



Neutral Citation Number: [2023] EWHC 152 (KB)

Case No: KB-2022-002296

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 January 2023

Before:

HIS HONOUR JUDGE DIGHT CBE

Between:

IVAN KAYE
- and -
AMANDA LEES

Claimant

Defendant

Kerry Bretheron KC and Philip Judd (instructed by **Perrin Myddelton**) for the **Claimant**
No appearance by or on behalf of the Defendant

Hearing dates: 23 January 2023

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.

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HIS HON JUDGE DIGHT CBE

His Hon Judge Dight CBE:

Introduction

1. These are the reasons for the decision which I announced yesterday afternoon.
2. Mr Kaye has an unpaid judgment against Ms Lees for a significant sum of money, exceeding £300,000, (“the Judgment Debt”) arising from decisions made by His Hon Judge Roberts, following trial, in two judgments handed down on 30 July 2018 and 2 January 2019 which dealt with liability and quantum of damages respectively. Those damages resulted from what HHJ Roberts found to be nuisance and harassment caused by Ms Lees to Mr Kaye during the time that she had been his neighbour in adjacent flats in the same building. As a consequence Mr Kaye was granted a final charging order over Ms Lees’ lease (“the Lease”) of the Ground Floor Maisonette, 8 Leysfield Road, London W12 (“the Flat”). An order for sale was made on 6 March 2020, pursuant to which Mr Kaye purported to sell Ms Lees’ leasehold interest to a Ms Dixon in March 2022 for £505,000. Mr Kaye used part of those proceeds of sale (£188,963.90) to discharge Ms Lees’ mortgage over her lease of the Flat in favour of Santander. As a result of the same order Ms Lees was evicted from the Flat and Ms Dixon went into occupation.
3. However, Ms Lees had been subject to a breathing space moratorium. She had been granted a series of four mental health crisis moratoria made under the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (“the Regulations”) as a result of which I held, in a judgment which I handed down on 13 May 2022 (Lees v Kaye [2022] EWHC 1151 (QB)) (“the May judgment”), that the sale to Ms Dixon and the eviction of Ms Lees from the Flat was null and void. For the detailed background to this litigation I refer to the May judgment. Here I will use the same abbreviations as I used in the May judgment.
4. Laing LJ subsequently refused permission to appeal to the Court of Appeal against the May judgment.
5. In a judgment which he handed down on 21 December 2022 ([2022] EWHC 3326 (KB)) (“the December judgment”) Swift J dismissed an application by Mr Kaye to set aside the moratorium which was in place at that time. Swift J also held that the effect of the discharge of the mortgage by Mr Kaye, in light of the May judgment, had been to subrogate Mr Kaye to the rights and liabilities of Santander as creditor of Ms Lees and mortgagee of the Lease. That means, in my view, that the liability of Ms Lees to Mr Kaye, after taking account of various costs orders going both ways, now stands in the order of £500,000, although I do not know the precise figure. Part of that liability is secured by the charging order which was made against the Lease of the Flat, which would remain in place following the May judgment, and part of it is secured by way of subrogation to the Santander charge over the Lease.
6. In the interim Ms Lees’ solicitors had sent a letter before action dated 31 August 2022 to Mr Kaye’s solicitors indicating that they had instructions to commence proceedings against him without further notice for breach of statutory duty and trespass for which Ms Lees would seek damages, including aggravated and exemplary damages. As I understand it no such claim has yet been brought. There is no suggestion that Ms

Lees was not in a position to give instructions to her solicitors to litigate on her behalf and commence fresh proceedings.

7. The event which gave rise to the current application was that Ms Lees had been granted a further Mental Health Crisis Moratorium which commenced on 8 November 2022 (“the Current Moratorium”).

The Application

8. On 21 November 2022 Mr Kaye, through his solicitors, issued a further application (“the Application”) to cancel the Current Moratorium pursuant to Regulation 19 on the grounds that (1) Mr Kaye’s interests as a judgment creditor are unfairly prejudiced by the moratorium and (2) there has been a material irregularity in that Ms Lees did not meet the relevant eligibility criteria when the application for the Current Moratorium was made (Reg 17(2)) and that the application was not made *bona fide*.
9. By his application notice Mr Kaye also seeks an order that Ms Lees be forbidden for a period of 60 days from applying for any further moratorium so as to prevent him from enforcing the Judgment Debt. During the course of her submissions Ms Bretherton KC refined this request for injunctive relief.
10. The Application had been listed for hearing on 9 December 2022 but the parties were awaiting the outcome of the hearing which had taken place before Swift J. Bearing in mind that, among other things, Mr Kaye had asked the court to cancel the mental health crisis moratorium which was then in place the parties sensibly agreed that the hearing of the Application be deferred until the outcome of that hearing was known. In a consent order approved by Freedman J on 7 November 2022 Ms Lees agreed to a direction that she should:

“(2)...file and serve evidence upon which she intends to rely, including evidence of her mental health crisis treatment upon which the debt advice provider submitted the application for the Moratorium [made on 8 November 2022], to include ongoing evidence as to duration, severity, prognosis and timescale for improvement, by 4pm on the day 14 days after Mr Justice Swift hands down judgment...”

The order went on to make provision for Mr Kaye to file evidence in reply and then, by agreement, for the Application to be relisted on an expedited basis. I observe in passing that this matter had obviously become urgent and that the parties were right to seek expedition even though more recently Ms Lees has sought to argue that it is not urgent and should be dealt with at a later date.

11. Swift J handed down judgment on 21 December 2022 which meant that Ms Lees’ evidence was to be filed by 4pm on 4 January 2023. The order of 7 November 2022, properly construed, required her to file existing material (ie what had been before the debt advice provider at the time that the application for the mental health crisis moratorium had been made on 8 November 2022) as well as material as to the future (dealing with the duration, severity, prognosis and timescale for improvement of Ms Lees’ mental health condition) which may or may not have been in existence at the date of the order approved by Freedman J but the collation of which need not have

awaited the outcome of the hearing before Swift J. Nevertheless no evidence (either as to the past or as to the future) was filed by or on behalf Ms Lees by the deadline in paragraph 2 of the order or subsequently. At the date of the deadline itself Ms Lees' solicitors, who had been publicly funded, came off the record.

An adjournment

12.

Ms Lees has throughout the proceedings in the High Court been represented by solicitors and counsel, including leading counsel, until her solicitors ceased to act for her and came off the record on 4 January 2023. By an application notice dated 12 January 2023, supported by a well drafted witness statement of the same date, Ms Lees, by then acting in person, sought an adjournment (on paper) of the hearing of the Application which had been listed for 24 January 2023. By an order dated 16 January 2023 Cavanagh J refused the application giving detailed reasons for doing so and setting out the matters on which Ms Lees had failed on paper to satisfy him. He left the door open to renewal of the request to adjourn before the judge who was to hear the Application. On the day before the Application came before me Ms Lees applied again (by an application notice and equally well drafted witness statement dated 23 January 2023) to adjourn the hearing for a period of three months to enable her to find new legal representation and to obtain the evidence which had been directed to be filed by Freedman J's order. She also filed a bundle of approximately 1,000 pages. Despite taking these substantial steps in respect of the Application Ms Lees did not appear when the Application was called on for hearing and indicated in a telephone call then made by the Associate to establish her whereabouts that she did not intend to attend because of, inter alia, her mental health moratorium. Having heard leading counsel for Mr Kaye I formed the view that Ms Lees had not by her more recent application and evidence filled the gaps which had been identified in the reasons given by Cavanagh J for refusing her application and had not satisfied me on the basis of the material filed on 23 January that I should adjourn the Application. I gave detailed reasons for dismissing her most recent request to adjourn in an ex tempore judgment before turning to the Application.

13. I should add that in considering the Application I have born in mind the evidence and submissions (in her communications to the court) filed by Ms Lees.

The moratoria and reviews

14. In total there have been four mental health crisis moratoria as well as one breathing space moratorium, as follows;

- i) on 30 June 2021 the Applicant was granted a breathing space moratorium for the period 1 July 2021 to 29 August 2021. The eviction which had been due to take place on 8 July 2021 did not go ahead;
- ii) shortly afterwards Mr Darren Caisley, a Mental Health and Money Advisor, working for Rethink, a national debt charity contracted by the Government to run the Mental Health Access to Breathing Space Scheme, was appointed to assist the Applicant under the scheme. An Approved Mental Health Professional ("AMHP") confirmed Ms Lees' eligibility for a Mental Health Breathing Space and on 26 October 2021 the Applicant was granted the first

mental health crisis moratorium under the Regulations which remained in place until 25 December 2021. A Writ of possession had been due to be executed on 27 October 2021, the day after the moratorium commenced;

- iii) on 12 January 2022 Mr John McGovern, an AMHP, certified that Ms Lees was receiving mental health crisis treatment and she was granted a further mental health crisis moratorium which was in effect from 13 January 2022 until 12 February 2022. Notwithstanding this moratorium the eviction which had been scheduled to take place on the same day as the moratorium was due to come into force (ie 13 January 2022) was effected and possession was taken of the Flat. It is that eviction which led ultimately to the issues which I ruled on in the May judgment holding that the eviction and subsequent sale of the Lease had been in breach of the moratorium and were null and void;
 - iv) on 15 February 2022 a further mental health crisis moratorium was granted. It lapsed on 6 November 2022. There is a number of unanswered queries about the lapsing of this third mental health crisis moratorium and the initiation of the subsequent fourth mental health crisis moratorium within a matter of days. On 13 October 2022 Rethink wrote to Ms Lees saying that as a result of her mental health treatment having ceased on 7 October the related moratorium would come to an end 30 days afterwards, in other words on 6 November 2022. Mr Kaye's solicitors were notified of the termination of the moratorium and asked Ms Lees' then solicitors to update them as to what was happening. Ms Lees' solicitors declined to do so on the basis that their client was under no obligation to provide an update. The reason why Ms Lees' treatment ceased or why it appears shortly thereafter to have restarted has not been clarified;
 - v) on 7 November 2022 a further application was made by Ms Lees and the current mental health crisis moratorium was granted on 8 November 2022. On 14 November Mr Kaye's solicitors asked Ms Lees' solicitors for the latest advice from Dr Sacks, the relevant mental health consultant, adding "*This is in relation to her dramatic change leading her to go back into crisis treatment as soon as the latest Breathing Space Order expired.*" The bald response was that Ms Lees' solicitors had not received any recent documents from Dr Sacks.
15. For the purposes of the application before me it is, as the parties and the order of Freedman J recognised, important that the information which led to the making of this fourth mental health crisis moratorium be disclosed. However, because of the failure of Ms Lees to comply with paragraph 2 of the order of Freedman J I do not know what material was before the officers of Rethink at the time that the Current Moratorium was obtained.
16. On 9 November 2022 by an email application addressed to Mr Neill Casson, the Mental Health and Money Advice Service Manager who had been involved in the decisions leading to the moratoria, Mr Kaye's solicitors sought a review of the decision to grant the Current Moratorium. The basis of Mr Kaye's request for a review was, as in the current Application, that Ms Lees did not satisfy the criteria for grant of a mental health crisis moratorium and that in any event the Current Moratorium was unfairly prejudicial to Mr Kaye. In his email response dated 15 November 2022 Mr Casson said that having undertaken a review the conclusion had been reached that the Current Moratorium should continue because as a debt advice

provider he was not in a position to challenge the assertion by the AMHP who had confirmed that Ms Lees was receiving treatment for a mental health crisis and therefore eligible for a mental health crisis moratorium and because his organisation was not in a position properly to undertake the envisaged balancing exercise to determine whether Mr Kaye had been unfairly prejudiced. Mr Casson did not disclose with his review decision any of the material on which the AMHP formed their view that Ms Lees was being treated for a mental health crisis.

The current medical evidence

17. In the absence of the material which Ms Lees should have filed in response to paragraph 2 of the order of Freedman J I was taken to the two most recent documents which deal with Ms Lees mental health and treatment. The first in time is a letter dated 15 August 2022 from Dr Sophie Sacks, a consultant psychiatrist, of the Hammersmith and Fulham Mental Health Integrated Network Team, a community based mental health service offering acute and longer term mental health care which, insofar as directly material, reads as follows:

“1. Any mental health condition(s) that Ms Lees has been diagnosed with

Ms Lees has a diagnosis of Adjustment Disorder, which was made following her presentation in crisis in October 2021. Further assessment is taking place to determine any underlying psychopathology. Possible comorbid diagnoses have not yet been discussed with Ms Lees.

2. The care/treatment that Ms Lees is receiving for her mental health condition(s)

Ms Lees is currently receiving 3-monthly outpatient psychiatric follow-up appointments. Her initial assessment was face to face, but subsequent appointments have been telephone-based, as she has been residing outside of London following eviction from her home. Her relocation outside of London has limited what other supportive interventions we have been able to offer her.

Alongside her psychiatric outpatient appointments, she is currently undergoing a Care Act assessment by my Social Work Hub colleagues.

3. Your view as to the condition(s)’s duration, severity, prognosis and timescale for improvement.

Ms Lees has a history of trauma from a young age, which I believe has significantly impacted the development of her personality, coping strategies and the way she relates to others. These characteristics are typically enduring in nature therefore likely to be long-lasting and dependent on what longer-term interventions she is able to engage with. Her symptoms related

to Adjustment Disorder, which have been characterised by low mood, anxiety and suicidal thoughts, appear more directly related to stressors sound the eviction from her home. The timescale for improvement is therefore dependent on resolution of those stressors.”

18. The second document was attached to Ms Lees’ witness statement of 12 January 2023 in support of her application to adjourn the hearing listed for 24 January. The document is an email dated 3 November 2022 from Desiree Hooper, who described herself as an Approved Mental Health Professional – Social Worker, which had been addressed to the debt advice provider who was to consider whether to make the Current Moratorium. Ms Hooper said:

“I am able to confirm that to the best of your knowledge (sic), I am 100% confident that the Ms Amanda Lees is receiving mental health crisis treatment as per section 2 of the referral form:-

receiving crisis, emergency or acute care or treatment in any setting from a specialist mental health service (i.e. crisis treatment from a crisis home treatment team, liaison mental health team, community mental health team or any other specialist mental health crisis service) for a mental disorder of a serious nature.”

In her email of 12 January 2023 Ms Lees described that second document as “evidence of my mental health crisis treatment as stated in the order of 6 December 2023”.

Submissions

19. On behalf of Mr Kaye it was submitted that:
- (1) he is unfairly prejudiced by the Current Moratorium;
 - (2) Ms Lees is not eligible for the Current Moratorium;
 - (3) Ms Lees is deploying the Regulations to evade a judgment debt, which is now over 4 years old and stems from proceedings issued 7 years ago. That is not the purpose of the Regulations and is a consequence which the court should guard against;
 - (4) Ms Lees has had the benefit of four previous moratoria, all of which were obtained on the eve of enforcement, and then allowed to lapse. She has never devised a realistic repayment plan, or any repayment plan, which is the very purpose of the statutory scheme;
 - (5) There is no relevant evidence of Ms Lees’ mental health condition, in particular as to severity, prognosis and duration. Her condition appears to be not serious nor to require acute or emergency intervention and is directly and solely related

to her eviction, which, on her construction, would render her forever immune from enforcement;

- (6) There is contemporary evidence that Ms Lees, an author, is able to write, publish and publicise two new works of fiction, one of which is being published at the date of the hearing. That supports the obvious inference that her condition is not serious, or has significantly improved;
 - (7) It is just to grant an injunction to prevent further attempts by Ms Lees to frustrate the enforcement of a very stale judgment and to give finality to this matter and, in particular to Mr Kaye who is an innocent victim of Ms Lees' conduct and to the innocent purchaser of Ms Lees' property, Ms Chelsea Dixon.
20. In her witness statement and the very substantial bundle which Ms Lees lodged with the court on 23 January she submits that:
- 1) there is plenty of material before the court from which it can conclude that she is receiving mental health crisis treatment which satisfies the statutory criteria;
 - 2) as a person who is suffering from a mental health crisis she is under a disability and the conduct of Mr Kaye towards her has been discriminatory;
 - 3) there has been a breach of her rights under the European Convention on Human Rights in the way in which she was evicted from her Flat and subjected to repeated applications to bring the moratoria to an end;
 - 4) the Application is an abuse of the process;
 - 5) Mr Kaye has failed to provide evidence that the Application is urgent or that his health has suffered in the way alleged in the witness statements filed by his solicitor on his behalf.

Discussion

21. It seems to me logical and convenient to consider first whether the conditions for the making of a mental health crisis moratorium were met at the date of grant of the Current Moratorium and secondly, if the conditions were met, whether the Current Moratorium unfairly prejudices the interests of Mr Kaye and should be cancelled in part or in whole.

The Legal Framework

22. By section 7 of the Financial Guidance and Claims Act 2018 the Secretary of State was given power to make regulations "for establishing a debt respite scheme". The aim of the scheme is to be found in section 6 of the Act:

"(2) A debt respite scheme is designed to do one or more of the following:

(a) protect individuals in debt from the accrual of further interest or charges on their debts during the period specified by the scheme,

(b) protect individuals in debt from enforcement action from their creditors during that period, and

(c) help individuals in debt and their creditors to devise a realistic plan for the repayment of some or all of the debts."

23. The Regulations were made by the Secretary of State on 17 November 2020 and came into force on 4 May 2021 (Regulation 1(2)). They provide for two different types of moratorium, a "Breathing Space Moratorium" (under Part 2 of the Regulations) and a "Mental Health Crisis Moratorium" (under Part 3 of the Regulations). It is the latter type of moratorium which is currently in place.

24. A mental health crisis moratorium is defined by Regulation 28(1) as a moratorium "in respect of a debtor who is receiving mental health crisis treatment". For the purposes of the Regulations "a debtor is receiving mental health crisis treatment" according to Regulation 28(2) when the debtor

"(a) has been detained in hospital for assessment under sections 2 or 4 of the Mental Health Act 1983,

(b) has been detained in hospital for treatment under section 3 of that Act,

(c) has been removed to a place of safety by a police constable under sections 135 or 136 of that Act,

(d) has been detained in hospital for assessment or treatment under sections 35, 36, 37, 38, 45A, 47 or 48 of that Act, or

(e) is receiving any other crisis, emergency or acute care or treatment in hospital or in the community from a specialist mental health service in relation to a mental disorder of a serious nature."

25. Regulation 28(3) defines "specialist mental health service" in the following terms:

"(3) In this regulation "specialist mental health service" means a mental health service provided by a crisis home treatment team, a liaison mental health team, a community mental health team or any other specialist mental health crisis service."

Pausing there, it is apparent that the two conditions for the making of a mental health crisis moratorium under Regulation 28(2) (e) are that

(1) the debtor is suffering from a "mental disorder of a serious nature" and

(2) in respect of that disorder the debtor is receiving "crisis, emergency or acute" care or treatment in hospital or in the community.

26. So far as condition (1) is concerned Ms Bretherton reminds me of the framework and provisions of the Mental Health Act 1983, which was extensively amended by the Mental Health Act 2007, and submits that the Regulations have to be construed consistently with that framework and Act. I agree. In my view the specific reference

to the 1983 Act in sub-paragraphs 28(2)(a) to (d) makes it plain that the Regulations insofar as they relate to mental health crisis moratoria are to be construed consistently or in accordance with the Act.

27. Further it seems to me that sub-paragraph 28(2)(e) has to be read consistently with the 4 categories of situation which precede it. In my judgment sub-paragraph (e) is a sweeping up provision which is intended to catch situations which have the same quality as those identified in sub-paragraphs (a) to (d) so far as the severity of the mental disorder is concerned but which do not fall into one of those earlier categories. The categories are not intended to provide some type of descending hierarchy. In my judgment (e) is intended to provide for an equivalent situation to those described in (a) to (d) but where the treatment can be provided without the debtor being removed or detained without their consent, which is the central feature of the powers conferred by the provisions of the Mental Health Act 1983 referred to in (a) to (d).
28. Sub-paragraphs 28(2)(a) to (d) each deal with a situation where a person is removed or detained without their consent or that of a nearest relative or against their will for assessment, treatment or protection and the nature of the mental health disorder is such that the proposed assessment, treatment or protection is for their benefit and/or for that of the public even though the person concerned may not agree. The hurdles for satisfying the conditions specified in (a) to (d) are necessarily high, directly conflicting with the individual's right to liberty and their free will. In my judgment the use of the phrase "mental disorder of a serious nature [my underlining]" is a plain indication that before a mental health crisis moratorium is put in place in reliance on sub-paragraph (e) evidence is required to demonstrate that the debtor is suffering from a disorder of a severity which in other circumstances would justify overriding the free will of the debtor in detaining or removing them in their own best interests or that of the public.
29. As to condition (2) the care or treatment must be of a nature and type designed to meet a crisis or emergency or of an acute nature. There is no further statutory definition of those words so far as I am aware but I note the repeated reference to crisis in Regulation 28(3) which defines the type of specialist who is to be providing the treatment. In my judgment the words crisis, emergency and acute are to be read disjunctively, in the sense that they are alternatives, but consistently with each other, in that they each relate to and reflect alternative states of urgency and severity. It is obvious therefore that not all care or treatment will satisfy this second condition which requires something well beyond general or routine treatment.
30. An application for a mental health crisis moratorium can be made by any of the persons listed in regulation 29(1). The list includes the debtor, and a range of persons who might provide medical care for persons receiving mental health crisis treatment. The application is made to a "debt advice provider" defined in regulation 3(1) as

"(1) In these Regulations a "debt advice provider" is—

(a) an authorised person who has Part 4A permission to carry on any regulated activity of the kind specified in article 39E (debt-counselling) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, or

(b) a local authority."

Regulation 30(4) permits a debt advice provider to initiate a mental health crisis moratorium if the following conditions are met:

- “(4) The conditions referred to in paragraph (2)(b) are that, in light of the information provided in accordance with regulation 29(2) and (4) and any other information obtained by the debt advice provider—*
- (a) the debtor is unable, or is unlikely to be able, to repay some or all of their debt as it falls due,*
 - (b) a mental health crisis moratorium would be appropriate, and*
 - (c) an approved mental health professional has provided evidence that the debtor is receiving mental health crisis treatment.*
- (5) For the purpose of paragraph (4)(b), when considering whether a mental health crisis moratorium is appropriate, the debt advice provider—*
- (a) must consider whether the debtor has sufficient funds or income to discharge or liquidate their debt as it falls due, and*
 - (b) may have regard to any other factor that the debt advice provider considers relevant.”*

The duration of a mental health crisis moratorium is different to that of a breathing space in that, in accordance with regulation 32(2).

- “(2) A mental health crisis moratorium ends on the earliest of—*
- (a) the end of the period of 30 days beginning with the day on which the debtor stops receiving mental health crisis treatment,*
 - (b) the end of the period of 30 days beginning with the day on which a debt advice provider makes a request to the debtor's nominated point of contact in accordance with regulation 33 and during which period the debt advice provider does not receive a response,*
 - (c) the day on which cancellation of the mental health crisis moratorium takes effect under regulations 18, 19 or 34, or*
 - (d) the day on which it ends in accordance with regulation 21 as a result of the death of the debtor.”*

Thus a mental health moratorium continues, in essence, so long as the debt advice provider is satisfied where an application is made under sub-paragraph 28(2)(e) that the debtor is continuing to receive mental health crisis treatment for a mental disorder of a serious nature.

31. The request for the review of the Current Moratorium was made by Mr Kaye’s solicitors pursuant to Regulation 17:

“17. — Creditor's request for review of a moratorium

- (1) Subject to paragraph (4), a creditor who receives notification of a moratorium under these Regulations may request that the debt advice provider who initiated the moratorium or (as the case may be) the debt advice provider to whom the debtor has been referred since the start of the moratorium*

reviews the moratorium to determine whether it should continue or be cancelled in respect of some or all of the moratorium debts on one or both of the following grounds, namely that—

- (a) the moratorium unfairly prejudices the interests of the creditor, or*
- (b) there has been some material irregularity in relation to any of the matters specified in paragraph (2).*

(2) The matters in relation to which a creditor may request a review on the ground of material irregularity are that—

- (a) the debtor did not meet the relevant eligibility criteria when the application for the moratorium was made,*
- (b) a moratorium debt is not a qualifying debt, or*
- (c) the debtor has sufficient funds to discharge or liquidate their debt as it falls due."*

It is common ground, or at least as I understand it it is not in dispute, that the request for a review of the Current Moratorium was made in accordance with Regulation 17(3) and (4) within 20 days of the date the moratorium started and the debt advice provider completed the review and notified the creditor of the outcome well within the 35 days directed by the Regulation 18.

32. The Application was made pursuant to Regulation 19 which reads:

"19. – Court application by creditor for cancellation of a moratorium"

If a debt advice provider has carried out a review of a moratorium following a request made by a creditor under regulation 17 and the moratorium has not been cancelled under regulation 18 in respect of some or all of the moratorium debts as a result, then the creditor may make an application to the county court on one or both of the grounds in regulation 17(1)".

The power of the court on such an application is to be found in sub-paragraph (3) of Regulation 19:

"(3) Where on an application under this regulation the court is satisfied as to either of the grounds in regulation 17(1), it may do either or both of the following, namely –

cancel the moratorium debt owed to the creditor who made the application to the court,

cancel the moratorium in respect of any other moratorium debt."

It is common ground that although Regulation 19(1) refers to an application under Regulation 19 being made to the county court nevertheless the High Court has concurrent jurisdiction and, in the context of this case, it is appropriate for the Application to be made within the existing High Court proceedings, support for which view is to be found in the decision of HHJ Paul Matthews in Axnoller Events Limited v Brakes [2021] EWHC 2308 (Ch) [paras 8 to 10]. It is to be noted that Swift J in the December judgment did not suggest otherwise in respect of an application which have been made to the county court.

33. The reason why Mr Kaye's application failed before Swift J is that, in essence, in seeking to challenge the ongoing moratoria he had missed various procedural and statutory deadlines and there was no jurisdiction to entertain a challenge after the time limit had been passed.

Were the conditions for the Current Moratorium met?

34. As I have said above, there are, in my view, two conditions which have to be satisfied before the criteria for initiation of a mental health crisis moratorium can be met; (1) the debtor is suffering from a "mental disorder of a serious nature" and (2) in respect of that disorder the debtor is receiving "crisis, emergency or acute" care or treatment in hospital or in the community. I am hampered on this Application, as I have also said above, by the lack of evidence which the order of Freedman J had been intended to provide. I am left therefore with the two documents dated 15 August 2022 from Dr Sacks and 3 November 2022 from Ms Hooper set against the context which appears from the numerous witness statements filed by both parties at various stages of this long running litigation.
35. In relation to the letter dated 15 August 2022 from Dr Sacks Swift J commented at [26]:

"It is not for me on this application, to assess the evidence provided to Mr Casson for the purposes of the discharge of his functions under regulation 32 of the 2020 Regulation in this case. One document I have seen that might be relevant to such issues is a letter dated 15 August 2022 from Dr Sophie Sacks, the Consultant Psychiatrist at the NHS West London Trust responsible for Ms Lees' treatment. The material part of that letter is as follows:

"2. The care/treatment that Ms Lees is receiving for her mental health condition(s);

Ms Lees is currently receiving 3-monthly outpatient psychiatric follow-up appointments. Her initial appointment was face to face, but subsequent appointments have been telephone-based, as she has been residing outside of London following eviction from her home. Her relocation outside London has limited what other supportive interventions we have been able to offer her.

Alongside her psychiatric out-patient appointments, she is currently undergoing a Care Act assessment by my Social Work Hub colleagues.

3. Your view as to the condition(s)'s duration, severity, prognosis and timescale for improvement.

Ms Lees has a history of trauma from a young age, which I believe has significantly impacted the development of her personality, coping strategies and the way she relates to others. These characteristics are typically enduring in nature therefore likely to be long-lasting and dependent on what longer-term interventions she is able to engage with. Her symptoms related to Adjustment Disorder, which is characterised by low mood, anxiety and suicidal thoughts, appear more directly related to stresses around the eviction from her home. The time scale for improvement is therefore dependent on the resolution of these stressors."

Were information of that nature to have been the only information available to Mr Casson, say for the purposes of the exercise of his functions under regulation 32 of the 2020 Regulations, I can see there could be good reason to conclude that it fell somewhat short of demonstrating that Ms Lees is now receiving treatment of the nature required by regulation 28(2)(e) in relation to a "mental disorder of serious nature". However, as I have said, I am not privy to all the information that is available to Mr Casson, and his exercise of his functions under regulation 32 of the 2020 Regulations is not, on this application, a matter for me."

I respectfully agree. However, there is no evidence before me to suggest that there was any other information before the debt advice provider at the time that the Current Moratorium was being sought.

36. I readily accept that I do not have the assistance of an expert to explain what an Adjustment Disorder is but there is no indication in the letter from Dr Sacks that it is a mental health disorder of a serious nature equivalent to the disorders for which a debtor might be forcibly removed or detained as provided for in sub-paragraphs 28(2)(a) to (d) of the Regulations. The letter does not begin to satisfy me that Ms Lees was at the material time suffering from a disorder of the severity required by the Regulations. Dr Sacks does not appear to describe Ms Lees' condition as serious, although her view appears to be that Ms Lees was suffering from a mental health crisis, albeit without further explanation. The symptoms described by Dr Sacks in section 3 of the letter relate not to the alleged disorder itself but to the eviction which took place in the Spring of 2022 leading unsurprisingly to Ms Lees suffering from stress, but in any event they would not lead me to conclude, if attributable to the diagnosed disorder, that it was of a serious nature within the proper meaning of that phrase as used in Regulation 28. Secondly the treatment described in the letter cannot be categorised as "crisis, emergency or acute". According to Dr Sacks the treatment consisted of three-monthly patient follow-up appointments without any other medical or clinical interventions whether involving medication, therapy or otherwise. In my judgment, therefore, this evidence is not capable of satisfying either of the conditions required by Regulation 28(2)(e) let alone both.

37. The email from Ms Hooper of 3 November 2022 adds nothing of value to assessment of the issue of whether the relevant criteria were met at the date of initiation of the Current Moratorium. The email is no more than an assertion (albeit from a potentially relevant professional) that Ms Lees was receiving mental health crisis treatment but provided nothing of substance which the court could evaluate.
38. I have therefore come to the conclusion on this limb alone that on this evidence the criteria of Regulation 28(2)(e) were not met when the application for the Current Moratorium was made (see Regulation 17(2)(a)). There has therefore been a material irregularity in accordance with Regulation 17(1)(b). As a result I would cancel the Current Moratorium pursuant to Regulation 19(3)(a) and (b).
39. I am fortified in my view by what were strictly, I think, obiter comments made by Swift J in the December judgment where, having dismissed Mr Kaye's application because of his failure to meet the relevant time limits, he went on to say [25]:

“In reaching these conclusions I recognise they are conclusions capable of having harsh effects on a creditor. I accept that the case before me is a “hard case” because the overall effect of the conclusions I have reached on the application of regulations 13 and 19 is that Mr Kaye will have no opportunity to request a review of the moratorium granted on 15 February 2022. However, it is readily apparent, that, as made, the 2020 Regulations are intended to and do strike the balance between debtors and creditors in favour of debtors. This is particularly striking for mental health crisis moratoriums. Breathing space moratoriums are limited to 60 days in length. Mental health crisis moratoriums are subject to the provisions of regulations 32 to 34; such moratoriums can endure indefinitely. This places a great burden both on debt advice providers and also on the mental health professionals who provide the opinion on which the debt advice providers act. All must act with scrupulous care to ensure that mental health crisis moratoriums are maintained only for so long as, taking the facts of this case as an example, the debtor is in receipt of mental health crisis treatment. Since it is unrealistic to expect a debt advice provider to assess the debtor's health for himself (and the 2020 Regulations do not anticipate this to be a task for the debt advice provider at all), it is essential that evidence that establishes whether a debtor is receiving mental health crisis treatment – i.e., that one or other of the conditions in regulation 28(2) is met is clear, considered and reliable. This is especially so when the matter rests on the application of regulation 28(2)(e). Each of the other conditions within regulation 28(2) sets a clearly observable benchmark. Condition (e) is different, requiring an opinion on the mental disorder – it must be one “of a serious nature” – and of the treatment being provided for that mental disorder. Although debt advice providers will not be in a position to second-guess medical evidence, they must ensure the evidence they have is

cogent. Where necessary they must be prepared closely to assess the information available and seek clarification or further information as necessary, before concluding that the conditions for continuation of a mental health crisis moratorium are met. Any other approach risks bringing the scheme of the 2020 Regulations into disrepute.”

Again, I respectfully agree and adopt those comments.

Unfair Prejudice

40. Given my conclusion above this second limb of the application falls away but I have received detailed written and oral submissions addressed to it and I therefore set out briefly my views. Ms Bretherton KC again drew my attention to the Axnoller case where HHJ Paul Matthews held at [32]:

“I accept that unfairness is to be assessed objectively, and that this will require the court to embark upon a balancing exercise. I further accept that, where the moratorium discriminates unfairly between creditors, so that the impact on one is significantly more severe than on another, that may well be a proper basis on which the court can say that the moratorium “unfairly prejudices” the applicant creditor. But I also accept that the phrase “unfairly prejudices” should not be confined to that. These are ordinary English words, undefined in the legislation, and not obviously terms of art. They can properly be understood to go wider.”

Ms Bretherton also submitted that the following principles can be derived from Axnoller, a decision with which Deputy ICC Judge Schaffer agreed in IV Fund Limited SAC v Mountain [2021] EWHC 2870 (Ch):

- (1) In assessing prejudice, post-moratorium conduct can alter the balance of prejudice. Improvement in condition may enable a debtor to engage with the debt problem, and failing to do so having sufficiently improved might make the moratorium unfairly prejudicial; at [34]
- (2) The Regulations necessarily require a Court to consider prejudice which outweighs any mental health crisis which the debtor may demonstrate. The interests of creditors and debtors are chalk and cheese, and the Court may determine for itself where the line is to be drawn; [35];
- (3) Disclosure of treatment and prognosis is required to carry the balancing exercise out, without which it will be difficult to assess the debtor’s interests; [37];
- (4) Accordingly, sufficient detail of the duration and severity of the illness, the prognosis and the timescale for improvement are required; [39];
- (5) Where the evidence, if any, suggests that the debtor’s mental health has improved to an extent that it would be reasonable to expect them to engage with debt advice, that would weigh in favour of cancellation; [45].

- (6) In assessing where the balance lies, Regulation 19(3) enables a court to distinguish between the effects on a particular creditor, and creditors generally, and make a tailored order; [25] and [36].
41. In the instant case, having carried out the balancing exercise contemplated by HHJ Paul Matthews, I have come to the conclusion that the interests of Mr Kaye have been unfairly prejudiced for the following reasons:
- i) The Judgment Debt is substantial, it is longstanding and no attempts have been made by Ms Lees to discharge it notwithstanding that one of the express purposes of the breathing space legislation is, as the name suggests, to provide the debtor with the opportunity of making a “realistic plan for the repayment of some or all of the debts” (section 6(2) of the Financial Guidance and Claims Act 2018);
 - ii) Either the debt is no longer fully secured or will cease to be fully secured in the near future as the sums owed by Ms Lees to Mr Kaye continue to grow;
 - iii) The evidence suggests that Mr Kaye, whose claims have been vindicated by a court which awarded appropriate compensation, has exhausted his financial means in seeking to enforce that award;
 - iv) Ms Lees did not participate in the trials before HHJ Roberts and has not directly engaged with the merits of the Application;
 - v) Ms Lees has subsequently been protected by a sequence of moratoria the basis for which must now be in doubt, which must be to the detriment of Mr Kaye;
 - vi) There is no evidence to suggest that Ms Lees requires any further protection from her debts whereas there is evidence that she has been able to continue to work and be economically productive.

An injunction

42. I turn finally to whether an injunction should be granted to prevent Ms Lees from seeking a further breathing space or mental health crisis moratorium which would have the effect of preventing Mr Kaye from finally enforcing the Judgment Debt. There is plainly a serious issue here, given that if Ms Lees were immediately after this judgment to seek a further moratorium the effect if it were granted is that Mr Kaye would be prevented from enforcing the Judgment Debt. Had Ms Lees been present for the hearing of this Application I would have considered with her the best way of balancing her interests and those of Mr Kaye in that regard but she was not present.
43. I have no doubt that, notwithstanding the statutory nature of the debt respite scheme (which includes the scheme for mental health crisis moratoria), the High Court has power to restrain potential abuses of the scheme by placing sensible limits on the

ability to access it. Taking that as my starting point I am satisfied that there is a real risk, given the history of this case, that were she not to be restrained Ms Lees might seek to obtain a further moratorium the effect of which would be to frustrate the terms of this judgment and prevent Mr Kaye from enforcing the Judgment Debt. A chronological analysis of the steps Ms Lees has, and has not, taken in the litigation from its inception in 2015 demonstrates clearly to me that there is such a risk. She failed to observe orders made in the county court and failed to engage with the trial process. She did not appeal the decisions made by HHJ Roberts. She has made repeated applications for moratoria at points in time when Mr Kaye was getting closer to enforcement, including on the eve of scheduled evictions. She has failed to engage properly with the Application leaving me with the paucity of material as to her alleged disorder and treatment which I have set out in detail above.

44. In all the circumstances I have no doubt that a fair and proportionate approach dictates that I should restrain Ms Lees from seeking a further breathing space or mental health crisis moratorium for a period which I will discuss when I hand down judgment. However, to protect her interests it is right that I should provide first, that she has permission to apply within 7 days of the date of the order to be made today to vary or discharge that part of it which relates to the proposed injunction but secondly, if she does not avail herself of such permission, she should nevertheless have permission to apply to vary or discharge the injunction at any point in the course of its duration if she wishes to seek a further breathing space or mental health crisis moratorium so long as any such application is made on notice and is accompanied by the evidence which she proposes to rely on in support of request for a further moratorium.
45. For all those reasons I will cancel the Current Moratorium and grant the injunctive relief which I have just outlined.