

# Key Defences



Evie Barden



# What will we look at?

- (1) Rights under the mortgage?
- (2) Equitable defences
- (3) Time to pay
- (4) Who else might be in occupation?



# What are the lender's remedies?

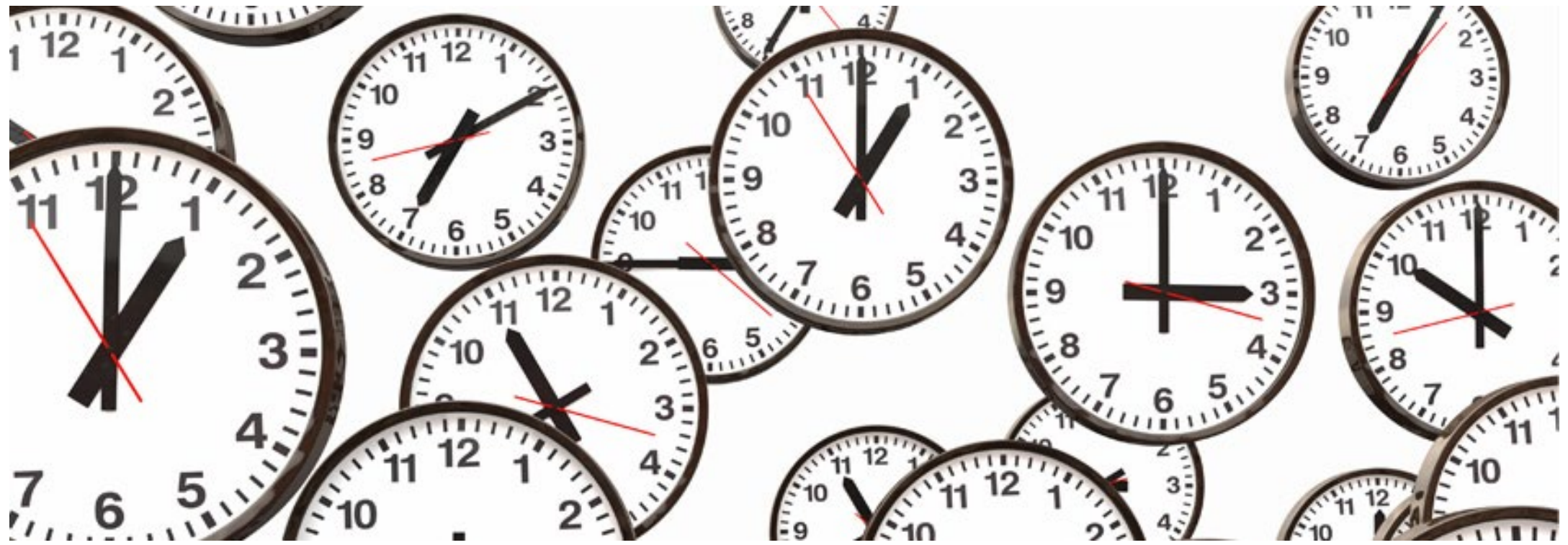


# What does the charge say?

- Right to possession “before the ink is dry”? *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317
- BUT are there any restrictions in the charge?
  - Loan payable by instalments?
  - Notice?
  - Jurisdiction clauses?
- **NB:** different defences to the money claim and the possession claim?



# Limitation?



# Undue influence

*Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44; [2002] 2 AC 773 at [8] – [33]; [44] - [49]:

1. Was the transaction brought about by the exercise of undue influence of one person on another? Could be actual undue influence or presumed undue influence.
2. Did the lender have actual or constructive notice of the undue influence?
3. Has the lender taken steps to remove the constructive notice?



# Etridge steps

1. Independent legal advice
2. Provision of information to the wife's solicitor
3. Written confirmation



# Consequences?

- The person influenced can have the mortgage set aside.
- BUT only as against their interest.
- Equitable charge against remaining interest?
- Subrogation?



## Other issues

- Forgery.
- Misrepresentation: transaction is voidable
- Mutual mistake: contract can be rectified.
- Insolvency Act 1986.
- Consumer Credit Act 1974.



# Section 36 of the Administration of Justice Act 1970

(1) Where the mortgagee under a mortgage of land which consists of or includes a dwelling-house brings an action in which he claims possession of the mortgaged property, not being an action for foreclosure in which a claim for possession of the mortgaged property is also made, the court may exercise any of the powers conferred on it by subsection (2) below if it appears to the court that in the event of its 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.

(2) The court—(a) may adjourn the proceedings, or (b) on giving judgment, or making an order, for delivery of possession of the mortgaged property, or at any time before the execution of such judgment or order, may—  
(i) stay or suspend execution of the judgment or order, or (ii) postpone the date for delivery of possession, for such period or periods as the court thinks reasonable.

(3) Any such adjournment, stay, suspension or postponement as is referred to in subsection (2) above may be made subject to such conditions with regard to payment by the mortgagor of any sum secured by the mortgage or the remedying of any default as the court thinks fit.



## Who are the proper defendants?





- Borrower?
- Occupiers? *Brighton and Shoreham Building Society v Hollingdale* [1965] 1 All ER 540
- Unauthorised tenants and Mortgage Repossessions (Protection of Tenants etc) Act
- Guarantors? Lender can pursue any or all of remedies concurrently against the debtor, its assets or the incumbered estate: *Fisher and Lightwood's Law of Mortgage* at 26.13.



# Thank you

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