeds of sale of the property prior to any entitlement of JAK.
Comment	This case contains a helpful review of the principles of contractual interpretation and rectification, and also provides some useful judicial commentary on the court's approach to the priority of charges and the underlying debts.

Case name Neutral citation	Houssein v London Credit Ltd [2025] EWHC 2749 (Ch)
Legal points	Unregulated mortgage lending – whether default rate of 4% p/m a penalty
Facts	This case follows a trial at first instance [2023] EWHC 1428 (Ch) (reported in the June 2023 monthly update) and an appeal to the Court of Appeal [2024] EWCA Civ 721 in which the Court reversed certain findings and returned the case back to the judge for further hearing. The case is reported here mainly on the default interest issue. The facts are summarised in the June 2023 monthly update. At first instance the judge (amongst other things): (1) refused to permit an unregulated mortgage lender from enforcing its security on a residential property based on a breach by the borrowers of a non-residence restriction because it was obvious on inspection that the borrowers were living there; and (2) struck out as a penalty a default rate of interest of 4% p/m. On appeal the Court of Appeal reversed the judge's findings on default interest and remitted this aspect back. The specific question was whether "having regard to the legitimate interest in the performance of the primary obligation [being to repay the loan, all interest, fees and commission on the repayment date] the default interest provision is extortionate, extravagant or unconscionable in amount or effect". In the meantime, some further issues arose after the parties agreed by consent to permit the lender to raise a counterclaim for the balance of the loan due under the facility letter which the borrowers disputed on the ground that the lender had by its conduct refused offers of payment made by the borrowers.
Held	(Richard Farnhill sitting as a Deputy Judge of the Chancery Division) This is a lengthy further judgment (87 pages, 361 paragraphs). It begins by reviewing the issues, and dealing with the specific issues raised in the counterclaim, including tender [25], the interpretation of the express terms of the facility letter [35], and the implication of terms [46]. The judge then reviewed the question of whether the default rate was a penalty [110] – reviewing the law on penalties [113] – adopting an objective approach [154]; addressing the difference between primary and secondary obligations [156]; the legitimate interests [160]; and whether the default rate was extortionate etc [253][270]. He concluded that overall, it was not extortionate for the lender to attach an above market default rate to the credit risk interest and it was not considered to be a penalty.
Comment	This decision contains a fairly comprehensive (but lengthy and complicated) analysis of the law on penalty interest following *Cavendish Square Holdings BV v Makdessi* [2015] UKSC 67 and subsequent caselaw including the three-stage approach in *Vivienne Westwood v Conduit Street* [2017] EWHC 350 (Ch); *Cargill International Trading PTE Ltd v Uttam Galva Steels* [2019] EWHC 476 (Comm) and *Ahuja Investments Ltd v Victorygame Ltd* [2021] EWHC 2382 (Ch).

	In this case the judge had to spend some time reviewing what is normally a straightforward threshold question whether the default rate was a primary or secondary obligation [156] and appears to have got bogged down on the meaning and effect of 'credit risk' and whether credit risk interest should be treated separately from repayment interest (not an easy analysis). Perhaps of more practical help is the analysis of the evidence (including expert evidence) on the rate itself [270], noting [292] (1) that typical default rate interest in the market was 2-3%, although higher rates existed up to 4% (2) higher rates would necessarily need to reflect higher risk which could include but was not limited to higher ltv (3) lender would often choose not to apply a higher rate for a prolonged period because it made refinancing impossible, and that was their commercial objective. While 4% was regarded as "plainly above the range of market rates" it was not, in itself, unreasonable [293]. Interestingly (but incorrectly) the judge noted that "no other lender had a default rate at this level" [295]. Practitioners may be able to glean something of use from this judgment, but it is a fairly difficult judgment to work through. And remember, as with all these cases, they are fact-sensitive.

Case name Neutral citation	Wilton Student Developments (Egerton) Ltd v IP [2025] EWHC 2750 (Ch)
Legal points	Mortgagee's equitable duties – collateral purpose in procuring deeds of surrender of leases to avoid equitable right to redeem charges secured on them
Facts	The claimant (IP) bought, off plan, a two student flats in Sheffield, from a developer. The developer got into financial difficulties and a new company (S) was set up to protect the interests of the investors, and was granted a charge over the freehold. IP and others were granted long leaseholds of their flats. S subsequently took possession of the block as mortgagee in possession and sold the freehold to the defendant (W). It was a condition of W taking over the development that the leaseholders either sold their leases to W or paid further sums towards the cost of completing the development. IP raised further funds by granting a mortgage to C over the leases. Following default in payment, C took possession of the apartments with two deeds of surrender of the leases being purportedly entered into, followed by new lettings of both. When W applied to HMLR for alteration of the registers to note the surrenders, IP applied for and obtained an injunction to prohibit the alteration. IP subsequently issued the present claim seeking various relief – that the surrenders were invalid, that W/its chargee had no right to possession, to restrain alteration of the registers, and for possession of the flats. Following a trial over two days before the DCJ, the judge held (amongst other things) that the deeds of surrender were ineffective to extinguish IP's equity of redemption of the two leases of the flats. W appealed.

Held	(Leech J) The court considered the statutory power of sale in s 101 Law of Property Act 1925 [45] and the caselaw on collateral purpose [47 etc] including *Quennell v Maltby* [1979] 1 WLR 318, *Downsview Nominees Ltd v First City Corporation Ltd* [1993] AC 295, *Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd* [2016] AC 923 and *Meretz Investments NV v ACP Ltd* [2007] Ch 197 (which addressed the issue of 'purity of purpose', noting [58] that a purchaser will take free of any impropriety if he has no actual knowledge of the motive of the mortgagee which gives rise to the improper purpose but that ignorance of the law is no defence. If the purchaser is fully aware of the terms of the documents and the motive of the mortgagee, it is no defence for the purchaser to say that he did not believe that the transaction was unlawful). The trial judge heard evidence and was entitled to make findings about the motive for entering into the deeds of surrender as opposed to exercising a power of sale [65]. He correctly addressed himself on the law – the correct legal test is not whether C had mixed motives or purposes for entering into the deeds of surrender but whether recover of the debt or protection of the security was no part of the mortgagee's purpose [66]. On the evidence, the judge was entitled to find that repayment of the loan formed no part of C's purpose in entering into the deeds of surrender, but instead to extinguish IP's equity of redemption [66(9)]. Only a valid exercise by a mortgagee of its power of sale will extinguish the equity of redemption, and if it exercises the power of sale, the equity of redemption attaches to the proceeds of sale [69]. It followed that the deeds of surrender were vitiated – C had no power to surrender the leases under the mortgage, and even if it did, C entered into the deeds for a collateral purpose (or not for a proper purpose being to repay the loan or protect its interests) [72]. Further, C was not entitled to rely on s 104 Law of Property Act 1925 (protection to purchaser where improper exercise of power of sale) because it was not a purchaser for valuable consideration [74]. Appeal dismissed. The court varied the order of the trial judge. It made various declarations and an order setting aside the deeds of variation [80 etc].
Comment	This is a complicated property/mortgage transaction which raised a point which is fairly uncommon in practice, about a mortgagee's equitable duty to act in good faith for the purpose of enforcing its security (the judge drew a comparison with directors' duties under s 171 Companies Act 2006 [52 etc]). The judgment helpfully brings together the caselaw on the point.

Case name Neutral citation	Perkins v Hawkins (Unrep, KBD, 17 October 2025)
Legal points	Receivers – applications for Extended Civil Restraint Orders
Facts	Respondents defaulted in repayment of a bank loan secured by a first legal charge over commercial property containing residential flats. The bank appointed joint fixed charge receivers who issued proceedings for possession in the county court. The respondents did not defend the claim and an order for possession was made which was transferred to the High Court for enforcement. Enforcement officers were unable to enforce the writ of possession as the respondents and others prevented access by barricading themselves in the property. The respondents then applied to the county court to set aside the order for possession and applied to the High Court to stay the writ of execution and remove the receivers on grounds of alleged misconduct. The three applications were dismissed as totally without merit. The writ of possession was executed and a buyer was found. The respondents then made further applications – for an injunction to prohibit the sale of the property and for an order to set aside the order for possession. Both were dismissed as totally without merit. The property was sold in Dec 2024. Six months later the first respondent served on the receivers' solicitors a statutory demand for US$ 600M, and the solicitors obtained an injunction under s 37 Senior Courts Act 1981 to prevent him from taking any action on the statutory demand. The second respondent also sent the solicitors "cease and desist" notices. In Aug 2025 the receivers applied for an Extended Civil Restraint Order (ECRO) under CPR PD 3C, para 3.1 to restrain the respondents (for a period of 3 years) from making any application and/or issuing any claim in the High Court or the county court involving, relating to or touching on the receivership of the property or the possession claim. The first respondent served a rebuttal of the ECRO application, a refusal to accept the authority of the High Court and a 'lawful counterclaim' for £25M. The second respondent served an 'affidavit of truth'. A further document was served on the LCJ.
Held	Application for ECRO refused. Although five of the respondents' applications had been certified as totally without merit, their overall conduct had to be considered in determining whether they had acted persistently in making totally without merit applications which relitigated matters already decided by the court or refused to take no for an answer (*Sartipy v Tigris Industries Inc* [2019] EWCA Civ 225). R2's last application was made pre-sale, and she had not made any further applications. On an objective assessment, the court was not satisfied in the circumstances that the threat level or risk posed by her was such that an ECRO should be granted (*Realworld Europe Ltd v Uddin* [2021] EWHC 535 (QB)).

	The effect of the ECRO application was to prevent any complaint being made about the applicant's receivership. Any such complaint might or might not be hopeless and would have to be considered at that stage. The evidence did not support the grant of an ECRO at the current time. Although R1 had one on to issue the statutory demand which was subject to a separate injunction, on an objective assessment of his conduct, his position was the same as R1. There was insufficient evidence that he was persistently issuing claims or a real risk that he would issue further applications/claims, so it was not appropriate to make an ECRO against him either.
Comment	Crikey. This is an extreme case which should have justified an extreme sanction, and the receivers should have been offered some protection against further applications, not least to deflect the (no doubt irrecoverable) cost of dealing with them. Given that a sale had been achieved some time ago, and the receivership had, to all intents and purposes, concluded, it is difficult to see what else, of any merit, these respondents could have had a got at, and the court might have enquired whether they were planning on making any further applications? Regrettably, it is not uncommon for disappointed borrowers to 'have a go' at any number of applications designed to delay enforcement and very often, the only procedural step open to lenders and their agents is to apply for some form of civil restraint order. As always with civil restraint orders, the devil is in the detail, and it is important to keep an eye on the requirements of CPR 3.11 and Practice Direction 3C. *Sartipy v Tigris Industries* [2019] EWCA Civ 225 [2019] 1 WLR 5892 provides Court of Appeal guidance on the requirements for making an extended civil restraint order under those provisions, and in particular the evaluation of the requirement for 'persistent' conduct in making totally without merit applications (which has been cited quite extensively in subsequent caselaw). The case also extends the reach of restraint orders beyond the named parties to the 'real parties' (the persons who are controlling the conduct of the proceedings and have a significant interest in the outcome).

Publication	On 9th October 2025 the Royal Institution of Chartered Surveyors updated their global guidance on bank lending valuations with two key publications - an Updated Professional Standard and New Practice Information. See https://www.rics.org/profession-standards/rics-standards-and-guidance/sector-standards/valuation-standards/bank-lending-valuations