



Neutral Citation Number: [2022] EWHC 2797 (Ch)

Case No: BL-2019-BRS-000028

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT IN BRISTOL
BUSINESS LIST (ChD)**

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 4 November 2022

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

BETWEEN:-

**(1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE**

Claimants

-and-

**(1) GEOFFREY WILLIAM GUY
(2) THE CHEDINGTON COURT ESTATE LIMITED
(3) AXNOLLER EVENTS LIMITED**

Defendants

-and-

JAMES HAY PENSION TRUSTEES LIMITED

Third Party

Mrs Nihal Brake for herself and Mr Andrew Brake, **Claimants**
William Day (instructed by **Stewarts Law LLP**) for the **Defendants**
Charlotte Pope-Williams (of **Pinsent Masons LLP**) for the **Third Party**

Application dealt with on paper

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 15:30 on 4 November 2022

HHJ Paul Matthews :

INTRODUCTION

1. This is my judgment on an application by the defendants (“the Guy Parties”) by notice dated 12 September 2022, for an order under regulation 7(2)(b) of the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (“the 2020 Regulations”). The purpose of the order would be to permit (and therefore require) the parties to comply with an order which I made on 20 July 2022 in relation to a third-party debt order (“TPDO”), notwithstanding the entry of the first claimant into a mental health crisis moratorium under the 2020 Regulations in late August or early September 2022. Unfortunately, the matter is procedurally complex, and it is necessary for me to give a little explanation of the background before dealing with the application itself.
2. The parties have been locked in large-scale litigation ever since the breakdown of the former employment relationship between them in November 2018. I have so far tried four full-scale actions between them. The employment tribunal proceedings between the parties are still to be tried (though not by me). The claim in which the present application arises was brought by the Brakes against the Guy Parties in respect of alleged misuse of confidential information and infringement of privacy. At first instance, I held that the Brakes’ claim failed: [2021] EWHC 671 (Ch). They appealed to the Court of Appeal, which dismissed the appeal: see [2022] EWCA Civ 235.

THE THIRD PARTY DEBT ORDER

3. Following the appeal, the Court of Appeal ordered that the Brakes pay the costs of the appeal of the Guy Parties, and ordered an interim payment on account of £70,000 by 4 PM on 16 March 2022. That sum was not paid on that date, nor, indeed, thereafter. The Guy Parties applied for a TPDO by notice dated 17 March 2022, but sealed only on 28 March 2022. In the notice the third party was identified as “James Hay Partnership”, of an address in Salisbury, and stated to owe money to one of the Brakes, namely the second claimant Andrew Brake. The debt was said to consist of a personal pension policy.
4. A TPDO was indeed made on an interim basis by Lewison LJ on 4 April 2022. He directed that the further consideration of the application should be at a hearing listed before me, to take place not before 28 April 2022. The interim TPDO was served on the James Hay Partnership by email sent on 4 April 2022, as were the application notice for the TPDO and documents in support. Receipt was acknowledged by email, expressly on behalf of the “James Hay Partnership”, by email on the morning of 5 April 2022. I directed that the hearing for further consideration of the application for a TPDO should take place before me at 2 PM on 29 April 2022.
5. In fact, there then followed a series of applications, which meant that the further consideration was adjourned, and did not in fact take place until 30 May 2022. Anyone interested in the exact sequence of events will find it set out in the written judgment which I eventually handed down on 11 July 2022: see [2022] EWHC 1746 (Ch). In summary, I decided that the TPDO should be made final. But, in fact, it was more complicated than that, and involved the grant of an injunction requiring Mr Brake to exercise his right to draw down his remaining pension entitlement from the

third party. I also decided that the third party should pay 90% of the Guy Parties' costs of the applications, summarily assessed on the indemnity basis: see [2022] EWHC 1911 (Ch), [2022] Costs LR 1315.

Enforcement of the TPDO

6. My decision requiring Mr Brake to take steps to draw down his pension was made on 20 July 2022. It set out the steps to be taken by the parties, beginning with Mr Brake. A draft order was sent to me on 29 July, agreed between the defendants and the third party, with no objection in principle from the claimants. On the same day Mrs Brake confirmed that Mr Brake had taken the first step required of him, namely, asking HMRC for confirmation of his tax code. On 3 August, the Guy Parties' solicitors asked Mrs Brake whether her husband had taken the next steps envisaged by the order (sending a letter to the third party) by the time specified of 4 pm on 3 August. The same day, Mrs Brake replied saying:

“Sincere apologies. I have been having a very bad week, and have not kept an eye on things. If you give me until Monday [8 August] to get Mr Brake's forms sorted.”

7. In fact, on 9 August 2022 the claimants wrote to the court asking for the next steps to be postponed until 27 August, after they had returned from what they referred to as their “annual leave”. In written reasons given to the parties on 9 August, I declined to make any change to the timetable as originally set out. As I said then,

“if the second claimant is able to go away on holiday, he is able to deal with the requirements of this order”.

The claimants nevertheless challenged the reasons given by email dated 12 August. A detailed response was sent by the court on 16 August, rejecting the challenge. I am not aware of any further challenge to my decision.

MRS BRAKE'S MORATORIUM

8. On 30 August 2022, the first Claimant, Mrs Brake, wrote to the Guy Parties' solicitors to inform them that she had entered into what she called a “Mental Health Crisis Breathing Space” (strictly speaking, a “mental health crisis moratorium”, which under the regulations is to be distinguished from a “breathing space moratorium”) on 26 August 2022. In fact, the official Insolvency Service notifications say that this happened on 27 August in relation to the second and third defendants, and 2 September in relation to the first defendant. But I do not think anything turns on this. As I have said, this all took place under the 2020 Regulations.
9. The main point of these regulations was to provide sufficient protection for indebted individuals to help them to enter into sustainable debt solutions, and to encourage them to seek appropriate debt advice: see my judgment of 17 August 2021, at [18]. But there was a second and separate route into the scheme for those receiving mental health crisis treatment. This reflected the fact that this group might face challenges in meeting the requirement to engage with debt advice in order to meet the eligibility criteria: see my judgment of 17 August 2021, at [19]. Mrs Brake has apparently been

entered under this alternative route. So hers is not a “breathing space moratorium”, but a “mental health crisis moratorium”.

The earlier moratorium for Mr Brake

10. At this stage I need to mention that Mr Brake had also entered into a similar mental health crisis moratorium over a year earlier, on 6 May 2021. (So far as I am aware, he is still in it.) After he did so, the Guy Parties made two applications. One was for that moratorium to be discharged; the other was for certain “unless orders”. The applications were heard by me on 12 August 2021. I announced my decision to the parties on 13 August 2021. I dismissed the application to discharge the moratorium, but granted the application for “unless” orders. I gave my reasons in a written judgment delivered on 17 August 2021: [2021] EWHC 2308 (Ch), [2021] 1 WLR 6218. I refused the Brakes permission to appeal on 19 August (see [2021] EWHC 2343 (Ch)), and so far as I know neither side took the matter any further.
11. The judgment of 17 August dealt with the structure and provisions of the 2020 Regulations, and I shall have to refer to some of what I said there for the purposes of the present judgment. One point which I decided on that occasion was that a moratorium under the regulations did not apply to *future* debts, *ie* debts incurred after the moratorium came into effect: see at [44], [51]-[70]. Accordingly, when the claimants were ordered to pay the defendants’ costs of their unsuccessful appeal in March this year, that was a debt which could be enforced against the claimants despite the existing moratorium in relation to Mr Brake. Hence it was possible for the Guy Parties to apply for and obtain a TPDO against Mr Brake and his pension provider.

The effect of Mrs Brake’s moratorium

12. However, the entry of Mrs Brake into *her own* moratorium has changed all that. Although the TPDO is against Mr Brake, the debt on which it is based is a joint debt of *both* claimants. And, as I noted at [21] of my judgment of 17 August 2021 in relation to the 2020 Regulations,

“enforcement action includes any enforcement action taken in relation to a person jointly liable with the debtor in respect of whom the moratorium has come into effect: see regulation 7(7)(n).”

That means that, without more, the TPDO cannot be further enforced against Mr Brake as previously provided by my order of 20 July 2022.

THE PRESENT APPLICATION

13. The Guy Parties applied for a review and cancellation of the moratorium under regulation 17 of the 2020 Regulations, as they are entitled to do (see [2021] EWHC 2308 (Ch), [23]-[25]). The request for a review and cancellation was supported by a witness statement made by Harry Spendlove, one of the Guy parties’ solicitors, which I have seen. That review was conducted by the debt adviser, who on 29 September 2022 concluded that the criteria for cancellation were not met. However, in the meantime, the Guy Parties had also made the present application dated 12 September 2022 under regulation 7(2)(b). This is a quite different matter, and assumes the validity of the moratorium. I therefore turn to consider this application.

Application notice

14. The application notice sets out the following relief sought:

“Pursuant to regulation 7(2)(b) of the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 the Defendants [*ie* the Guy Parties] seeks [*sic*] the Court’s permission for:

1. The parties to comply with the Order of HHJ Matthews dated 20 July 2022 (the **TPDO**) forthwith;
2. The Defendants to enforce the terms of the TPDO in the event of non-compliance.”

The application was supported by written submissions dated 12 September 2022. The notice asked for the application to be decided without a hearing.

15. On 14 September 2022 the court sent an email to the Brakes and the third party asking for comments on the proposal to deal with the application on the papers. Having received them, I made an order on 15 September giving directions for serial written submissions to be made, and also for the Brakes to file and serve any evidence on which they wished to rely. The dates provided for were in fact subsequently varied by a further order of 26 September. Written submissions were received from the Brakes, followed by a reply from the Guy Parties. There was also an email further reply (not provided for in my directions) by Mrs Brake. The third party made it clear in inter parties correspondence that it did not intend to make any submissions on this application.

Evidence

16. Neither party put in any formal witness statements. But a number of documents were exhibited to the parties’ submissions, and have been relied on without objection. These include some clinical reports. It is clear from these that in April Mrs Brake was assessed by her GP and found to be severely depressed. Her occupational therapist wrote to the same effect in May, in support of the Brakes’ application for an adjournment of the trial of the employment tribunal proceedings, then listed for June.

17. He said in part:

“Mrs Brake’s symptoms are such that she finds it impossible to attend to complex tasks, her sleep is impaired as is her memory, she is lacking in energy, hopeless and experiencing frequent anxiety and panic. It is my view that Mrs Brake is cognitively impaired to such an extent that she is unable to deal with the legal matters for the upcoming trial and that any attempt to do so will lead to a further and serious deterioration in mental health”.

18. In addition, her consultant nephrologist also wrote in May in support of an adjournment of the trial of the employment tribunal proceedings. Mrs Brake had a kidney transplant in 2001. However, following treatment for cancer in 2017, her transplant function deteriorated, and she suffered acute antibody mediated rejection.

This has severely damaged her transplant. Her kidney function is now less than 20%, impacting on mental acuity, cognition and physical endurance. It is likely that she will require dialysis and a further transplant in the next 12-18 months. As for *Mr* Brake, the evidence also shows that he was assessed by his mental health team in May, and found also to be severely depressed, finding it difficult to process information, and very difficult to complete day to day tasks.

19. On 27 September, Mrs Brake’s occupational therapist wrote again, explaining that

“Mrs Brake was referred to us by her general medical practitioner in late April 2022, she was at risk of suicide, was depressed and in the midst of a mental health crisis. Since Mrs Brake's treatment began, I have been aware that there have been numerous court interactions and Mrs Brake has had to represent her family on many occasions, she has found this very difficult, every court outing caused a significant set back to her mental health and has posed a barrier to her recovery.”

20. As a result, he and his colleague had

“decided that Mrs Brake should be entered into a Mental Health Crisis Breathing Space.... The Mental Health Crisis Moratorium is an essential part of the treatment plan. It is our opinion that Mrs Brake cannot make a full recovery when faced with the detrimental effect of being pursued by her creditors in court.... I understand that an application has been made by one of Mrs Brake’s creditors to allow enforcement action to continue. This application has resulted in Mrs Brake’s panic attacks returning and symptoms worsening. It is quite clear to me that the lack of certainty that the application has brought has been detrimental to Mrs Brake’s mental health. Enforcement action would be highly detrimental to her. It is critical that the Mental Health Crisis Breathing Space works as it is designed to, ie to provide a ‘safe haven’ until Mrs Brake is able to deal with the effect that any enforcement action would have on her and her family.”

Relevant law

21. So far as relevant, regulation 7 provides as follows:

“7(1) A moratorium has the effect specified in this regulation in relation to moratorium debt during a moratorium period.

(2) Subject to paragraph (3), during a moratorium period a creditor may not, in relation to any moratorium debt, take any of the steps specified in paragraph (6) in respect of the debt unless—

(a) these Regulations specify otherwise, or

(b) the county court or any other court or tribunal where legal proceedings concerning the debt have been or could be issued or started has given permission for the creditor to take the step.

(3) A court or tribunal may not give permission for a creditor or agent to take any of the steps specified in paragraph (6)(a) or (b).

(4) Subject to paragraph (5), for the purposes of paragraph (2)(b), a court or tribunal may—

(a) determine an application for permission to take a step specified in paragraph (6)(c) or (d) in any way that it thinks fit,

(b) give permission subject to such conditions as it thinks fit, and

(c) make such orders as may be necessary to give effect to the determination of the application.

(5) A court or tribunal may only grant permission under paragraph 2(b) for a creditor or agent to take a step specified in paragraph (6)(c) or for a creditor to instruct an agent to take a step specified in paragraph (6)(c) where the court considers that—

(a) it is reasonable to allow the creditor or their agent to take the step, and

(b) the step will not—

(i) be detrimental to the debtor to whom the moratorium relates, or

(ii) significantly undermine the protections of the moratorium.

(6) The steps mentioned in paragraph (2) that a creditor is prevented from taking are any steps to—

(a) require a debtor to pay interest that accrues on a moratorium debt during a moratorium period,

(b) require a debtor to pay fees, penalties or charges in relation to a moratorium debt that accrue during a moratorium period,

(c) take any enforcement action in respect of a moratorium debt (whether the right to take such action arises under a contract, by virtue of an enactment or otherwise), or

(d) instruct an agent to take any of the actions mentioned in sub-paragraphs (a) to (c).

(7) A creditor or agent takes enforcement action if they take any of the following steps in relation to a moratorium debt—

(a) take a step to collect a moratorium debt from a debtor,

(b) take a step to enforce a judgment or order issued by a court or tribunal before or during a moratorium period regarding a moratorium debt,

(c) enforce security held in respect of a moratorium debt,

(d) obtain a warrant,

(e) subject to regulation 12(4)(d), sell or take control of a debtor's property or goods,

(f) start any action or legal proceedings against a debtor relating to or as a consequence of non-payment of a moratorium debt,

(g) make an application for a default judgment in respect of a claim for money against the debtor,

[...]

(l) contact a debtor for the purpose of enforcement of a moratorium debt,

[...], or

(n) take any of the steps in this paragraph in relation to a joint debtor.

(8) For the purposes of paragraph (7)(f), legal proceedings against a debtor includes a bankruptcy petition.

(9) Where a moratorium debt is a secured debt, paragraph (6)(a) applies only to interest that accrues on any arrears on the debt during a moratorium period.

[...]

(12) Any action taken contrary to this regulation shall be null and void.

[...]

(15) This regulation is subject to regulation 11.”

(Regulation 11 forbids contact between a creditor or its agent and the debtor during a moratorium, with certain exceptions.)

22. So far as relevant, regulation 10 provides as follows:

“10.— [...]

(5) Subject to paragraph (7), during a moratorium a court or tribunal must take all necessary steps to ensure that any action or proceeding to enforce a court order or judgment concerning a moratorium debt does not progress during the moratorium period.

(6) For the purpose of paragraph (5), the progression of an action or proceeding includes (but is not limited to)—

(i) holding a hearing during a moratorium period,

(ii) making or serving an order or warrant, writ of control, writ of execution or judgment summons, and

(iii) instructing an enforcement agent to serve an order, warrant, writ of control, writ of execution or judgment summons.

[...]

(8) This regulation is subject to regulation 7(2)(b).”

23. It will be seen that the initial (and critical) questions for me to determine on this application are those set out in regulation 7(5), that is, whether

“the court considers that—

(a) it is reasonable to allow the creditor or their agent to take the step, and

(b) the step will not—

(i) be detrimental to the debtor to whom the moratorium relates, or

(ii) significantly undermine the protections of the moratorium.”

These are questions of fact and evaluation rather than pure questions of law: *cf R(Z) v Hackney LBC* [2020] 1 WLR 4327, [56], [74]. But of course the true construction of the regulation, on the basis of which the questions of fact and evaluation are decided, is a matter of law.

THE PARTIES’ SUBMISSIONS

24. In this section of my judgment, I attempt to summarise the submissions of the parties. In so doing, I emphasise that I have read the whole of the submissions made to me and all the evidence referred to. In the interests of conciseness, however, I have not here included summaries of submissions that seem to me to be merely repetitive of others, or utterly devoid of merit. In my view, these are the submissions that really matter in resolving this application. In addition, I remind the parties that judges are not obliged to deal in their judgments with every single point that is argued, or every piece of evidence tendered: *Weymont v Place* [2015] EWCA Civ 289, [6]. In the absence of compelling evidence, the court is assumed to have taken everything into account: *Henderson v Foxworth Ltd* [2014] 1 WLR 2600, [48]. I have divided this section of my judgment into three parts, each concerned with one of the three main points to be decided, namely, (1) reasonableness, (2) detriment, and (3) significant undermining.

1. Reasonableness

The Guy Parties

25. The Guy Parties submit, on the first point, that it is reasonable for the court to allow the enforcement of the TPDO. They put this on three bases. First, the enforcement action is nearly complete, and none of the remaining steps involves Mrs Brake. Secondly, they ask the court to infer that Mr Brake has delayed in complying with the TPDO in order for Mrs Brake to be able to apply for her own moratorium. They say that, had he not done so, the enforcement would have been complete before Mrs Brake entered into her moratorium.
26. Thirdly, enforcement of the TPDO against Mr Brake’s property would not harm Mrs Brake, or undermine the protection given to her by her moratorium. It seems to me,

however, that this third point is simply another way of putting the second and third questions referred to in regulation 7(5)(b), set out above. I will therefore consider those points when I come to them. Given the form in which that regulation is set out, I do not think that they are part of the separately stated question whether it is reasonable to allow the step to be taken.

27. As I say, the court is asked to draw the inference that Mr Brake has delayed in complying with the TPDO in order for Mrs Brake to be able to apply for her own moratorium from the following. As recited earlier, Mr Brake requested his tax code from HMRC on 29 July 2022. He had not provided that tax code either to the Guy Parties or to the third party by the time that Mrs Brake entered her moratorium (nor, indeed, since). It is also clear that Mr Brake did not instruct the third party to disinvest his pension by 3 August 2022.
28. On 4 August 2022 Mrs Brake asked for an extension of time to 8 August 2022, but on that day however she simply apologised to the Guy Parties for the further delay and asked whether the Guy Parties had the final (*ie* sealed) order. On 9 August 2022 she emailed the court asking for an extension of time to 27 August 2022 (which extension the court refused). The sealed TPDO was provided by the court on 12 August and served on Mr Brake. Mrs Brake then applied for a stay of the order, but this was refused by the court on 16 August.

The Brakes

29. As against the submissions of the Guy Parties that the proposed enforcement step is a reasonable one to take, Mrs Brake makes a number of points. First of all, she says that “whether enforcement action is nearly complete or not is irrelevant if the other hurdles set out in regulation 7(5) are not met”. She points to regulation 10(5), requiring the court to ensure that enforcement of moratorium debt does not progress during the moratorium.
30. Secondly, she says that the limited discretion given to the court to “press the emergency button” of regulation 7(2)(b) must be the exception rather than the rule. In this connection, she refers to the decision of HHJ Dight CBE, sitting as a High Court judge, in *Lees v Kaye* [2022] EWHC 1151 (QB). That was also a case involving a mental health crisis moratorium, though not a case under regulation 7(2)(b). Mrs Brake says that, if the application there had in fact been for permission under that regulation, “it is clear that the Judge would have rejected it”.
31. In particular, she relies on a passage in the judgment as follows:

“72. ... the First Respondent would, in my judgment, have to identify and prove very exceptional circumstances to persuade me to subvert the policy of the Regulations and deprive the Applicant of the protection which the Regulations are designed to confer on her and was conferred on her by grant of the Moratorium as a consequence of her receiving mental health crisis treatment. The factors relied on by the First Respondent do not begin to satisfy that heavy burden.”
32. Mrs Brake further says that if relief were granted to the Guy Parties, it could lead to similar claims by other creditors to enforce their rights. She gives the example of a

claim made against her in the County Court Money Claims Centre by the London Clinic for fees said to be outstanding. The moratorium administrators have told the London Clinic that this is a moratorium debt, and the matter appears to be on hold. Mrs Brake says that,

“If the Guy Parties are allowed to continue their enforcement action, this would lead to other creditors making applications under regulation 19 of unfair prejudice”.

33. She also says that the fact that the Brakes would not be (or need not be) involved in the further enforcement steps is also irrelevant. She observes (correctly) that there is nothing in the legislation that suggests that the creditor may continue to enforce as long as the debtor is not involved. She submits that in any event the Guy Parties do not intend to leave Mr and Mrs Brake alone, but will continue to make applications against them. Mrs Brake calls this application “the thin end of the wedge”.
34. So far as concerns the further submission by the Guy Parties that Mr Brake has delayed complying with the order, Mrs Brake makes a number of points. First of all, the suggestion that Mr Brake has purposely delayed at all is denied. She points to the fact that Mr Brake is in a mental health crisis, and suffering from severe depression. But, even were Mr Brake to have delayed, she submits that the past conduct of the debtor (or the spouse of the debtor) is not relevant to the application of the regulations.
35. The further suggestion that Mr Brake was delaying in order to enable Mrs Brake to enter into a moratorium before enforcement could be carried out is also denied. She points to the fact that she has been receiving mental health treatment since April 2022, and that it takes time to set up a mental health crisis moratorium. Mrs Brake also denies the suggestion that she is acting in bad faith by “seeking refuge” in such a moratorium.

The Guy Parties’ reply

36. In reply, the Guy Parties make the forensic point that Mrs Brake’s “long and detailed written objections to the application” are all the more impressive for someone who claims to be in a mental health crisis. They also point out that Mrs Brake’s occupational therapist in May 2022 had reached the conclusion that she was “cognitively impaired to such an extent that she is unable to deal with the legal matters...” But he did not go on to explain on what clinical basis he reached that conclusion, and it sits oddly with the prompt and detailed correspondence entered into by Mrs Brake and the lengthy written legal submissions that she has since made, on behalf of them both, in the present litigation.
37. The Guy Parties then submit that most of Mrs Brake’s submissions are in fact irrelevant to the issues before the court. The Guy Parties submit that it is relevant here that they are seeking to continue enforcement action which was almost complete when the moratorium began. They are not seeking to start enforcement action from scratch. They also submit that it is relevant to consider how much is required of the debtor personally in the step for which permission is sought. If it would involve significant effort for the debtor, that points away from granting permission. The Guy Parties distinguish *Lees v Kaye* as irrelevant to the question of reasonableness under

regulation 7(5), and argue that delaying tactics to preserve assets for an anticipated moratorium are obviously relevant to that question.

2. Detriment

The Guy Parties

38. The Guy Parties submit that the relief they seek would not be detrimental to Mrs Brake because (i) the asset concerned is not hers (and so her own assets will not be reduced), (ii) the enforcement is not against her, but against her husband, and they do not involve her in any way (and neither in practice Mr Brake), and (iii) it will benefit Mrs Brake by reducing her liabilities to the Guy Parties.

The Brakes

39. Mrs Brake submits that, even though the pension policy belongs to her husband, there *will* be a detriment to herself because, as a married couple, “they enjoy the benefit of each other’s assets”. She specifically submits that the pension, if available to Mr Brake, would benefit the whole family including her. In addition she says that, as Mr Brake’s wife, she could obtain a direct interest in it on his death or their divorce. Further, she says that it is not the *enforcement* of the TPDO that reduces the assets available to her, but the *TPDO itself*. The moratorium does not cancel the debt or remove the TPDO. So the Guy Parties’ argument is “otiose”.
40. In addition to this, Mrs Brake submits that detriment is not confined to financial matters. It also extends to the non-financial detriment of losing the “safe haven status” of the moratorium. She relies on the evidence of the letter of 27 September 2022 from the occupational therapist in the mental health team. I set out relevant parts of this letter earlier in this judgment, at paragraphs [18] and [19]. (There is also the earlier occupational therapist’s letter of May 2022, from which I set out a relevant passage at paragraph [17] above.)
41. She submits that there is nothing extraordinary in the Guy Parties’ application, and that if they succeed, other creditors (she refers to the London Clinic and Ashfords LLP, her former solicitors, in this connection) may feel that they too can make application under regulation 7(2)(b) to allow enforcement to continue. Mrs Brake says that this would “open the floodgates to numerous applications from disgruntled creditors”, and “set a very low threshold for those applications”.
42. She also refers to my own judgment in the earlier moratorium application ([2021] EWHC 2308 (Ch), [42], [43]), where I said:

”42. Now I agree that there is a sense in which the Guy Parties are in a worse position than any other creditors of the Brakes, because they are continuing to defend themselves against claims brought by the Brakes (as well as pursuing their own claim against them), and so they are in a situation where there is, in addition to the past debts, a potential liability on the Brakes in the future to pay the costs of the Guy Parties, if the Brakes lose the litigation. Whereas other creditors of the Brakes have (in this respect at least) no further exposure to irrecoverable debts, the Guy Parties are exposed to further such debts in the future. In this sense, the

Guy Parties are prejudiced by the moratorium in a way in which other creditors may not be.

43. However, in my judgment, that prejudice is not so much the result of the moratorium, whose effects are the same for all creditors, as the result of the litigation system itself, and in particular the costs rules. The rules of civil procedure build in a number of safeguards, including the well-known provisions for security for costs. If for any reason they do not provide sufficient protection to the Guy Parties then that is a deficiency in those rules. It is not for the provisions relating to a breathing space moratorium to make up for their lack. The moratorium is intended to provide a breathing space from *past* debts, not *future* ones. So far as concerns the debts arising from the costs orders made before the moratorium took effect, they are intended to be covered by the moratorium. That is what is supposed to happen.”

43. The next submission addresses the Guy Parties’ argument that Mrs Brake is not involved in further enforcement of the TPDO, because it is not against her or her asset. Mrs Brake says that she is nevertheless involved, because she is the advocate for the Brakes, and has to bear the strain of making the relevant arguments on their behalf. And she refers to what she calls the

“lack of certainty that allowing an application on such flimsy grounds that would be the source of detriment to Mrs Brake...”

44. She also refers to the extension of protection to persons jointly liable with the debtor the subject of the moratorium, by regulation 7(7)(n). She says that the “stress and mental anguish does not stop if only one debtor is being pursued”. In addition, she says that she requires the protection of a separate moratorium “because she may have debts that are not in common with Mr Brake as well as joint debts”.
45. Mrs Brake’s next point is that the Guy Parties are wrong to argue that the steps proposed will result in a benefit to her by reducing her liabilities to the Guy Parties. She says that the moratorium does not wipe out either the debt or the TPDO. It merely halts enforcement action. But (she further says) enforcement action has no positive effect on her liabilities. She submits that the Guy Parties will seek to operate an emergency tax code for Mr Brake, thus ensuring that too much tax is paid on the pension fund and therefore the amount available to pay the debt is significantly decreased. She then argues that this means that “the net liability to the Guy Parties would be increased and not decreased by allowing enforcement to continue”. Indeed, if the application were successful, the Guy Parties “would also undoubtedly be awarded costs which would further increase Mrs Brake’s liability to them”. She also expresses concerns about the third party’s fees.

The Guy Parties’ reply

46. The Guy Parties say that the moratorium does not cut across the interim injunctive effect of the TPDO. The pension policy can never be made available to the Brakes. So far as concerns the “loss of safe haven” argument, the Guy Parties say that “it cannot be sufficient for the debtor simply to assert this, otherwise no application under regulation 7(5) would ever succeed”. Moreover, they say there is no sufficient medical evidence on this point. They say that no qualified practitioner has been given

the relevant facts (including that Mr Brake cannot benefit from the pension, and the Brakes need do nothing for the enforcement to conclude), and asked to give an opinion on that basis.

47. They further say that there is no answer to their point that enforcement is against Mr Brake rather than his wife, and is permitted under his own moratorium. Lastly, they say that any monies recovered from the pension policy which are applied in reduction of the debt will benefit Mrs Brake by reducing her debt. The concerns about using an emergency tax code only arise because the Brakes have not complied with the court order and have refused to provide the tax code to the third party. The concerns about the third party's fees are dismissed as "speculative".

The Brakes' further reply

48. Exceptionally, Mrs Brake sent a further written submission to the court seeking to reply to the Guy Parties' reply. This comments on the Guy Parties' submission that there is no sufficient medical evidence of non-financial detriment, and that the occupational therapist's September letter does not reach the requisite standard. The Guy Parties did not object to my looking at this, and so I have done so. In that submission, Mrs Brake makes a number of points, which I summarise as follows:

1. The occupational therapist is a qualified professional.
2. He and the team know what the enforcement action entails.
3. If the evidence so far is inadequate the Brakes should be given the opportunity to obtain it.
4. The May letter from the occupational therapist convinced the employment tribunal to adjourn the trial. The September is more detailed.
5. Regulation 7(2)(b) enables the court to exercise a discretion only where there is no detriment to the debtor.
6. This is a mental health crisis moratorium, and the emphasis must be on the debtor's mental health.
7. The Guy Parties will suffer "very little if any" detriment if enforcement is paused.
8. There is no authority for treating detriment only in financial terms.
9. An intelligent person can suffer from depression and have a mental health crisis.

3. Undermining

The Guy Parties

49. The Guy Parties say that the relief sought would not significantly undermine the protection given by Mrs Brake's moratorium. This is, firstly, because the pension belongs to Mr Brake, and the enforcement of the order is against him. But, secondly, it is because the enforcement procedure is close to conclusion, with limited steps remaining to be taken, and none at all against Mrs Brake or her assets. The pension

policy will never be available to the Brakes. The moratorium merely delays the point which it goes to reduce the debt owed to the Guy Parties.

The Brakes

50. The Brakes refer to *dicta* of HHJ Dight CBE in *Lees v Kaye* (referred to above), at [72], reproduced in paragraph [31] above. They say that the purpose of the moratorium is to give peace of mind to the debtor by removing the threat of enforcement. Allowing the Guy Parties to continue to enforce the order would substantially undermine that protection. They also say that the professional opinion of the occupational therapist (who, they say, represents a team of “qualified professionals”) is “appropriate evidence” for the court to act upon in assessing Mrs Brake’s mental health for the purposes of this application. Finally, they say that if there is a balancing exercise to be undertaken by the court then there are a number of factors to be taken into account.
51. In summary form, these are as follows:
1. The evidence of the occupational therapist that enforcement would be detrimental to Mrs Brake’s mental health and substantially undermine the “safe haven” of the moratorium.
 2. Regulation 7(2)(b) is an exception to regulation 10, and the applicant must show there are “exceptional circumstances” justifying the deprivation of Mrs Brake of the protection of the moratorium.
 3. Allowing the application could lead to further applications by other creditors.
 4. Allowing the application would increase Mrs Brake’s liabilities to the Guy Parties.
 5. Allowing the application would result in the Guy Parties receiving less than if they waited for the moratorium to come to an end.
 6. The value of the asset which they are seeking to enforce against is disproportionately small compared to the total debts which they claim that the Brakes owe.
 7. The Guy Parties are not facing any hardship of their own, justifying the application.
 8. Mrs Brake has end stage kidney failure, exacerbating the situation.
 9. Mr Brake’s mental health position is even more precarious than that of Mrs Brake, and he too is entered into a moratorium.
 10. The application is not brought in good faith, but in order to circumvent Mr Brake’s moratorium and raise a new liability (*ie* for costs) which would lie outside Mrs Brake’s moratorium.
 11. The burden of proof lies on the Guy Parties to show that the step will not be detrimental to Mrs Brake, and, if the court accepts the occupational therapist evidence, they have failed to discharge it.

12. Similarly, they have the burden of proving that the step does not substantially undermine the purpose of the moratorium, whereas in fact it completely subverts that purpose.

13. The available case law is to the effect that the protection given by the moratorium will be maintained unless there are exceptional circumstances affecting the creditor.

The Guy Parties' reply

52. The Guy Parties submit that *Lees v Kaye* was not a case about regulation 7(5), and so does not assist the court. They also make two final points. One is that Mrs Brake is wrong to suggest that the test can only be satisfied in “extreme situations: for example, if the creditor him or herself was being pursued by other creditors and was about to face his or her own enforcement action or extreme hardship like homelessness”. They say that this is a gloss not supported by the test on the face of the regulations. The second point is that Mrs Brake is wrong to deploy a “floodgates” argument. They say that a TPDO is different from an ordinary debt caught by a moratorium, and that each case must be dealt with on its own merits.

DISCUSSION

General points

53. I have already mentioned what I consider to be the main purpose of the 2020 Regulations, and also the alternative route into the scheme for those receiving mental health crisis treatment: see at paragraph [9] above. The Guy Parties have made an application under regulation 7(2)(b). The court’s task is to deal judicially with that application, construing that regulation in the context of the regulations as a whole. As I understand the matter, there are no authorities yet on the construction of this particular regulation, though the decision in *Lees v Kaye*, on a different aspect of the 2020 Regulations, has already been noted, and indeed is now relied on by the Brakes.
54. The first point to note is that regulation 7(2) imposes a prohibition on the taking of certain steps during a moratorium in relation to a “moratorium debt”. Those steps include any enforcement action in relation to that moratorium debt. However, in relation to the prohibition on enforcement action, there is an exception to that prohibition, where the court concerned *gives permission* for the creditor to take that step. However, the court may grant such permission *only* where three conditions are all satisfied. One is that the court considers that it is *reasonable* to allow the creditor to take the step. The second is that the court considers that the step will not be *detrimental* to the relevant debtor. The third is that the court considers that the step will not *significantly undermine* the moratorium protections.
55. When (and only when) the three conditions are *all* satisfied, then the court *may* (not must) give permission. It is clear that, even where the conditions are satisfied, the court retains a discretion whether or not to exercise the power conferred. The court’s decision is therefore not mechanistic, but fact-sensitive. In my judgment, and as I have already said, reasonableness is separate from the questions of detriment and undermining. In English law, the notion of reasonableness is frequently used as a standard by which a decision-maker is given a margin of tolerance. Within that margin, and assuming no other defects, the decision is safe. There is nothing in the

2020 Regulations to suggest that it is being used in a different way from the usual one. So I would give it that usual meaning.

56. But that is only one stage in the decision-making process. The discretion arises only when two further thresholds are passed. I agree with Mrs Brake when she says that “whether enforcement action is nearly complete or not is irrelevant if the other hurdles set out in regulation 7(5) are not met”. On the other hand, if the other two hurdles *are* got over, then how far the enforcement is nearly complete *will* be a relevant consideration in assessing reasonableness.
57. As for whether a step is “*detrimental*” to the debtor, I agree with the Brakes that there is no reason to confine its meaning to *financial* detriment. The word is perfectly general, and the context is one relating to health in general, and mental health in particular. So in my judgment a physical or psychological detriment may suffice. Thirdly, as to whether the step would “*significantly undermine*” the moratorium protections, this requires a focus on the effect of the proposed step on that protection, and in particular whether that protection is diminished by a margin which (in the appreciation of the court) is “significant”.

The evidence available to the court

58. However, in my judgment, all three of these matters are matters of *evaluation* by the court. They will depend very much on the evidence available to the court. In the context of a mental health crisis moratorium, this is likely to include evidence from an appropriately qualified clinical professional. I have already set out the substance of the clinical material relied on earlier in this judgment (at [16]-[20]). As appears from paragraph [15] above, my order of 15 September directed the Brakes to file and serve the evidence on which they wished to rely by a certain date. Although neither party filed or served any witness statements, both the Guy Parties and Mrs Brake exhibited documents to their written submissions, and relied on them. However, Mrs Brake has submitted that, if I am not convinced by the material she has put before me, a further opportunity should be given to the Brakes to obtain other evidence.
59. In my judgment, it is not acceptable for a party to put in the documents on which it wishes to rely (including clinical reports) and then to tell the court that if, when the court assesses the evidence, it is judged insufficient to achieve the party’s objective, then the court should allow that party to go away and attempt to get more and better evidence. The parties must each be able to see and comment on the material relied on by the other, and then the judge makes a decision based on that material. If one party were allowed to go away and find better evidence after “losing”, then the other party would have to be allowed the like right, with the result that the matter would never be concluded. There must be fairness, but also finality. As Lewison LJ memorably put it in *FAGE Ltd v Chobani UK Ltd* [2014] EWCA Civ 5,

“114. ... The trial is not a dress rehearsal. It is the first and last night of the show.”

In my judgment the same is broadly true of applications. I must therefore decide this application on the basis of the material which the parties have placed before me.

Assessment of the clinical evidence

60. Looking at the clinical evidence in the present case, I see no reason in principle why an occupational therapist cannot give appropriate evidence relating to a mental health crisis. The therapist observes the behaviour of the patient, and uses that, together with other material available, to reach a conclusion on the patient's mental health. It may be that in some cases only a psychiatrist can give the appropriate opinion. It all depends on what is under consideration. Here the question is not whether Mrs Brake is or is not suffering from a mental health problem. She clearly is. Nor is it whether she is or is not suffering from other, serious health problems. Again, she clearly is. Instead the question is whether enforcement of the order against *Mr Brake's* own asset will cause *her* a detriment, in particular by worsening her mental health.
61. It seems to me that an occupational therapist who has examined and observed the patient, and who is familiar with the patient's case, is able to give an opinion on that question, at least in relation to his or her area of expertise, even if it may in the circumstances be less powerful than that of a psychiatrist. Of course, that does not mean that the clinical opinion (of whomever) is conclusive. As Norris J said in *Levy v Ellis-Carr* [2012] EWHC 63 (Ch),
- “36. ... No judge is bound to accept expert evidence: even a proper medical report falls to be considered simply as part of the material as a whole...”
62. I turn therefore to consider the evidence of the occupational therapist relied on. He writes, in the September letter, in part:
- “I understand that an application has been made by one of Mrs Brake's creditors to allow enforcement action to continue. This application has resulted in Mrs Brake's panic attacks returning and symptoms worsening. It is quite clear to me that the lack of certainty that the application has brought has been detrimental to Mrs Brake's mental health. Enforcement action would be highly detrimental to her. It is critical that the Mental Health Crisis Breathing Space works as it is designed to, ie to provide a 'safe haven' until Mrs Brake is able to deal with the effect that any enforcement action would have on her and her family.”
63. As it seems to me, the writer has unfortunately misunderstood the position, because the enforcement action in question is *not* being taken against *Mrs* Brake at all. Instead, it is being taken against *Mr* Brake, in respect of a debt which his moratorium does not cover, and against an asset belonging to *him*. Moreover, the writer appears also not to appreciate (and certainly does not mention) that Mr Brake's pension policy is not now and will never in the future be available to either of Mr or Mrs Brake, or that the enforcement action against that policy, if permitted by the court, would in fact reduce the debt for which she is jointly liable with her husband, but without financial cost to her. I do not know the source of the misunderstanding, and make no assumptions about it.
64. At the same time, the writer states that the fact of the application has resulted in the return of panic attacks and symptoms worsening. The opinion is not well reasoned, but it may be that this is why the writer says that the enforcement action proposed would be “highly detrimental” to Mrs Brake. I am bound to say that I find this a surprising conclusion. The application to complete enforcement of the existing TPDO does not require Mrs Brake to do anything (and very little, if anything, from Mr Brake). As I have said, the operation of the TPDO had already made the pension

policy unavailable to the Brakes before Mrs Brake entered her moratorium. Once the moratorium is over, the asset will be taken in execution. So, the Brakes will never benefit from it anyway. And, when it is taken in execution, the value will reduce the Brakes' (including Mrs Brake's) liability under the costs order.

65. These are weighty considerations, and yet, so far as I can see, they have not been not taken into account by the occupational therapist. In my judgment this significantly weakens the value of this evidence. And, as I have said, this is the evidence of an occupational therapist, and not of a psychiatrist.

The first condition: reasonableness

Inference of deliberate delay?

66. In submitting that it is reasonable for the court to allow the enforcement of the TPDO, the Guy Parties ask the court to infer from the evidence that the Brakes deliberately delayed the enforcement process until Mrs Brake was able to enter her own moratorium. The Brakes deny this, but in my judgment the evidence is strong enough to permit the inference to be drawn. My decision requiring Mr Brake to draw down his pension was made on 20 July 2022, and a draft order was sent to me on 29 July. The Brakes had not dissented from this in principle, but did not agree to it either. When it was sealed, it was dated 20 July 2022.
67. The terms of the TPDO required Mr Brake to request his tax code and to send certain letters. He did the former, but not the latter, despite being chased on 3 August. Mrs Brake asked to be given until 8 August to get the "forms sorted". She then asked the court to postpone this step until 27 August, after their "annual leave". The court refused to do this. After the sealed order was served on her, she asked again for a stay, but with the same result. There was no mention to the court or to the Guy Parties, throughout all of this time, of any mental health crisis affecting Mrs Brake, or any suggestion that she was seeking to enter into a moratorium. If the Brakes had not prevaricated in relation to the taking of the steps under the TPDO, they would have been taken before the entry of Mrs Brake into the moratorium, and this application would never have been needed. I think it is a clear inference that this was deliberate, and I am satisfied on the balance of probabilities that that is what happened.

Lees v Kaye

68. Mrs Brake relies on the decision in *Lees v Kaye* [2022] EWHC 1151 (QB). That was also a case involving a moratorium, though in somewhat different circumstances from the present. There an application was made for a declaration that the execution of a writ of possession was null and void under regulation 7(12) of the 2020 Regulations (set out at [20] above), because there was a mental health crisis moratorium in place at the time of execution. Determination of the application involved a number of discrete issues, including whether the moratorium had been properly registered and was effective at the time of execution, whether the judgment debt was a "non-eligible debt", and whether regulation 7(13) applied so as to exclude the judgment debt from the moratorium. It was not an application under regulation 7(2)(b). The court held that the application succeeded.

69. At the end of his judgment, HHJ Dight CBE discussed how far the court, having been satisfied that the application should otherwise succeed, might properly refuse, as a matter of *discretion*, to grant the applicant the relief sought. It was in this context that he made the comments relied upon by Mrs Brake and set out at paragraph [31] above. Those comments are prefaced by these words:

“72. Moreover, given that I have reached the conclusion that the First Respondent has taken actions in evicting the Applicant and in selling the Lease which, because they are breaches of regulation 7, are null and void ... ”

70. So that was a case in which the regulation said that the actions taken by the first respondent were null and void, and the question was whether the court nevertheless had an unexpressed discretion to override that, and to refuse the applicant the relief that would otherwise follow. In that context, I am not at all surprised that the judge said what he did. But an application under regulation 7(2)(b) is rather different. Regulation 7(2) first of all imposes a prohibition on a creditor taking certain steps during a moratorium, but then provides for two exceptions, in subparagraphs (a) and (b). Subparagraph (b) is the relevant exception, involving permission being given by the court. In fact, as Mrs Brake points out, the ability of the court to give permission is heavily circumscribed by regulation 7(5).
71. But the important point is that it is an exception which is expressly made by the regulations themselves, and (unlike *Lees v Kaye*) does not involve the *glossing* of the regulations by inferring the existence of a discretion which is not expressed. In my judgment, there is no justification for reading regulation 7(2)(b) and (5) as being subject to any such words as were used by HHJ Dight CBE in relation to regulation 7(12). Whilst I accept that there is a legislative policy in enacting the regulations, that policy is to be found by considering the regulations as a whole, including exceptions such as regulation 7(2)(b).

Similar claims by other creditors?

72. Mrs Brake also submits that it would be unreasonable to allow this application because it would encourage other creditors to make similar claims to enforce their rights. I do not accept this argument. Each application made under regulation 7(2)(b) is to be dealt with on its own merits. If Mrs Brake were right, it is difficult to see how any successful application could be made under the regulation. It is also to be borne in mind that this application relates to a TPDO, rather than to a debt for which no enforcement had yet been commenced. There is not only a judgment debt, but in addition an asset has in effect been frozen by the interim TPDO.

Significance of further involvement?

73. Mrs Brake further argues that it is irrelevant that she or her husband would not be involved in the further enforcement steps. Again, I do not agree. In my judgment, it is highly relevant to the question of whether it is reasonable to permit a creditor to continue to enforce a debt to know how far the debtor will be required to take steps at the behest of the creditor or the court, and what steps those are. The more time-consuming and onerous those steps are, the less likely it will be reasonable to permit them to be taken.

Overall

74. Looking at the question of reasonableness in the round, I bear in mind that the enforcement action is nearly complete, and that none of the remaining steps involves Mrs Brake. I also bear in mind that the Brakes have deliberately delayed implementation of the TPDO in order for Mrs Brake to be able to enter into her own moratorium. In these circumstances, I think it is entirely reasonable for the court to permit the continued enforcement of the TPDO. But that is only one of the three hurdles that the Guy Parties need to surmount. I must now move on to the second.

The second condition: detriment

Availability of the pension policy

75. The Guy Parties submit that it would not be detrimental to Mrs Brake to enforce the TPDO, because the asset involved is not hers, she is not involved in the enforcement, and in fact enforcement would reduce her liabilities to the Guy Parties. I have already said that I do not think that in the context of the 2020 Regulations “detriment” is confined to money or money’s worth. Mrs Brake says there *will* be a detriment, even in financial terms, because the pension would benefit the whole family, and she as Mr Brake’s wife could obtain it on his death or their divorce. The problem with this argument is that the pension policy is currently frozen by the interim TPDO, and will therefore never become available to Mr Brake or his family. Indeed, Mrs Brake rightly said that it was not the *enforcement* of the TPDO that reduced the assets available to her, but the effect of the TPDO itself. For all practical purposes, the asset has already gone.

“Safe haven” status

76. But Mrs Brake says there is also non-financial detriment, first of all in the loss of the “safe haven status” of the moratorium. Here she relies on the evidence of the occupational therapist. As I have said, I found the conclusion come to, that the enforcement action proposed would be “highly detrimental” to Mrs Brake, surprising and difficult to follow. The evidence is significantly weakened by the apparent failure to appreciate the true position, that the asset concerned does not belong to Mrs Brake, can never be available to Mrs Brake, and when taken in execution will actually reduce her liabilities to the Guy Parties. There is no suggestion that the Guy Parties, or any other creditors, are in the same or a similar position as are the Guy Parties in relation to this TPDO. There are no “floodgates” to be opened by allowing this application.

The earlier moratorium judgment

77. Mrs Brake also relied on two paragraphs from my own judgment in the earlier moratorium application. I set these out at paragraph [42] above. But I do not think that they assist her argument. I quite accept that the 2020 Regulations should not be twisted to provide a remedy for the Guy Parties which the rules of civil procedure do not otherwise supply. But here I am concerned with the true construction of regulation 7(2)(b), which provides for exactly the application which the Guy Parties are making. What I said in my earlier judgment does not affect that. Despite the evidence of the occupational therapist, I am not satisfied that the action proposed to be taken if the

application is allowed will threaten the “safe haven status” of moratorium or act as a non-financial detriment to Mrs Brake.

Mrs Brake as advocate

78. Mrs Brake also submits that there is also non-financial detriment to her in further enforcement of the TPDO, because she is the Brakes’ advocate, and bears the strain of making the arguments. She says that “allowing an application on such flimsy grounds” would be the source of detriment to her. The first point to make here is that, if any application is allowed, the grounds will not be “flimsy”. They will be such as justify the allowing of the application in accordance with the relevant rules. Secondly, if there were a detriment to Mrs Brake arising from the work she puts into acting as advocate, that detriment would arise from her role as advocate, and not from her position as debtor. Thirdly, I do not accept that allowing this application would lead in itself to the need for further arguments to be made.

Joint debtors

79. Mrs Brake makes a further point that the protection given by a moratorium “extends” to joint debtors by virtue of regulation 7(7)(n), because “the stress and mental anguish does not stop if only one debtor is being pursued”. I have not seen any extra-legislative explanation (for example in a parliamentary debate or an accompanying memorandum) to that effect, but I accept that it is possible. On the other hand, a joint debt is subject to special rules under the general law which might apply with unforeseen consequences if action was forbidden to be taken against one joint debtor but not the other or others. But, in any event, I do not consider that the mere fact that each of Mr and Mrs Brake has a separate moratorium, or that each of them has joint debts with the other but also separate debts, can make an application under regulation 7(2)(b) unreasonable.

Effect on Mrs Brake’s liabilities

80. Lastly, Mrs Brake says that the effect of allowing the Guy Parties to enforce the TPDO will be to *increase* rather than reduce her own liabilities to them. She says that, by operating an emergency tax code for Mr Brake, too much tax will be deducted by the third party, and the amount paid to reduce the judgment debt will be decreased. But she says that this will increase the net liability to the Guy Parties. I do not follow this. Even if too much tax were deducted from the pension fund before it is paid over, still *something* would be paid over, and that something would reduce the joint liability of Mr and Mrs Brake to the Guy Parties. The net liability would not increase.
81. In any event, however, the only basis upon which an emergency tax code would be needed is if Mr Brake’s tax code is not supplied. But that is something within the control of the Brakes, and I do not think it should lie in the mouths of the Brakes to rely on their own breach of the TPDO to argue that they would be made worse off as a result.
82. Mrs Brake also says that she would be worse off if the application were allowed because costs would follow the event. One obvious answer to that is that, if the Brakes had complied with the TPDO in the first place, this application would not have been made. Moreover, if they had consented to it once made, the costs would have

been minimal. They have chosen to take the stance which they have, and must accept the consequences.

83. But the more important point is that the regulation refers to the “*step*” (that is, of enforcement) being detrimental to the debtor, and not the *application* under regulation 7(2)(b). The normal application of litigation costs rules is the consequence of the *application*, and not of the *step*. If it were necessary to show that the application was not detrimental, then *every* such (successful) application would obviously be detrimental to the debtor, and accordingly none could succeed. That would be a nonsense.

Overall

84. Looking at the matter overall, I am entirely satisfied that if this application is allowed the enforcement of the TPDO will not be detrimental to Mrs Brake.

The third condition: undermining the protection

85. I turn lastly to consider the question whether the protection of Mrs Brake’s moratorium will be significantly undermined by the taking of the step sought in the application. The Guy Parties say it will not, because the asset belongs to Mr Brake, and the judgment debt is being enforced against him, with only limited steps remained to be taken, and none at all by Mrs Brake.
86. The Brakes refer once again to the decision in *Lees v Kaye*, and submit that the peace of mind provided by the moratorium would be threatened if the Guy Parties were permitted to continue to enforce the order. First of all, I do not accept that *Lees v Kaye* is of any assistance to me in considering this point. The circumstances of that case were far removed from those of this. Secondly, I do not think that there is any threat to the peace of mind provided by the moratorium. No asset which is currently available to Mrs Brake, or from which she can benefit in the future, is threatened. She is not required to do anything. None of the other eligible debts which she incurred before entering the moratorium will change in status as a result. As a result, I do not consider that the protection of the moratorium will be significantly undermined if I allow this application.

Discretion

87. With all three hurdles cleared, the question becomes one of discretion to be exercised by the court on a judicial basis. Mrs Brake makes 13 points which she says are to be taken into account in exercising that discretion, and which I summarised earlier (see [46] above). I deal with them as follows:

1. I have already dealt with the clinical evidence. In my judgment it is not strong enough to bear the weight which is put upon it.

2. There is no requirement in an application under regulation 7(2)(b) for the applicant to show “exceptional circumstances”. That regulation provides for an exception to the general prohibition on enforcement action, and regulation 7(5) sets out three preconditions which must be satisfied before the court can give permission. *Lees v Kaye* is not in point.

3. I have already dealt with this point.
 4. I have already dealt with this point.
 5. This is a matter for the Guy Parties. They have chosen to make this application. Presumably their assessment of the situation is different.
 6. This is really relevant only to the allegation of bad faith in making the application, which I deal with below.
 7. This is really relevant only to the allegation of bad faith in making the application, which I deal with below.
 8. This could be a relevant consideration in some cases, but I cannot see its relevance here.
 9. Mr Brake's existing moratorium does not cover this debt (as the Brakes accept), and in any event it is not relevant to the position of Mrs Brake, whose moratorium *is* concerned.
 10. I bear in mind what is said in points 6 and 7 above, in considering the allegation made here of bad faith in making the application. However, in my judgment the material relied on falls far short of what would be needed to make such a serious allegation good. I do not accept therefore that this application was made in bad faith.
 11. I agree that the Guy Parties bear the burden of proof in relation to detriment. I have already commented on the clinical evidence.
 12. I agree that the Guy Parties bear the burden of proof in relation to undermining the moratorium protection. I do not agree that the step proposed subverts the purpose of the moratorium.
 13. The decision in *Lees v Kaye* is not in point, and does not show that an application under regulation 7(2)(b) can succeed only if the applicant demonstrates that there are exceptional circumstances which affect the creditor.
88. Having satisfied myself that the three conditions required by regulation 7(5) are all met in the present case, and having taken into account all the points put forward by the Brakes, I am left with the question of the exercise the court's discretion. I bear in mind, first of all, that the pension policy is not currently of any benefit to either of the Brakes, and that it will not become so in future. I bear in mind also that Mrs Brake is not required to do anything in order for the further enforcement steps to be taken, and that if those steps are taken Mrs Brake will not be in any way (financially or non-financially) worse off. I bear in mind, thirdly, that the Brakes deliberately delayed compliance with the TPDO so that Mrs Brake would enter her own moratorium (which, unlike that of Mr Brake, would cover this judgment debt) before the final steps were taken in the enforcement of that judgment debt. In these circumstances, I am satisfied that it is appropriate for the court to grant the relief sought under regulation 7(2)(b).

CONCLUSION

89. I will allow this application and make the order sought. I propose to deal with consequential matters on paper in the first instance. The parties should file (and serve) written submissions on consequential matters by 4 pm on Tuesday 8 November 2022, and reply submissions (if so advised) by 4 pm on Thursday 10 November 2022. I will then consider these and assuming that I see no reason to require a hearing I will decide the matter on paper.