<u>S THERE A TRUST OF LAND?</u>

HAVE YOU GOT A VALID LEGAL MORTGAGE? - Formalities: charge by deed (s23(1)(a) LRA 2002), which is duly registered (sch 2, paragraph 8 LRA 2002)

If there is no valid legal mortgage, and the equitable co-owner has not consented to the mortgage, or there was a problem with that consent, then priority is determined by time. The interest under the trust will have priority if it arose before the mortgage. In such cases, the mortgagee will only be able to deal with the equitable interest of the other co-owner and will be unable to deal with the legal title (query, unless made by deed, see *Swift 1st v Colin).* In such circumstances, the lender will seek an order for sale under s14 TOLATA 1996.

DOES THE INTEREST UNDER THE TRUST BIND THE MORTGAGEE?

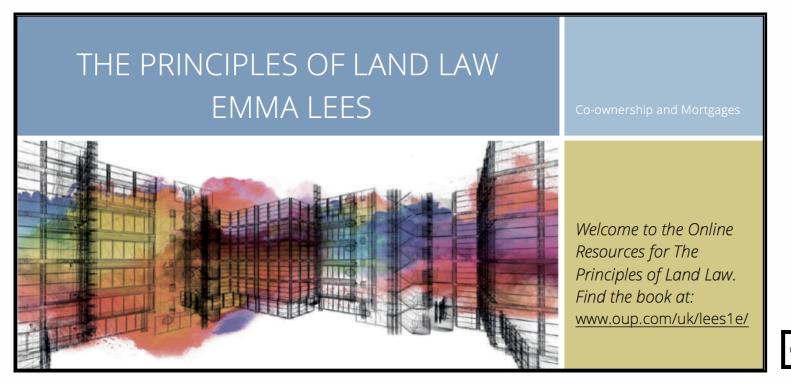
 Did the equitable interest under the trust arise prior to the grant of the mortgage?
 This can be particularly difficult in some constructive trust cases. In "acquisition mortgages" cases, the rule in *Abbey National v Cann* applies so that the trust is treated as though it arose simultaneous with the grant of the mortgage and the mortgagee will not be bound. If it arose after the grant, the mortgagee will not be bound.
 If the trust arose before the grant of the

mortgage, has the interest under the trust been overreached? If yes, the mortgagee will not be bound.

 Did the co-owner in equity expressly or impliedly waive their priority over the mortgage? Was any consent obtained by undue influence? If a valid waiver is present, the mortgagee will not be bound.
 Is the co-owner's interest protected as an overriding interest under schedules 1 and 3 LRA 2002 - actual occupation? If no, the mortgagee will not be bound, IS THERE A VALID LEGAL MORTGAGE? - Formalities: charge by deed (s23(1)(a) LRA 2002), which is duly registered (sch 2, paragraph 8 LRA

2002)

If the interest under the trust does bind the mortgagee, then the mortgagee must apply to the court for an order for sale under s14 TOLATA 1996.



Remedies - Legal Mortgage

<u>(a) Sale</u>

A power of sale arises and is rendered exercisable according to the provisions in s101-104 LPA 1925, and a lender can apply for sale under s91 LPA 1925. (b) Possession

A mortgagee has a right of possession as soon as the mortgage is created, but s36 AJA 1970 as amended may delay or prevent the exercise of that right as long as (i) the mortgagee applied to the court for an order for possession; (ii) the mortgagor(s) can show that they will pay back the sums due on the mortgage in a reasonable time; and (iii) the property is a residential dwelling.

(<u>c) Foreclosure</u>

The mortgagee must apply to the court, which habitually will order sale in lieu of foreclosure under s91 LPA 1925.

(d) Appoint a receiver

The power to appoint a receiver arises under the same conditions as does a power of sale udner s101 LPA 1925.

<u>Remedies - Equitable Mortgage</u> (<u>a) Foreclosure</u>

The mortgagee is able to take tthe equitable interest free from the right to redeem.

<u>(b) Sale</u>

(i) If the mortgage was made by deed, then s101 LPA 1925 gives a power of sale. Query whether this power extends to the legal title. If it does not, then the lender can apply for an order of sale, s90 LRA 1925.

(ii) If not made by deed, the lender is able to sell equitable title, or apply to the court.

<u>(c) Possession</u>

There is no possession as of right but a lender may apply to the court.

(d) <u>Receiver</u>

(i) If the mortgage was made by deed, then s101 LPA 1925 gives a power to appoint a receiver.(ii) If not made by deed, then the mortgagee can apply to the court.

<u>1. All co-owners have validly</u> consented to the mortgage but the relevant formalities have not been completed.</u>

Then

(a) There will be an equitable
mortgage which binds all coowners.
(b) The mortgagee can use the

normal remedies associated with an equitable mortgage. <u>IS THERE A VALID LEGAL MORTGAGE?</u>
Formalities: charge by deed (s23(1)(a) LRA 2002), which is duly registered (sch 2, paragraph 8 LRA 2002)
Consents: have both legal owners executed the mortgage deed? Check for forgery, non-est factum, mistake. Is the legal mortgage voidable? Check for undue influence, misrepresentation.

WHY IS THE LEGAL MORTGAGE NOT VALID? (Either void or voidable)

2. One of the co-owners has not validly consented but the formality requirements have been met. - Then

(a) The register will be rectified to correct the mistakenly registered charge. There will no longer be a legal mortgage. (note: this is more complicated if there has been a subsequent disposition of the registered title or the registered mortgage - see chapter 5).
(b) Because money has been lent, the lender will be entitled to an equitable mortgage over the truly consenting co-owners share in equity.

(c) The mortgagee, who becomes an equitable co-owner, will use section 14 TOLATA 1996 to seek an order for sale.

