Neutral Citation Number: [2025] EWHC 3247 (Ch)

Case No: CH-2025-000075

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15/12/2025

Before :

MR JUSTICE ADAM JOHNSON

- -

Between :

(1) JAVED ASHRAFI
(2) ZULEKHA ASHRAFI **Appellants**

- and -

BELMONT GREEN FINANCE LIMITED **Respondent**

- -
- -

Mr Chinonso Ijezie (instructed by **Piperjuris Solicitors & Advocates**) for the **Appellants**
Mr Richard Miller (instructed by **TLT LLP**) for the **Respondent**

Hearing date: 12 November 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on Monday 15 December 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Adam Johnson:

Introduction and Summary

1. This appeal arises in the following way.

2. Mr and Mrs Ashrafi, the beneficial owners of a property at 79 Lyndhurst Gardens, Barking, Essex IG11 9YA ("*the Property*"), were unable to raise a mortgage and so asked Mrs Ashrafi's brother, Mr Shabir, to raise a mortgage on the Property instead. He did so, representing himself as the owner.

3. Belmont Green Finance Limited ("*the Bank*") advanced funds in March 2019, but the payment terms were not complied with, and there were other breaches too – the mortgage was a buy-to-let mortgage, and the mortgage terms prohibited occupation by family members, but the Ashrafis were not tenants and were family members because Mrs Ashrafi was Mr Shabir's sister.

4. In April 2024, the Bank applied for both (i) a money judgment against the borrower, Mr Shabir, and (ii) an order for possession, relying on the failure to make payments and on breach of the mortgage terms prohibiting occupation by family members.

5. In October 2024, HHJ Holmes granted a money judgment against Mr Shabir and made an order for possession. There is no appeal against the money judgment, but Mr and Mrs Ashrafi now appeal the possession order. They say the Judge was wrong to make it, because he was wrong to conclude there was no real prospect of the Ashrafis making good their grounds of defence.

6. The questions raised by their Grounds of Appeal are essentially as follows: (i) whether the Ashrafis should be treated as having had an overriding interest in the Property in March 2019, such that Bank took its security subject to their ownership and thus they are not bound by the mortgage; (ii) whether the Bank's security interest merged in its money judgment such that thereafter it was no longer able to enforce its security; (iii) whether, assuming the Bank's interest under the mortgage stands in priority to their beneficial interest in the Property, the Ashrafis can nonetheless claim to be "*mortgagors*" under s.36 of the Administration of Justice Act 1970 ("*AJA 1970*"), such that the Judge should have considered – before making an order for possession – whether they were likely to be able to pay any outstanding sums or remedy any outstanding defaults; and (iv) whether by October 2024, the Bank had otherwise behaved so unconscionably that an Order for possession should not have been made.

7. In summary, my view on these issues is as follows: (i) the Ashrafis did not have an overriding interest in the Property in March 2019 - having put Mr Shabir in the position of being able to represent himself as the owner and raise a mortgage, they were precluded from maintaining that they had a beneficial interest with potential to have priority over the security interest of the Bank; (ii) the Bank's security did not somehow merge with the money judgment – instead the Bank was entitled to, and did, seek a money judgment and enforcement of its security concurrently; (iii) the Ashrafis were not "*mortgagors*" within the meaning of that phrase under the AJA 1970, because they were (and are) not able to assert any right to ownership or possession of the Property as against the Bank (see (i) above); and (iv) the Bank had not behaved

unconscionably in circumstances where by October 2024 the Ashrafis had been on notice for about two years of the need to obtain a replacement mortgage of their own, and in any event were occupying the Property in breach of the terms of the Bank's mortgage.

8. I would therefore dismiss the appeal.

9. My more detailed reasoning is set out below.

Relevant background

10. Much of the background is set out in a detailed and careful Judgment of Recorder Jones dated 17 November 2022. That was given in earlier proceedings between Mr Shabir and the Ashrafis. The issue between them was that Mr Shabir was claiming a 50% beneficial interest in the Property. The Ashrafis denied that Mr Shabir had any interest. In the end, Recorder Jones agreed with the Ashrafis, and held that Mr Shabir was a bare trustee only, and they were the holders of the entire beneficial interest.

11. The following emerges from the Judgment of the Recorder.

12. In 2017, the Ashrafis were living in a two bedroom flat at 114 Forest Row, London E12 5JX. This was an ex-council flat they had bought under the "*Right to Buy*" scheme. But they had outgrown it: they had a large family, including two children with special needs. They desperately needed more space.

13. They had serious problems raising a mortgage, however. In the end, Mr Shabir senior (father of Mrs Ashrafi and the Mr Shabir mentioned above), asked Mr Shabir to assist. He agreed to do so. Mr and Mrs Ashrafi sent him some £139,000. But that left a considerable shortfall. The Property was worth £515,000.

14. The acquisition was initially financed by means of (i) a bridging loan obtained by Mr Shabir, secured on the Property; and (ii) an additional loan in the amount of £100,000, plus a £10,000 facility fee, borrowed by Mr Shabir from a Mr Meraj.

15. Completion took place on 25 July 2018. A loft conversion was undertaken, which was completed by October. It was necessary though to repay the bridging loan and Mr Meraj. Mr Shabir thus approached the Bank, and sought to refinance. He took out an interest only, buy-to-let mortgage. That obviously involved Mr Shabir misleading the bank, because there was no intention to let the Property. The intention was for the Ashrafis to occupy it. Funds were advanced in March 2019. The bridging loan was repaid in full and the associated security released. Mr Meraj was paid back in part but some £60,000 remained outstanding to him, and Mr Shabir's case before Recorder Jones was that he had to sell one of his investment properties to clear the debt.

16. The Bank's mortgage terms provided for a fixed rate of interest (4.64%) applicable for five years, followed by a variable rate of 5.89% above LIBOR for the remaining term of the loan. As already noted, among the "*Additional Obligations*" was the following: "*It is a condition of this mortgage that the [Property] cannot at any time be occupied as a dwelling by you (the borrower) or by a related person (which means*

your spouse or civil partner ... or your parent, brother, sister, child ...) and is to be occupied as a dwelling on the basis of a rental agreement".

17. Between March 2019 and November 2022 (the date of Recorder Jones' Judgment), the Ashrafis nonetheless remained in occupation of the Property. Arrears began to build up. There was a mortgage holiday during the Covid-19 pandemic period, but after that arrears continued to accrue and neither Mr Shabir nor the Ashrafis made regular payments.

18. That was the background to the hearing before Recorder Jones. An unfortunate family dispute had developed. Mr Shabir, who had become exposed to liabilities owed both to Mr Meraj and to the Bank, claimed a 50% interest in the Property. The Ashrafis denied his claim, and Recorder Jones agreed with them. At [76] of her Judgment, she said:

> *"In my view it is amply clear that the intention at the time of the purchase and since then was that the claimants would have [a] 100% of the beneficial interest in the property subject to payment of loans and mortgages. I will make a declaration accordingly."*

19. At [77] she then continued:

> *"I also find that they [the Ashrafis] are liable to indemnify Mr Shabir in respect of the mortgage on the [Property] subject to further findings in respect of the costs of those mortgages and the unpaid sums from the Meraj loan."*

20. These findings were reflected at paragraphs 1 and 2 of the Order made by the Recorder, which set out the following declarations:

> *"1. [Mr Shabir] holds [the Property] on trust for [the Ashrafis].*
>
> *2. [The Ashrafis] are liable to indemnify [Mr Shabir] in respect of the mortgage with [the Bank] secured on [the Property]".*

21. The Order then set out some other, detailed provisions, designed (as the Recorder expressed it) to try and extricate the parties from the difficulties they were in (see at [91]). I need not set out the detailed language. The scheme of it was as follows: (i) the Ashrafis were to pay to Mr Shabir all outstanding sums due under the mortgage with the Bank – the precise figure to be agreed or determined by a District Judge and paid by a longstop date of 26 January 2023; (iii) the Ashrafis were to pay Mr Shabir the outstanding £60,000 paid by him under the Meraj loan, again by 26 January 2023; (iii) the Property was to be marketed for sale at a price not less than £490,000, Mr Shabir to have formal conduct of the sale but the Ashrafis to determine practical matters such as the estate agent to be used; (iv) any sale however was to be postponed "*until 17.4.2023 to enable the Ashrafis to seek a mortgage and transfer of property as set out hereunder ...*"; and finally (v) if the Ashrafis in fact found themselves able to

refinance by way of their own mortgage, Mr Shabir was to co-operate with any consequential transfer of legal title into the names of the Ashrafis.

22. Matters did not develop in such an orderly way, however.

Later Events: the Possession Claim

23. The Bank was duly notified of the judgment and Order of Recorder Jones. According to the Bank's evidence, that was the first it knew about the dispute between their borrower, Mr Shabir, and the Ashrafis; and the first it knew about the Ashrafis being 100% beneficial owners of the Property.

24. In correspondence with the Ashrafis' solicitors, the Bank's solicitors rejected the idea of an informal arrangement under which the Ashrafis would make payments direct to the Bank. In its solicitors' letter dated 10 January 2023, the Bank took the position that if the Ashrafis wanted to be treated as mortgagors, they would need to apply for their own mortgage. In the meantime, the Bank said it would accept any payments made via Mr Shabir (which of course is what Recorder Jones' order contemplated – by means of his indemnity), or alternatively the Bank could appoint a receiver and collect rent from the Ashrafis.

25. It appears none of this was done, however. The reasons are obscure. Meanwhile, the clock was ticking on the period of suspension of the order for sale, directed by Recorder Jones, which was due to expire on 17 April 2023. During the hearing before me, the Ashrafis' solicitor-advocate Mr Ijezie explained that the Ashrafis made an application to postpone the order for sale further, but this had not been resolved by the time of the hearing before HHJ Holmes in October 2024. The result was that there was a *de facto* suspension of the order for sale for a period of about two years.

26. Meanwhile, arears continued to accrue. In March 2024, moreover, the five year period of fixed rate payments under the mortgage came to an end and the monthly repayments increased, given the variable rate, to some £4,008.17 per month.

27. On 15 April 2024, the Bank issued its possession claim, naming Mr Shabir as Defendant. The Particulars of Claim identified 2 grounds for possession. The first was unpaid arrears. The Particulars set out unpaid arrears as at 2 April 2024 of £50,455.76, with accumulating monthly instalments as above. The second ground relied on was as follows:

> *"The mortgage was granted on a Buy-to-Let basis. Under the terms of the mortgage [Mr Shabir] agreed, among other things, that [the Property] would not be occupied by them or any member of their family. [Mr Shabir's] family are currently in occupation of [the Property] and, as such, [Mr Shabir] is in breach of the mortgage comprising the mortgage offer and conditions".*

28. It is the possession claim which was heard by HHJ Holmes in October 2024, and which is the subject of the present appeal. By then, the documents reveal that the

Ashrafis had made a number of efforts to obtain their own mortgage, but none of these had come to fruition. Their counsel Mr Ijezie indicated that they had also made efforts to raise money by selling their old flat at 114 Forest Row, which they still owned and which was thought to be worth about £280,000, but such efforts had stalled because there was a sitting tenant and it was not possible to obtain vacant possession. In the meantime, though, apparently in lieu of making payments under the indemnity to Mr Shabir (Mr Shabir's evidence was that he had not received anything), the Ashrafis had instead been making payments into what Mr Ijezie referred to as a "*special account*", apparently designed as a collection point for funds which might be used to pay the mortgage arrears. Documents produced in the bundle for the hearing before me, which I was told were also available before HHJ Holmes, included a statement for a Barclays account in the name of the Ashrafis daughter dated April 2023, showing a balance of £10.108.58, and also a screenshot for another account (the account holder unclear) showing a balance of £56,853.26 at some point in July 2023.

Judgment of HHJ Holmes

29. HHJ Holmes made an Order adding the Ashrafis to the possession claim (which they wanted), but he made an Order for possession (which they of course resisted).

30. The Judge's approach, given that the hearing before him was the first hearing of the possession application, was to determine whether the claim was genuinely disputed on grounds which appeared to be substantial: see CPR, rule 55.8 and Global 100 Ltd v. Laleva [2021] EWCA Civ. 1835; [2022] 1 WLR 1046, in which Lewison LJ said that the test under CPR rule 55.8 is the same as the test for summary judgment.

31. As to the matters relevant for the purposes of the present appeal, the Judge dealt with the question of overriding interest at [12] of his Judgment. His view was that the idea of the Ashrafis having an interest which overrode that of the Bank was inconsistent with the findings made by Recorder Jones in November 2022, in particular the finding that they knew what Mr Shabir was doing in applying for a mortgage, and indeed had encouraged it. At the end of his paragraph [12], having referred to certain findings made by Recorder Jones, HHJ Holmes said:

> *"There is no doubt that, in terms of those findings, the learned recorder had determined that the Ashrafis were well aware of the circumstances which led to the mortgage and the bridging loans being entered into. It is therefore very difficult in those circumstances to see how a claim that there was an overriding interest could possibly succeed."*

32. As to s.36 AJA 1970, the Judge did not think this relevant. He dealt with this briefly at paragraph [14] of his Judgment, and said:

> *"This is about giving a mortgagor time to pay. Allowing time to pay in this case is not going to regularise the position where the Ashrafis are not in the position of the mortgagor."*

33. The Judge then went on at [15] to note that Mr Shabir himself did not oppose the making of a possession order, and in any event "*there is no reasonable prospect of Mr Shabir making payment within any particular time*".

34. Also at [14], the Judge dealt briefly with the Ashrafis' argument about unconscionability, which at the time appears to have been focused on the change in March 2024 from a fixed to a variable rate of interest, and the resultant increase in monthly instalments. The Judge said this was not a matter that the Ashrafis could raise against the Bank: "*It may be they have an argument as against Mr Shabir in relation to his breach of fiduciary duty, but it is not, in my judgment, a defence to the point of the possession claim brought by [the Bank]*".

35. The Judge dealt with another aspect of alleged unconscionability in his later ruling refusing the Ashrafis' application for permission to appeal. This was the point that the Bank had declined to engage with the Ashrafis directly, rather than with their customer, Mr Shabir. The Judge said:

> *" ... the fact that a bank refuses proposals to repay or, in this case, has refused to accept payments from a non-party to the contract, does not seem to me to get close to any threshold of unconscionability".*

36. The argument that the Bank's rights under its mortgage had not survived the merger of its claim into its money judgment was not dealt with. That is a new point, not raised before the Judge.

37. The Judge's Order provided relevantly as follows:

> *"1. Mr Javed Ashrafi and Ms Zulekha Ashrafi be joined to the claim as Second and Third Defendant, respectively.*
>
> *2. The Defendants give the Claimant possession of the Property on or before 1 November 2024.*
>
> *3. The First Defendant pay the Claimant £501,974.63, being the balance of the mortgage inclusive of arrears of £70,496.61".*

Did the Ashrafis have a real prospect of showing an Overriding Interest?

The Judge's Decision

38. As I have said, at [6] of his Judgment, HHJ Holmes correctly identified that his function was either to decide the claim for possession or, if satisfied it was genuinely disputed on grounds which appeared to be substantial, to give further directions for its disposal. That involved asking whether the Ashrafis had a real prospect of succeeding on their proposed defence based on an overriding interest.

39. The Judge thought not, given the findings made by Recorder Jones as to their knowledge of, and indeed support of, Mr Shabir's activities in helping them acquire the new home they were so keen to move to. The Judge thought it would be very

difficult in those circumstances for any defence based on an overriding interest to succeed, and thus the claim could not be genuinely disputed on that basis.

The Points Taken on Appeal

40. On this Appeal, the Ashrafis have argued that HHJ Holmes was wrong to have regarded himself as bound by the findings made by Recorder Jones. They say that the Judgment of Recorder Jones was not concerned with any question of overriding interest as against the Bank, and indeed the Bank was not even a party to those proceedings. Recorder Jones was only concerned with the question of whether the Ashrafis were the beneficial owners of the Property, and whether they were bound to indemnify Mr Shabir.

41. The Ashrafis have further submitted that, although it is true that they asked Mr Shabir for his assistance, their instructions to him were to obtain a repayment residential mortgage, and that they are not responsible for the fact that Mr Shabir appears to have misled the Bank by (i) representing to the Bank that he had full title to the Property; (ii) representing to the Bank that they were his tenants; (iii) failing to disclose that he was in fact a bare trustee and they were the beneficial owners. They deny any complicity in any such acts of wrongdoing.

42. I note these points but in my opinion, HHJ Holmes came to a correct conclusion on the question of overriding interest, and so this Ground of Appeal cannot succeed.

Legal Principles: There must be a right capable of giving rise to an overriding interest

43. HHJ Holmes did not set out any detail of the legal framework, but did not have to. It is well established and can be explained briefly. There is a comprehensive review of the relevant principles in the judgment of Sales LJ (as he then was) in Wishart v. Credit & Mercantile Plc [2015] EWCA Civ. 655, at [43]-[55].

44. In the case of registered land, broadly speaking, a transferee for value will take in priority to the interest of any other party, unless such interest is itself protected by means of an entry on the register: Land Registration Act 2002 (the "*2002 Act*"), s. 29.

45. There is an exception, however, under paragraph 2 of Schedule 3 to the 2002 Act. This applies where the earlier interest – although not registered – belongs to a person in actual occupation of the land. In such a case the transferee takes subject to the interest of the person in actual occupation, even though that interest was not registered (so long as the fact of the occupation was itself clear: if it would not have been obvious on a reasonably careful inspection then the transferee will still take clear of the earlier interest, unless they have actual knowledge of it).

46. In this case, it is accepted that Mr and Mrs Ashrafi were in occupation of the Property at the time the Bank acquired its security interest – i.e., in March 2019.

47. It is also accepted that at that time, Mr and Mrs Ashrafi had 100% beneficial ownership of the Property.

48. That is not the end of it, however. In the Wishart case, relying on Williams & Glyn's Bank v. Boland [1981] AC 487, per Lord Wilberforce at 504F, Sales LJ explained that what is needed in order for an overriding interest to arise, is not *any* interest on

the part of the occupier, but instead a right exercisable as against the transferee (who might be a purchaser or mortgagor). Sales LJ said at [47] (emphasis added):

> *" ... the occupier has to show that he has relevant rights capable of binding the purchaser of the legal title in equity, subject only to the question of actual occupation. Therefore, there is scope for the operation of any rule of law which prevents the occupier from having a relevant right against the purchaser before one comes to apply the actual occupation test, which may have the effect of preventing a finding that there is an overriding interest under the statute."*

49. As Sales LJ went on to say, the principle derived from Brocklesby v. Temperance Permanent BS [1895] AC 173 is one such rule of law which, when it applies, prevents an occupier from having a relevant right against a purchaser or lender. It is a principle akin to an estoppel, which arises (per Sales LJ at [52]) from a combination of factors:

> *"... actual authority given by the owner of an asset to a person authorised to deal with it in some way on his behalf; where the owner has furnished the agent with the means of holding himself out to a purchaser or lender as the owner of the asset or as having full authority to deal with it; together with an omission by the owner to bring to the attention of a person dealing with the agent any limitation that exists as to the extent of the actual authority of the agent*."

50. The logic of the principle is that it is fair, as between the owner of the asset and the innocent purchaser or lender, for the owner to bear the risk of the third party exceeding his authority. That is so even if the third party is guilty of a fraud.

51. In Abbey National Building Society v. Cann [1991] 1 AC 56, for example, Mrs Cann left it to her son to raise money on mortgage to complete the purchase of a property, but he exceeded the limits of his authority and borrowed much more than she had authorised. The Court of Appeal held that even if Mrs Cann had been in occupation of the house at the relevant time, her interest could not override the security rights of the building society, which could be enforced to the full extent of the borrowing undertaken by the son (see (1989) 57 P & CR 381). The House of Lords, on an appeal on different grounds, endorsed that reasoning *obiter*: [1991] 1 AC 56, 94B-G.

52. Wishart was a case involving a fraud. A Mr Wishart had left the acquisition of a property called Dalhanna in the hands of a business associate known as Sami. The idea was that Mr Wishart would have the beneficial ownership of Dalhanna free of any mortgage. Instead, Sami acted outside the limits of his authority by arranging for the grant of a mortgage over Dalhanna to a lender, C&M. Sami then spent the money on gambling and absconded. At trial, the Judge held that any beneficial interest which Mr Wishart held in relation to Dalhanna had to be treated as subordinate to C&M's mortgage, and the Court of Appeal agreed. At [57], Sales LJ said that what was significant was that Mr Wishart had furnished Sami with the means to hold himself out as the true beneficial purchaser of Dalhanna, and hence as the legal and beneficial

owner for the purposes of borrowing money from C&M against the mortgage in its favour. At [58] he then said that on the facts as found by the Judge, the Judge:

> *" ... was right to hold that Mr Wishart was precluded by operation of the Brocklesby principle from maintaining that he had a beneficial interest in relation to Dalhanna with potential to have priority over the security interest of C&M, and hence right to hold that Mr Wishart could not claim to have an overriding interest as against C&M."*

Why the Judge was Correct

53. Bearing those points in mind, in my opinion the judge was entirely correct in coming to the view that the Ashrafis' defence based on an overriding interest had no real prospect of success.

54. To start with, I think criticism of the Judge based on the idea that he considered Recorder Jones' decision to have *res judicata* effect is misguided. I do not think that on a proper reading, HHJ Holmes was saying that the findings made by Recorder Jones had binding effect vis-à-vis the Bank. What HHJ Holmes was doing was evaluating whether the Ashrafis' proposed defence had a real prospect of success. In forming a view about that, he was perfectly well entitled – without regarding them as formally binding – to take account of the fact that another Judge in other related proceedings to which the Ashrafis had been party, had expressed views which were entirely at variance with the idea that there could ever be an overriding interest. That did not involve treating the earlier findings as binding in the sense of being *res judicata* as between the Ashrafis and the Bank, only looking at what another Judge had said and asking whether, on the relevant points, there was a real prospect of any later proceedings yielding a different result. That was a legitimate part of the process of assessing the viability of the proposed defence.

55. The point HHJ Holmes found persuasive was Recorder Jones' assessment that the Ashrafis "*were well aware of the circumstances which led to the mortgage and the bridging loans being entered into.*" On this appeal, Mr Ijezie has argued that was going too far, because the Ashrafis were not aware of, and did not approve of, the false representations made by Mr Shabir, and whatever Recorder Jones decided on the issue of their knowledge, they should be entitled to test the point in these proceedings against the Bank.

56. The authorities I have analysed above, however, make it clear that whether the Ashrafis knew precisely what Mr Shabir was doing is irrelevant. So is the fact that Mr Shabir may have exceeded the authority given to him by the Ashrafis, including by raising a form of mortgage (i.e., a buy-to-let mortgage) which they did not want. All that matters is that they knowingly put Mr Shabir in a position where he was able to represent himself as the owner of the Property, and left him to make the arrangements without any limitation on the scope of his authority being communicated to the Bank. That they clearly did. The point was not disputed, and indeed their own case was that Mr Shabir had agreed to assist them in obtaining a mortgage when they could not do so in their own names. They knew that was happening and left him to deal with the Bank.

57. Given that, I consider the Judge was entirely correct to say it was very difficult to think that a defence based on an overriding interest could possibly succeed. If anything, I think the Judge undersold the point, because there is nothing to suggest that the case is distinguishable from either the Cann or Wishart decisions. I would say that on any view, the Ashrafis had done enough and knew enough to be precluded from maintaining that they had a beneficial interest in relation to the Property with potential to have priority over the security interest of the Bank.

Did the security merge in the money judgment?

58. The next Ground can be dealt with more shortly.

59. The argument is put in Mr Ijezie's Skeleton as follows:

> *"By entering judgment for the principal sum (capital) and interest against Mr Shabir, the mortgage contract has merged in the judgment, and the principal (capital) and interest became owned by Mr Shabir under the judgment and not the mortgage contract. Therefore, there was no valid and subsisting security or charge under the mortgage contract to enforce against Mr and Mrs Ashrafi's property (the trust property). Consequently, Mr and Mrs Ashrafi's property cannot be used to secure the payment of the judgment debt against Mr Shabir, more so when he was a bare trustee with no beneficial interest in or title to the Property ...".*

60. Respectfully, I consider that this argument cannot be correct. As Mr Miller pointed out in his submissions, it would effectively mean that a mortgagee would be put to their election when a mortgage was in arrears: they could sue for the money or enforce their security by seeking an order for possession, but not both.

61. That must be wrong as a matter of principle, because it would defeat the purpose of a mortgage being a form of security. It is also inconsistent with authority, because as Hoffmann LJ said in Cheltenham & Gloucester Building Society v. Guttridge (1993) 25 H.L.R 434, at 457, a mortgagee is "*entitled to exercise all his remedies concurrently* ...". That is what happened here, because the Bank in the same action sought both the amounts outstanding under the mortgage contract and an order for possession, and both remedies were granted at the same time, in the same Order of HHJ Holmes (see above at [37]). If that is right (which I consider it is), then it is not open to Mr Ijezie to argue that the Bank somehow lost its security at the point in time when it obtained its money judgment, because the money judgment was entered, and the security enforced by means of the order for possession, simultaneously.

62. Even if it is wrong, and there was a scintilla of time in which the Bank had the benefit of its money judgment but not yet the order for possession, in my opinion it makes no difference, because of the terms of the security. The Mortgage Deed dated 25 March 2019 provides as follows at para. 2 (emphasis added):

> *"You [i.e., Mr Shabir] charge the Property with full title guarantee by way of legal mortgage and as a continuing security with the payment to us of all monies at any time*

> *payable or to become payable by you to us on any account whatsoever and with the performance of all other obligations at the time owed by you to us."*

63. The underlined words are very wide. They are plainly wide enough to capture amounts due under a judgment as well as under the contract of mortgage itself. They show that, as a matter of construction, the security was intended to subsist while ever monies were payable by Mr Shabir to the Bank, and whatever the source of his obligation to pay them.

Were the Ashrafis "*mortgagors*" within the meaning of s.36 AJA 1970?

64. Section 36 AJA 1970 is headed, "*Additional powers of court in action by mortgagee for possession of dwelling house*". The section deals with cases where a mortgagee claims for possession of a dwelling. It provides that, so long as the relevant conditions are satisfied, then the Court may exercise certain procedural powers set out in s36(2): to adjourn, stay or suspend execution of the possession order, or to postpone the date of possession.

65. We are concerned here with the conditions set out in s.36(1). It must appear to the Court that:

> *" ... in the event of it exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage"* (emphasis added).

66. The subsection refers only to "*the mortgagor*". HHJ Holmes proceeded here on the basis that Mr Shabir was the mortgagor, and that since there was no reasonable prospect of him making payment of the sums due within a reasonable time, and given that he did not oppose the making of a possession order, the powers under s.36(2) were not engaged.

67. On this appeal, Mr Ijezie has sought to argue that they were, on the footing that the Ashrafis should in fact be treated as being in the position of mortgagors. He argued that part of Recorder Jones' decision was that the Ashrafis were the absolute beneficial owners of the Property, and so should be entitled to have an opportunity to redeem the mortgage according to their estate, right or interest in the Property.

68. This debate gives rise to a legal question of definition.

69. Section 39 of the AJA 1970 is headed "*Interpretation of Part IV*", and amongst other definitions contains the following:

> *"'mortgagor' and 'mortgagee' includes any person deriving title under the original mortgagor or mortgagee".*

70. There is in fact little authority on the proper interpretation of this wording. The efforts of counsel have identified only three cases.

71. Taking them in order, in Britannia Building Society v. Earl [1990] 1 W.L.R. 422, the defendant had mortgaged premises on terms which prohibited letting, but then let them to tenants, who subsequently (on expiry of the agreed term) became statutory tenants by virtue of the Rent Act 1977. When the Claimant building society sought possession, the tenants sought to rely on s.36. The Court of Appeal agreed with the Claimant's submission that although the s.39 definition was wide enough to include assignees from the mortgagor, it did not include tenants and certainly not statutory tenants who do not derive any title at all (see at p. 429H-430A).

72. In Cheval Bridging Finance Ltd v. Bhasin & Anor [2008] EWCA Civ. 1613, Mrs Bhasin had entrusted a Mr and Mrs Hastings to help her out of financial difficulties. Mrs Bhasin owned a property in Acton in which she lived. She entered into an arrangement under which she transferred the property to Mr and Mrs Hastings on terms that they would hold it on trust for her to transfer it back if certain conditions were met. Mr and Mrs Hastings then raised finance secured by way of mortgage on the property from a lender called Cheval. Mrs Bhasin continued to live in the property in the meantime. In proceedings for possession by Cheval against Mrs Bhasin, Mrs Bhasin asked for an adjournment or stay under s.36. It was conceded by Cheval that Mrs Bhasin should be treated as a mortgagor. The logic of the concession was that given the terms of their agreement, a new beneficial interest in favour of Mrs Bhasin came into being on the transfer to Mr and Mrs Hastings, carved out of their legal title; thus, Mrs Bhasin was a person deriving title from them as original mortgagors.

73. The concession was accepted by HHJ Edwards at first instance, but he refused Mrs Bhasin's request for an adjournment or stay. On Mrs Bhasin's application for permission to appeal, the Court itself raised the question whether HHJ Edwards had been correct to accept Cheval's concession. On the hearing of the resultant appeal, however, Lawrence Collins LJ said he had not found it easy to understand how the point could properly arise for determination, given that it was really for Cheval to challenge Mrs Bhasin's standing under s.36, but it had not done so and indeed had maintained the concession on appeal (see at [16]). In the circumstances Lawrence Collins LJ said at [17]: "*I see no reason to go behind that concession and, in any event, it is not, in my judgment, a ground of appeal on which Mrs Bhasin relies or could rely*".

74. Finally, in Menon v. Pask [2020] Ch 66, a bank with the benefit of a mortgage appointed receivers over the mortgaged property, and the receivers, rather than the bank, then brought possession proceedings. At the trial, HHJ Dight held that there was no power under s.36 of the AJA 1970 to allow time for payment, because the section only applied where possession was sought by the mortgagee, and the receivers were not the mortgagee. In fact, they acted as agents of the mortgagor. On appeal, Mann J disagreed: he said that although in a technical sense the receivers acted as agents of the mortgagor, the substance of it was that they were suing for possession for the benefit of the mortgagee bank. It was thus right to say that they derived their title – i.e. their right to claim possession – "*under the mortgagee*", within the meaning of s.36. Mann J said as follows at [42]:

> *" ... while it would in most cases be technically right to say that in the exercise of their powers they act as agents of the mortgagor, it would not reflect reality ... to treat them as such,*

> *particularly so far as concerns the enforcement of possession rights against a resident mortgagor. They are appointed by the mortgagee to enforce the mortgagee's security. Were it not for the appointment they would never exist as receivers. In all those circumstances it seems to me to be right, and not an improper strain on the language of section 39, to say they derive title from the mortgagee for the purposes of section 36. 'Title' for these purposes means their right to possession."*

75. In my opinion, none of these cases provides a clear answer to the issue presented in this case, but Menon v. Park provides some assistance.

76. Probably the closest factual comparison is with the Cheval Bridging decision, because here the Ashrafis, like Mrs Bhasin, relied on someone else to raise money by way of mortgage, but on terms (as now found by Recorder Jones) which allowed them to acquire a beneficial interest in the property in question.

77. On analysis, however, I do not regard Cheval Bridging as binding or determinative of any issue I have to address. As I read it, there was no relevant decision by the Court of Appeal. Lawrence Collins J said in terms that the relevant ground was not one on which Mrs Bhasin could rely. His statement that he saw no reason to go behind the concession was not reasoned, and was really no more than an acknowledgment that he had no basis for ignoring what Cheval itself had decided to do. None of points dealt with above as to the Brocklesby line of authorities was raised or dealt with.

78. In my opinion, I should therefore consider the matter from first principles. The question is whether beneficial owners of a property in the position of the Ashrafis should be regarded as persons "*deriving title under*" Mr Shabir as original mortgagor. Critically in my opinion, their position includes the fact that although they are beneficial owners, they are precluded by the Brocklesby principle from maintaining that they have a beneficial interest which has priority over the security interest of the Bank. Given that, it seems to me they have no relevant interest they can assert against the Bank. In such circumstances, and in agreement with Mr Miller, I find it very difficult to see that the Ashrafis have "*title*" in any relevant sense.

79. That view is consistent with Mann J's reasoning in Menon v. Pask. Mann J took a pragmatic view of what was meant by "*title*", and dealing in that case with the position of a mortgagee, he thought it meant the mortgagee's right to possession, which the receivers were entitled to assert. Adapting that logic to the circumstances of this case, it is relevant to ask what right to ownership or possession the Ashrafis are able to assert against the Bank. The consequence of the analysis set out above is that they have no such right. Thus, I would conclude they have no relevant "*title*", let alone one derived from Mr Shabir, and therefore do not fall within the definition of mortgagor in section 39 of the AJA 1970.

80. In argument, Mr Ijezie referred to the definition of "*mortgagor*" to be found in section 205(1)(xvi) of the Law of Property Act 1925. This provides that a "*mortgagor*" includes "*any person from time to time deriving title under the original mortgagor or entitled to redeem a mortgage according to his estate interest or right in the mortgaged property ...*" (emphasis added).

81. This is a creative point, but there are two objections to it. The first is that this is a definition in a different (and earlier) statute. It cannot have a bearing on the meaning of the relevant phraseology in the AJA 1970. The definitions in that Act must be looked at on their own terms.

82. The second objection is that it is in any event difficult to see how the Ashrafis can be said to be "*entitled to redeem*" the mortgage with the Bank. That might be so had they somehow stepped into the shoes of Mr Shabir, but they expressly have not. The Order made by Recorder Jones (see above at [20]-[21]) was very clear, that it was Mr Shabir who remained responsible under the mortgage. The obligation of the Ashrafis was towards him, not the Bank, by way of an indemnity. If they wished to step into his shoes and adopt the position of mortgagor, they would have to refinance and obtain their own mortgage. They were given time to try and make that happen, but in the event it did not.

83. In short, I think HHJ Holmes was correct to conclude that the Ashrafis are not mortgagors, and thus could not avail themselves of the machinery in s.36. Even had they been able to, they would have faced the insuperable difficulty that the claim for possession, in addition to relying on unpaid arrears, relied also on the fact that their very occupation involved a breach of the mortgage, which was on buy-to-let terms and imposed a restriction on occupation by any family member of Mr Shabir (see above at [16]). In Britannia Building Society v. Earl, mentioned above, the Court of Appeal accepted the submission that the power under section 36 is only exercisable if the relevant breach can be remedied (see at p. 430B-C). The Ashrafis unauthorised occupation was not a breach that could be remedied, save by them moving out, which is just the result they wanted to avoid.

Was the Judge Correct to reject the argument of Unconscionable Conduct?

84. This is a somewhat generic Ground of Appeal, but in his Skeleton Mr Ijezie provided a little more detail. He relied on the following matters as giving rise to unconscionability on the part of the Bank, which he argued the Judge did not take account of:

    i. The Bank's refusal to accept monthly mortgage instalments from Mr and Mrs Ashrafi, followed by it then using the unpaid arrears as a basis for seeking an order for possession.

    ii. The move from fixed rate to variable rate payments in March 2024. Mr Ijezie said in his Skeleton that the Bank had, "*exercised its contractual discretion to increase the monthly mortgage astronomically*".

85. Mr Ijezie said that these points, taken either together or individually, had operated as a clog on the Ashrafis' equity of redemption. Alternatively, he submitted that the Bank should not be entitled to complain about the accumulation of arrears, because it had by its own unconscionable conduct brought about a situation in which the Ashrafis were hindered in their ability to perform the mortgage contract.

86. I have considered these submissions, but do not consider there is anything in the point that the Bank was acting unconscionably. I consider the Judge was correct to come to

the view he did, and to reject this as a standalone basis for refusing to make an order for possession.

87. To begin with, it is unclear to me that a generic assertion of unconscionability, which in this case is based on perceived unfairness, provides a basis for resisting an order for possession, if otherwise it is justified and the powers under s.36AJA 1970 are not exercisable.

88. Leaving that aside, however, I agree with the Judge that, looked at in context, the actions of the Bank were not unconscionable:

i. Running through Mr Ijezie's submissions was the idea that somehow the Ashrafis were entitled to step into the shoes of Mr Shabir, and that the Bank were under some form of obligation to deal with them directly. That is not so. As I have explained above, the structure reflected in the Order of Recorder Jones was clear: Mr Shabir remained liable under the mortgage, and the Ashrafis obligation was to indemnify him. It was up to the Ashrafis and Mr Shabir to work out how the indemnity would operate. That was not a matter of concern of the Bank.

ii. That makes good sense. The Bank had only ever dealt with Mr Shabir, as it turns out on a false basis, and when they were notified of the Judgment of Recorder Jones and of the Ashrafis' beneficial interest of the Property, it came as a surprise. They were not obliged to deal with the Ashrafis as, in effect, the new mortgagors. The Court was in no position to force the Bank into a relationship with persons who had not previously been its customers, and did not seek to do so.

iii. That is all consistent with the Order of Recorder Jones, but to be fair to the Ashrafis, they were given time under the Order – about 4 and a half months between the end of November 2022 and mid-April 2023 – to sort out a new mortgage of their own.

iv. The fact is they were not able to. Their efforts were unsuccessful. In practice they were given a great deal longer than the period allowed by Recorder Jones, because the Bank did not initiate its possession claim until March 2024, and it was not heard by HHJ Holmes until October 2024. The position even then, almost two years later, was that no new mortgage had been obtained.

v. I see nothing unconscionable about the change from a fixed to a variable rate in March 2024. That was consistent with the mortgage terms entered into by Mr Shabir, which provided for a fixed rate of interest for five years followed by a variable rate of 5.89% above LIBOR for the remainder of the mortgage term. There is nothing unconscionable about a mortgagee enforcing the terms the mortgagor has agreed to. Mr Miller explained in his Skeleton Argument that the interest rates are normal in the market for loans of this type, and that in any event, since the mortgage is a buy-to-let mortgage it is not to be treated as a regulated contract or regulated consumer credit agreement (see Fortwell Finance Ltd v. Halstead [2018] C.T.L.C. 166). Mr Ijezie said that the Bank must have had a general power or discretion to apply a different rate of interest if it wanted to. Even if that is correct, however, it is impossible to say there was anything unconscionable in it failing to do so here, in order to vary the arrangement freely

entered into by Mr Shabir (with the Ashrafis' tacit encouragement) some years earlier.

vi. Finally, Mr Ijezie's submissions were all focused on the unconscionability of the Bank seeking an Order for possession based on the unpaid arrears. But as noted above, possession was also sought on the basis of the breach arising from the Ashrafis unauthorised occupation. That had also continued for a period of two years following Recorder Jones' Order, much longer than the Ashrafis' had been given under that Order to regularise the position by obtaining a mortgage of their own which permitted them to stay in occupation.

89. In all those circumstances, I consider the Judge was correct to conclude that there was no real prospect of the Bank's claim for possession being defeated by a general defence of unconscionability.

Conclusion

90. The result is that the appeal is dismissed. I would invite the parties to agree consequential matters and to submit a draft Order for approval.