

# UNIT 5: MORTGAGES

## Contents

- Key stages
- Legal v equitable mortgages
- Enforceability
- Undue influence
- Mortgagor and mortgagee rights and responsibilities

# UNIT 5: LEARNING OUTCOMES

- Differentiate between legal and equitable mortgages
- Explain the rights and responsibilities of the mortgagor and mortgagee
- Explain the effect of undue influence on a mortgage, differentiating between actual and presumed undue influence
- Explain the rules on priority in distributing the proceeds of sale
- Summarise the role of the solicitor in advising on mortgages
- Apply the law to factual scenarios.

# ICEBREAKER: RECAPPING ESTOPPEL

- Answer the following short-answer questions
  - True or false, promissory estoppel is the type of estoppel relevant to land law?
  - True or false, estoppel in land requires evidence of a common intention?
  - What are the four elements that need to be proven to establish an estoppel?
  - What is the starting point used by the court when calculating how to satisfy the equity? Detriment or expectation?

# INTRODUCING MORTGAGES

- Contractual bank loans with money given in return for an interest over land/property.
- Can apply to either residential or commercial property
- Common mechanism to fund purchase of property
  - few homeowners are able to purchase without a loan
  - commercial properties way to free capital for business
- Purchaser (borrower) = **mortgagor**
- Lender (bank) = **mortgagee**
- Despite rise in house purchases, mortgage applications declining in recent years (2022)
- Outstanding value of all residential mortgages at start of 2024 was £1,660,900,000,000 (rising) (FCA, 2024)
- Those defaulting on the loan repayments risk repossession of their property (i.e. the bank acting on their interest).
- Fixed or floating



# KEY STATGES

- Purchaser applies to bank after offer on purchase accepted (increasingly using mortgage brokers)
- Banks usually require a deposit, subject to due diligence (assess that purchaser is able to meet monthly repayments: income assessed and creditworthiness)
- After application is reviewed: property survey. Bank wants assurance that property is in good condition it can register a charge on the property (i.e. the value of property is sufficient to recover the loan)
- Only after due diligence will bank make a formal offer (letter)
- Once received, conveyancer can proceed with purchase and mortgage contract
- Most cases, solicitor acting for purchaser will also act for lender during conveyancing transaction (without conflict).



# SOLICITOR'S ROLE

- Lender will undertake due diligence before making a mortgage offer
- Only if satisfied make mortgage offer
  - terms and conditions of loan
  - Commercial loans: commitment letter and facility agreement
- Mortgagor's solicitor checks T&Cs and gives advice and assistance to their client before exchange of contracts (at which point binding)
- **Legal advice:** enforcement options should be explained.
  - Legal implications of financial hardship/arrears
  - Legal protections to mortgagor if an issue arises with way agreement reached: undue influence, unfair terms, consumer protection
- **Conflict of interest:** usually same solicitor acts for purchaser and bank.
  - Usually can do, but need to consider Col, e.g. prejudicial terms or otherwise unacceptable.
  - If becomes unacceptable, cannot continue to act for both parties.

# LEGAL V EQUITABLE MORTGAGES

- Mortgages may be created in law or equity. Legal mortgages are the most common
- Equitable mortgages 'plug the gap' where legal mortgage might have failed.
- **Legal mortgage**
  - Must be created by deed, or by demise (temp ownership/lease) (LPA 1925, ss85-86 ):
  - in compliance with statutory formalities: **Law of Property (Misc Provisions) Act 1989**
  - recorded on land register (LRA 2002, s23)
  - mortgagee holds legal interest in property
  - legally binding contract: deed registered with Land Registry
  - mortgage continues to exist as legal charge, until fully repaid and charge removed



# LEGAL V EQUITABLE MORTGAGES

- Equitable mortgage
  - rare, does not grant mortgagee a legal interest
  - may arise because
    - mortgagor holds an equitable interest in land
    - or because (legal mortgage) contract declared defective.... eg. due to failure to register, or fraud on part of mortgagor
  - An equitable mortgage cannot be registered in its own right but may be protected by registration of a notice.



# ENFORCEABILITY OF MORTGAGES

- Both mortgagor and mortgagee have legal rights and duties under the mortgage
- Historically, mortgagee perceived to have all of the legal rights, how
- Mortgagor are a party to the legally binding contract and do enjoy contractual rights
- LPA 1925: two ways to create a legal mortgage
  - lease
  - legal charge (deed)
- gives rise to **equity of redemption**: rights enjoyed by mortgagor pending repayment of debt
- two key dates: lifespan of mortgage
- six months after deed to end of mortgage = equitable right to redeem the mortgage
- this is a right right to pay or redeem the mortgage, rather than be bound to it for the full term (e.g. 25 years)
- essential mortgagor has right to redeem at any time. e.g. windfall
- mortgagee will want to ensure priority

# UNFAIR TERMS

- An unfair term is a stipulation in the contract that changes the terms and conditions over time or prevents the mortgagor from making full repayment - thus keeping the mortgage alive
- Unconscionable terms struck down:
  - *Cityland Properties v Dabrah* [1968] Ch. 166: 57% interest rate unfair and unconscionable
  - *Jones v Morgan* [2001] EWCA Civ 995: 50% interest rate fair and thus not unconscionable
- equity of redemption intended to protect mortgagor from 'unfair terms',
  - safeguards from undue influence
  - consumer protection: mortgagors must be given enough information before entering contract, including about risks of conditions. Significant loan, subject to usual CP law.
  - *Fairclough v Swan Brewery* [1912] AC 565: a condition that restricted redemption of mortgage until 6 months before the term was held to be unfair, rendering right to redemption 'illusory'

# UNDUE INFLUENCE

- Rules of undue influence apply to mortgages, as they do any other contractual agreement
- Arises rarely: decisions made by a person because of pressure exerted on them may well amount to undue influence.
  - Actual undue influence: improper pressure by actions of parties, e.g. pressure, coercion or unlawful threats
  - Presumed undue influence: acquired ability to influence from relationship between two people, used to take unfair advantage (breach of trust)
- Mortgage can be set aside if undue influence established
- Solicitors have a duty of care to their clients regarding undue influence (Etridge protocol)
  - steps mortgagee can take to gain protection from risk of undue influence being later argued by mortgagor.

# TWO FORMS

- **Class 1: actual undue influence**

- Claimant must prove undue influence actually exerted;
- Either by the mortgagee or a third party; *and*
- That undue influence brought about the mortgage

- **Class 2: presumed undue influence**

- Relationship of trust and confidence between the parties; *and*
- Transaction is one that calls for an explanation; *but*
- Presumption is **rebuttable**

## Class 2A: specific relationships:

Solicitor and client  
Trustee and beneficiary  
Guardian and ward  
Medical advisor and patient  
Parent and child  
But not husband & wife

Irrebuttable presumption of influence

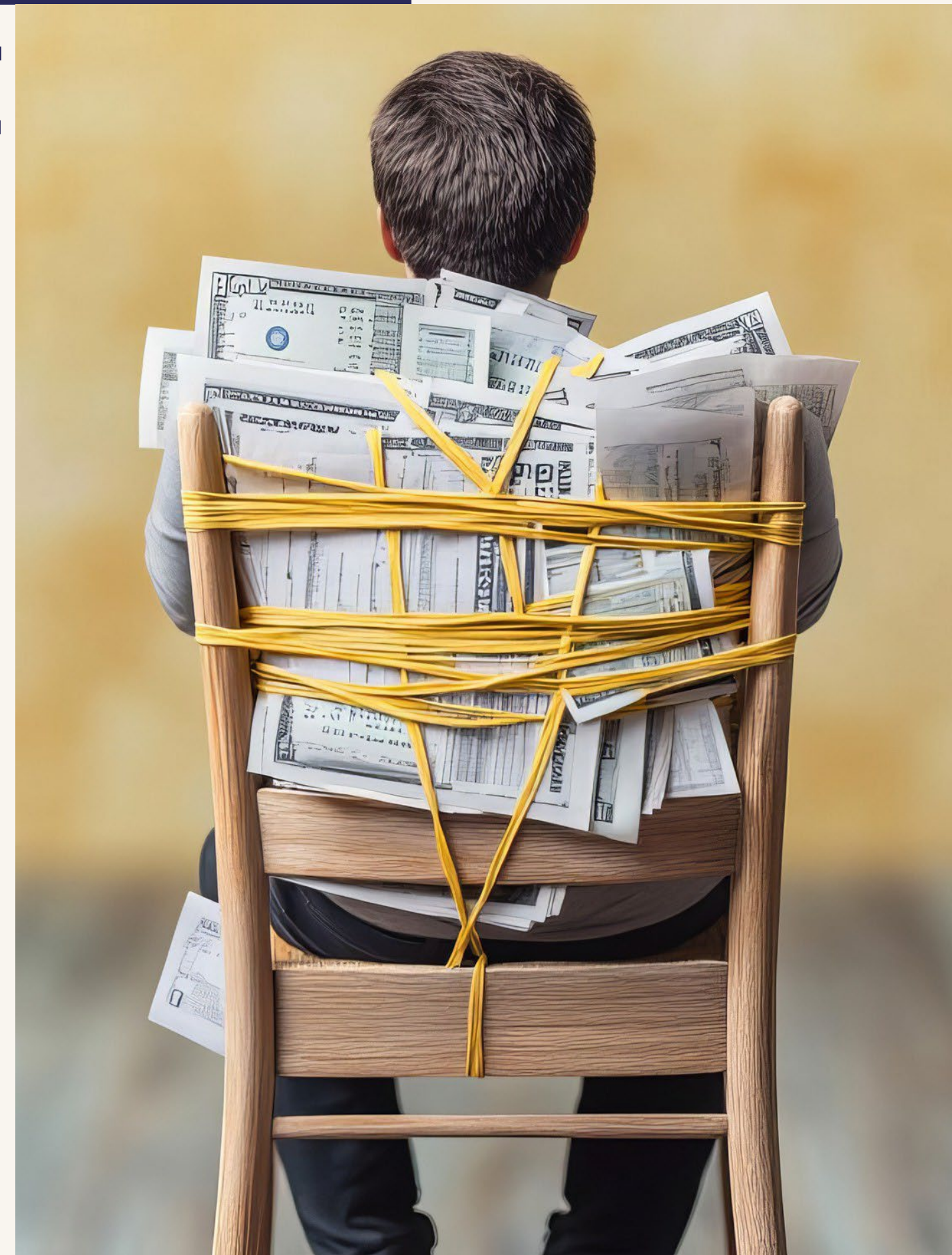
## Class 2B: that *particular* relationship

- Was one of trust and confidence; so
- *Rebuttable* presumption that transaction *is* one that calls for an explanation  
• (Can include husband and wife)

**Key source: *BCCI v Aboudy*  
[1990] 1 Q.B. 923**

# ACTUAL UNDUE INFLUENCE

- Person who claims to have been wronged needs to prove that third party exerted undue influence on them to enter the mortgage transaction
- Must show:
  - the other party to the transaction (or someone who induced the transaction for their own benefit) had the capacity to influence the complainant
  - the influence was exercised
  - its exercise was undue, and
  - its exercise brought about the transaction



# PRESUMED UNDUE INFLUENCE

- Question to consider is whether:
  - one party has sufficient trust and confidence in the other
  - transaction tainted by presumed undue influence (fact)
  - Burden of proof on claimant, discharged if:
    - the complainant can prove that they placed trust and confidence in the other party in relation to the management of their financial affairs, and
    - the transaction is one which calls for explanation (eg the transaction is not readily explicable by the relationship of the parties)
    - if proven: rebuttable presumption of UI, for defendant (lender) to prove was no undue influence
  - Relationship must pre-date transaction
  - Not enough just to prove relationship

## Rebutting the Presumption

- The evidential presumption of the exercise of undue influence may be rebutted by showing that the transaction was entered into “only after full, free and informed thought about it”

*Zamet v Hyman* [1961] 3 All E.R. 933, at 938

**Key source:** *Royal Bank of Scotland v Etridge (No 2)*  
[2002] 2 AC 773

# ETRIDGE PROTOCOL

- Sets out guidelines that protect a mortgagee against any future issues
- Key aspect of solicitor's duty of care in relation to mortgages
- Clear awareness and application of protocol, including in breaches
- Where individual provides security for benefit of a third party, can be a presumption of undue influence.
- Etridge protocol outlines to follow to enable lender to protect itself against third party claiming undue influence (setting agreement aside).
- Purpose is to show that the third party understood the transaction and made a fully informed decision to grant the mortgage



**Key source:** *Royal Bank of Scotland v Etridge (No 2)*  
[2002] 2 AC 773

# ACTIONS ON THE LENDER

- The lender writes to the third party to inform them that:
  - they need to nominate a solicitor to advise them and provide the Confirmation (see below). The solicitor can be the debtor's solicitor, it is up to the solicitor to decide whether there is a conflict of interest and decline to act
  - they will need to obtain confirmation from a solicitor that they have received a full explanation of the security documents and how these documents will impact upon them (the 'Confirmation'), and
  - the Confirmation is to stop a dispute at a later date over whether the security documents are legally binding
- The lender gives the third party's solicitor all the financial and other information they need to be able to advise that third party, including:
  - the purpose of the loan provided to the debtor
  - the amount of the debtor's current indebtedness
  - the amount and terms of any new loan to be provided to the debtor
  - copies of any loan applications made by the debtor, and
  - any other information it has which might lead the lender to suspect that the third party is being influenced by the debtor and is not entering into the transaction freely
- Lender not to proceed if either debtor does not consent, or third party party refuses confirmation of solicitor

# ACTIONS ON THE SOLICITOR

- The solicitor is instructed by the third party (*not* the debtor)
- There is no conflict of interest in the solicitor acting for the third party (where the solicitor is also acting for the debtor or the lender there is more likely to be a conflict of interest—the advice provided by the solicitor must be independent and where the solicitor feels unable to discharge this obligation they should refuse to act)
- The solicitor's indemnity insurers have not issued any guidance or set out any additional requirements that need to be met where a solicitor is acting in this scenario, or if they have the solicitor has complied with these guidelines/requirements
- The solicitor meets the third party face-to-face (without the debtor being present) to give advice
- The solicitor gives advice in clear non-technical language

# ACTIONS ON THE SOLICITOR

- The solicitor ensures that they receive
  - from the lender, any information required in order to discharge its obligations to the third party properly (including the purpose of the loan, the amount of the debtor's current indebtedness, the amount and terms of any new loan to be provided to the debtor and copies of any loan applications made by the debtor); and
  - from the third party, the letter and any enclosures sent to them from the lender in relation to the security to be given
- The solicitor is confident in their ability to interpret and advise the third party in relation to the financial information they have been provided with
- The solicitor explains to the third party that if they try to challenge the transaction at a later date the lender will rely on the solicitor's written confirmation (the '**Confirmation**') to rebut any suggestion that they did not understand what they were signing and did not understand the implications of the transaction
- The third party confirms that they are happy for the solicitor to act in these circumstances and to advise them on the legal and practical implications of the transaction

# ACTIONS ON THE SOLICITOR

- The solicitor explains:
  - the nature of the documents
  - the practical consequences for the third party if they sign the documents, including the potential loss of their house and/or bankruptcy
  - the purpose of the loan
  - the amount of the debtor's current indebtedness
  - the amount and terms of any new loan to be provided to the debtor
  - the risk of the lender increasing the indebtedness of the debtor without consulting the third party; and
  - the amount and duration of the third party's liability under the guarantee or other security to be provided to the lender
- The solicitor discusses:
  - the finances of the third party
  - their understanding of the value of the property being charged in favour of the lender; and
  - what other assets could be used to repay the lender in the event of the debtor defaulting on their debt repayments

# ACTIONS ON THE SOLICITOR

- The solicitor clearly states that the third party is not obliged to go ahead with the transaction and checks whether they wish to proceed
- The solicitor asks whether the third party would like them to negotiate on their behalf to change the terms of the transaction ie in order to limit their liability
- If the third party is happy to go ahead, the solicitor obtains their authority to provide the Confirmation to the lender
- The solicitor writes a detailed attendance note recording the meeting with the third party and the discussions which took place, including:
  - the documents provided by the third party and the lender
- confirmation that the third party understood the documents and the nature of the risk involved in signing them
- confirmation of the third party's willingness to enter into the transaction and any amendments negotiated on their behalf to the transaction documents; and
- confirmation that the third party was happy for the solicitor to send the lender the Confirmation
- The solicitor sends a letter to the third party confirming the advice given to them in the form set out in
- The solicitor receives the acknowledgement attached to the letter of advice signed by the third party

# ACTIVITY 1: UNDUE INFLUENCE

- Liz, a teacher, is married to Del, who owns his own business, a Botox clinic. The family home is in Del's sole name, as he owned it when they met. It was subject to a mortgage to North Western Bank in the sum of £150,000, which was almost fully repaid some 15 years later. At this point, Del suggested that the property be remortgaged to finance his business.
- At the time, Liz was experiencing severe fatigue from work and the COVID-19 pandemic, as well as caring for elderly parents and the couple's severely disabled daughter, Amanda, aged 20.
- Del told Liz that the business might 'go under' and that the funds were urgently needed, with no other option for a business loan. He persuaded Liz to agree to a remortgage in the sum of £100,000. Liz signed the documents without really reading them or fully understanding the risk to the family home.
- The funds were used to design and decorate the waiting room at the Botox clinic, purchase new equipment, pay existing bills and run a promotional campaign.
- A year later, the business is now in debt since customer numbers have dropped following some negative reviews on social media.
- Liz is on sick leave, receiving only social welfare payments because she has used all her paid sick leave. The bank is threatening repossession proceedings due to mortgage arrears, and Liz is very unhappy about the remortgage.
- The same solicitor acted for both parties during the remortgage.
- **What key questions would you ask Liz in order to determine whether she might argue undue influence**

# PROTECTIONS FOR MORTGAGEE (LENDER)

- Right to sue on the covenant
- Insurance against the risk of fire, at the mortgagor's expense
  - Law of Property Act, 1925, section 101(1)(ii)
- Consolidating mortgages and tacking advances
  - Consolidating mortgages — Law of Property Act, 1925, section 93
    - January 2016—A borrows £100,000 from B Building Society to buy Red House
    - January 2018—A borrows £100,000 from B Building Society to buy Blue House.
    - B can insist that A cannot redeem the mortgage on Blue House until he has repaid the loan on Red House



# PROTECTIONS FOR MORTGAGEE (LENDER)

- Tacking advances — Law of Property Act, 1925, section 94
  - January 2016—A borrows £100,000 from B Building Society
  - January 2018—A borrows £10,000 from C building society
  - January 2020—A borrows £10,000 from B Building Society
    - This loan is treated as an extension of the 2016 loan
- Restricting the right to lease
  - Law of Property Act, 1925, section 99
- The power to appoint a receiver
  - Law of Property Act, 1925, section 109



# PROTECTIONS FOR MORTGAGEE (LENDER)

- Several protections, including legal right for loan to be repaid per contract terms and conditions
- Non-payment/breach: though bank may offer some flexibility (e.g. extra time): mortgage is technically in 'arrears' once single payment is missed.
- Arrears is usually the main factor triggering action by lender
- Lender has several remedies available, potentially leading to repossession and sale of property
- Repossession usually arises when there has been default on the mortgage repayments
- Often the step taken by the mortgagee before sale to ensure the property is vacant when it changes owner.
- Various statutory protections for mortgagor
  - **Family Law Act 1996:** Allows the court to postpone proceedings to allow a connected person to be made a party (i.e. a spouse or cohabitant).
  - **Criminal Law Act 1977, s6(1):** Possession of land should not be undertaken without order of the court.
  - **Administration of Justice Act 1970:** Allows the court to delay the repossession proceedings for a reasonable period if the borrower can demonstrate a reasonable prospect of repaying the debt.

# SALE OF PROPERTY

- Invariably, following repossession, lender will sell property to recover loan (difference to mortgagor who benefits from increase in value)
- Power of sale arising, and becoming exercisable: LPA 1925, s103
- If mortgage deed does not contain 'power of sale' provision, LPA 1925 implies, unless the mortgage deed expressly states that this power is excluded
- Power of sale only arises after legal date of redemption has passed, and there is no express prohibition
- Thereafter, the power of sale may be exercised, subject to:
  - notice of default being served to the mortgagor and three months having elapsed
  - whether interest under the mortgage is in arrears and has remained unpaid for two months after becoming due
  - whether there was some other breach of the terms and conditions of the mortgage.

# MORTGAGEE DUTIES

- Law keen to protect mortgagors from abuse of the right to sale, which can result in person losing home
- Mortgagee has certain obligations. If breached, mortgagor can challenge sale, or the price obtained.
  - mortgagee must seek optimum value and be open and transparent with prospective purchasers; a quick sale to repay part of the debt may not be sufficient to fulfil this duty.
- [Pre-action protocol \(2017\)](#) places a duty on the mortgagee to act reasonably, engage with the mortgagor and consider all options. This includes the parties having an open dialogue and reaching a repayment agreement where possible.
- applies to mortgagees who have the first legal charge (known as a priority mortgage) over a residential property



# OTHER REMEDIES

- **Appoint receiver:**
  - commercial property usually during insolvency
  - receiver take over running of premises, including receiving income and paying any outstanding debts
  - pay mortgagee any surplus
  - uncommon in residential as cost outweighs benefit
- **Foreclosure**
  - Rarely used today
  - Removes mortgagor's right of redemption
  - If debt not paid by specific day, property vests in mortgagee, and they become registered owner
  - Mortgagee not obliged to pay the mortgagor any difference in value

# MORTGAGE PRIORITY (LEGAL)

- Possible to have more than one mortgage against the property
- If the sale price achieve covers repayment of all mortgages then there is no issue.
- Occasionally, however sale does not cover recovery of the mortgage: **negative equity** (debts exceed market value)
- If sale does not achieve full recovery of the debt, mortgagee has up to 12 years to enforce the debt against the mortgagor
- **Mortgage priority** determines the order in which mortgagees are paid
- **Legal mortgage:** must record as a charge in title register.
  - Prioritised by date of registration (not mortgage)
  - Important not to delay registration if acting for mortgagee

# MORTGAGE PRIORITY (EQUITABLE)

- **Equitable mortgage:** either created on equitable interest or due to non-compliance with legal formalities
  - Registered land: must be protected by notice on title deeds. Notice gives priority over later mortgages.
  - Unregistered land: mortgagee will take possession of deeds, preventing subsequent registration, ensuring priority.
    - LP(MP)A 1989, depositing title deeds with a mortgagee is not sufficient evidence of equitable mortgage: now must be registered as a land charge. If registered, takes priority, otherwise void.

# MORTGAGE PRIORITY (IN PRACTICE)

- Shares that pre-date the mortgage (*Williams and Glyn's Bank v Boland* [1981] AC 487)
- Costs of the sale, e.g., auctioneer's fees
- The first registered mortgage plus interest (but see **Land Registration Act 2002, s49**—tacking and further advances)
- The subsequent registered charges plus interest (in the order of registration not creation—**Land Registration Act 2002, s48**)
- Any charges that are not recorded on the Land Register
- Balance to the mortgagor



# ACTIVITY 2: ADVISING A CLIENT

- Cathy and Lily are the joint owners of Appletree Cottage. In 2009, they obtained a loan from the Red Bank and Appletree Cottage was used as security for the loan. Cathy and Lily required the loan in order to finance a business venture that Cathy was involved with. The business has been in financial difficulties for some time now, and Cathy and Lily have been unable to repay the loan. Please advise on whether:
  - The Red Bank is able to sell Appletree Cottage in order to recover their loan and what conditions must be satisfied in order for it to do so.
  - What problems might arise for the Red Bank if it attempts to sell Appletree Cottage?

# UNIT 5: LEARNING OUTCOMES

- Differentiate between legal and equitable mortgages
- Explain the rights and responsibilities of the mortgagor and mortgagee
- Explain the effect of undue influence on a mortgage, differentiating between actual and presumed undue influence
- Explain the rules on priority in distributing the proceeds of sale
- Summarise the role of the solicitor in advising on mortgages
- Apply the law to factual scenarios.

## RECAP

# UNIT 5: READING MATERIALS

- You can draw on the following chapters of your textbooks to deepen your understanding of the topics discussed in this unit.
- Bevan (2022) chapter 13
- Dixon (2024), chapter 11

# EXPLORING FURTHER

- You may find the following sources of interest to you in exploring the topics discussed in this unit further. You are not expected to read these to pass the module, they are provided should you wish to explore the topics further.
  - BBC (2018) 'Mortgage misery: The homeowners facing repossession'. Available at: <https://www.bbc.co.uk/news/business-44851363>
  - Law Society of England and Wales (2002). Undue influence - solicitors' duties post-Etridge. [online] [www.lawsociety.org.uk](http://www.lawsociety.org.uk). Available at: <https://www.lawsociety.org.uk/topics/property/model-letter-post-etridge>.
  - Morris, D. (2003) 'Surety wives in the House of Lords: time for solicitors to "get real"? Royal Bank of Scotland plc v. Etridge (No.2) 2001 4 All E.R. 449', *Feminist legal studies*, 11(1), pp. 57-69.
  - Nield, S. and Hopkins, N. (2013) 'Human rights and mortgage repossession: beyond property law using Article 8', *Legal Studies*, 33(3), pp. 431-454. doi:10.1111/j.1748-121X.2012.00257.x.
  - Rowan, E. (2023) "Independent legal advice in (re)mortgage transactions 20 years on from RBS v Etridge (No.2)." *The Conveyancer and Property Lawyer*, (2) , pp. 166-183.