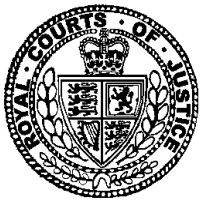

Neutral Citation Number: [2021] EWHC 2308 (Ch)

Case Nos: E00YE350, F00YE085

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY TRUSTS AND PROBATE LIST (ChD)

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

Date: 17/08/2021

Before :

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

- -

BETWEEN:

AXNOLLER EVENTS LIMITED

Claimant

and

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

Defendants

AND BETWEEN:

(1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE
(3) TOM CONYERS D'ARCY

Claimants

and

THE CHEDINGTON COURT ESTATE LIMITED

Defendant

- -

Andrew Sutcliffe QC and William Day (instructed by **Stewarts Law LLP**) appeared on behalf of **Axnoller Events Ltd and The Chedington Court Estate Ltd**
Mrs Nihal Brake appeared on her own behalf and that of **Mr Andrew Brake and Mr Tom D'Arcy**

Hearing date: 12 August 2021

- -

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.

.....

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 10:30 am.

HHJ Paul Matthews :

Introduction

1. These are the written reasons for my decision on two applications by Axnoller Events Ltd ("AEL") and The Chedington Court Estate Ltd ("Chedington") (together, "the Guy Parties"), made by notice dated 25 June 2021. The respondents are Mrs Nihal Brake, Mr Andrew Brake, and Mr Tom D'Arcy ("the Brakes"). One is freestanding. The other is made in both the so-called "Possession Proceedings" (brought by AEL against Mr and Mrs Brake) and the "Eviction Proceedings" (brought by the Brakes against Chedington). I announced my decision by email to the parties on 13 August 2021, following the hearing on 12 August 2021. The reason for the urgency, in both announcing a decision and giving written reasons for that decision, is that these two claims are listed for trial on 6 September 2021 and 11 October 2021 respectively.

2. The applications are for two forms of relief. First, the applicants seek an order cancelling the mental health crisis moratorium into which Mr Andrew Brake (second defendant in the Possession Proceedings and second claimant in the Eviction Proceedings) entered on 6 May 2021, under the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 ("the 2020 Regulations"). Second, the applicants seek an order that, unless the Brakes pay certain existing costs orders in favour of the Guy Parties, they be debarred from defending and counterclaiming in the Possession Proceedings and claiming in the Eviction Proceedings, and their relevant statements of case be struck out.

Background

3. The background to the litigation in which these applications are made is both lengthy and complex. I take the following summary from my decision in *Brake v Guy* [2021] EWHC 671 (Ch), which concerned the part-trial of the so-called "Documents Claim" between the parties:

> "4. In September 2004, the first claimant (then Mrs D'Arcy, but whom I shall call by her current name, Mrs Brake) acquired West Axnoller Farm ("the Farm"), near Beaminster in Dorset, from local landowners, the Vickery family (who continued to have substantial landholdings locally). This property included a substantial dwelling-house known subsequently as Axnoller House. In 2006 Mrs Brake began to operate a holiday letting business at the Farm, subsequently joined in partnership in 2008 by her husband, the second claimant ("Mr Brake"). Just outside the southern boundary of the Farm, on the other side of the private lane leading to the Farm, lies another, smaller residential property known as West Axnoller Cottage (the "cottage").

5. In July 2002 a Mr and Mrs White had purchased the cottage from the Vickery family and were living there when Mrs Brake bought the Farm. Mrs Brake borrowed money from bankers Adam & Co in 2006, secured by a first legal charge on the Farm. The financial crisis of 2008 made it impossible to obtain further bank finance to expand the business being carried on at the Farm. The claimants therefore looked for an outside investor.

6. In February 2010 the claimants entered into a partnership with a limited partnership called Patley Wood Farm LLP ("PWF"), whose principal was Mrs Lorraine Brehme ("Mrs Brehme"). The new partnership (known as "Stay in Style") was to carry on the business of providing luxurious weekend and other breaks, and hosting events such as weddings. The claimants contributed the Farm as partnership property, although it remained charged to Adam & Co to secure existing borrowings. With funds contributed by Mrs Brehme, on 8 March 2010 the partnership acquired the cottage, the legal title to which was transferred to the claimants and Mrs Brehme jointly, who were registered as proprietors. At first the cottage was used as accommodation for a housekeeper and then for a personal assistant (Simon Windus) and his family. After they left in 2012 it was used (inter alia) for the claimants to stay in when the main house was let.

7. Differences arose between the claimants on the one hand and PWF on the other, as partners in Stay in Style. In accordance with the partnership agreement, these were referred to arbitration, which ended on 21 June 2013 with an award in favour of PWF, and the dissolution of the partnership. Following a failure to pay orders made against them for costs in the arbitration, the claimants were adjudicated bankrupt on 12 May 2015. Mr Duncan Swift was appointed trustee in bankruptcy with another person, who later retired and was not replaced. The partnership itself subsequently went into administration (in 2016), and then into liquidation (in 2017).

8. In October 2014 Adam & Co, the bank which had lent money to Mrs Brake against the security of the Farm, appointed receivers under the Law of Property Act 1925. After marketing the property, the LPA receivers sold it in July 2015 to a newly incorporated company, Sarafina Properties Limited ("Sarafina"), said to be a corporate vehicle for the Hon Saffron Foster ("Mrs Foster"), a daughter of Lord Vestey, as well as a friend of Mrs Brake.

9. In February 2017 Mrs Foster sold the company to The Chedington Court Estate Ltd ("Chedington", the second defendant), and its name was changed to Axnoller Events Limited ("AEL"). It is the third defendant in this claim. Chedington is an investment vehicle for Dr Geoffrey Guy ("Dr Guy", the first defendant). Mr and Mrs Brake were employed to continue to run the wedding and rental accommodation business as before. Relations between the parties broke down, and on 8 November 2018 notice was given of the termination of their employment. This led to proceedings in the employment tribunal against Chedington and others by

each of the claimants ("the Employment Claims"), and proceedings in the High Court by AEL against the applicants to recover possession of the Farm ("the Possession Claim").

10. Following this, in January 2019, Mr Swift as trustee in bankruptcy entered into a transaction with the liquidators of the partnership in relation to the cottage, to acquire the liquidators' rights in it. Chedington entered into back to back transactions with Mr Swift in order to acquire those rights. The Brakes allege that Chedington and Mr Swift acted collusively, implementing "unlawful arrangements to create the false appearance that Chedington had acquired title to the cottage". Chedington subsequently took possession of the cottage, the Brakes say unlawfully. They therefore commenced eviction proceedings against Chedington ("the Eviction Claim"). So the position on the ground currently is that the claimants are in occupation of the house, but seek possession of the cottage, whereas the second defendant is in occupation of the cottage, and the third defendant seeks possession of the house. Trials of these two possession claims are currently listed for April and May 2021.

11. In addition, on 12 February 2019 the Brakes commenced insolvency proceedings (the "Liquidation Application" and the "Bankruptcy Application") against both the liquidators of the partnership and their trustee in bankruptcy. The first purpose of these insolvency proceedings was to unwind the disputed transactions. The second purpose was (as against the trustee) to establish that the Brakes' pre-existing interests in the cottage and the adjacent parcels had revested in them and Mrs Brake respectively on 12 May 2018 under the Insolvency Act 1986, section 283A, on the basis that they were the Brakes' sole or principal residence at the date of bankruptcy, and Mr Swift had taken no steps to realise them three years later. In April 2019, by consent, Chedington was joined as second respondent to the proceedings against Mr Swift, because it claimed to be a successor in title to him. In June 2019 Mr Jarvis QC made two orders by consent, one removing Mr Swift from office, and another appointing his successors.

12. In January 2020 Chedington applied to strike out the proceedings against the liquidators and most of those against Mr Swift and itself, on the basis that the Brakes lacked standing to bring them. I heard those applications in early March 2020, and acceded to them. I struck out the whole of the Liquidation Application ([2020] EWHC 538 (Ch)), and most of the Bankruptcy Application ([2020] EWHC 537 (Ch)), for lack of standing. An appeal against my decision in the Liquidation Application was dismissed by the Court of Appeal. An appeal against my decision in the Bankruptcy Application was however allowed, so that that application is yet to be tried (see [2020] EWCA Civ 1491 for both appeals). But, as at March 2020, the only significant matter left from the Liquidation and Bankruptcy Applications to be tried in May of that year, against the former trustee and Chedington, was the revesting issue under section 283A.

> 13. It is relevant to note that, on 4 May 2020, the claimants applied by notice in relation to that section 283A claim for me to recuse myself from trying it. I heard that application on 7 May and gave judgment on 11 May 2020, refusing the application: see [2020] EWHC 1156 (Ch), [2020] BPIR 1254. Permission to appeal against my decision was refused by the Court of Appeal. So the section 283A claim was tried, and I gave judgment in July 2020, in favour of Chedington ([2020] EWHC 1810 (Ch), [2020] 4 WLR 113). An application for permission to appeal was refused by the Court of Appeal on 30 October 2020."

4. In the Documents Claim, I found in favour of the Guy Parties, and against the Brakes, having already held on a preliminary issue that certain defences of law were not open to the Brakes: see *Brake v Guy* [2021] 4 WLR 71 (preliminary issue), [2021] EWHC 671 (Ch) (substantive claim). An application to the Court of Appeal for permission to appeal against the substantive decision remains outstanding. The next matters to be tried in this wide-ranging litigation are the Possession Proceedings and the Eviction Proceedings. They were originally listed for April and May this year, but were adjourned after the Brakes' counsel withdrew from the case. Later, their solicitors withdrew as well. In the former case AEL claims possession of Axnoller House against the Brakes. There is a counterclaim by the Brakes. In the Eviction Proceedings the Brakes sue Chedington for what they say was their unlawful eviction from Axnoller Cottage.

5. As I have already said, these two claims are listed for trial on 6 September 2021 and 11 October 2021 respectively. On 13 April 2021, after an oral hearing conducted remotely by video-conference, I refused an application by the Brakes for me to recuse myself from presiding over these trials. I subsequently gave written reasons for that decision: [2021] EWHC 949 (Ch). There have been other interlocutory skirmishes too. There are also employment proceedings on foot, listed for trial in June 2022. However, as I have noted, the Brakes are now acting in person, and Mrs Nihal Brake is both conducting the litigation and acting as advocate on behalf of them all.

Preliminary matters

6. As stated above, the present applications are made by notice dated 25 June 2021. They are supported by witness statements from Frances Baird of 25 June 2021 and 29 July 2021, and from Oliver Ingham of 8 August 2021. They are opposed by witness statements of Mrs Nihal Brake of 22 July 2021, 10 August 2021 and 11 August 2021. At the hearing I gave permission for the statement of Mr Ingham and the third statement of Mrs Brake to be admitted in evidence. I also gave permission at the hearing for the Guy Parties to refer to Mrs Brake's earlier witness statements in support of the Brakes' application to stay costs orders in the "Documents Claim" to which I referred above.

7. There were two other preliminary matters, which I raised following my pre-reading. The first was the question whether the application to cancel the moratorium should be in the County Court or the High Court. The second was whether the application to cancel the moratorium should have been made by

claim form instead of by ordinary application notice in form N244. I will deal with these briefly in turn.

County court or High Court?

8. The application to cancel the moratorium is made under regulation 19 of the 2020 Regulations. So far as relevant, that reads as follows:

> "(1) 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)."

For present purposes, the critical words are "the creditor may make an application to the county court". The present application, however, is made the High Court.

9. As is well known, the High Court enjoys an almost plenary jurisdiction in England and Wales over civil litigation at first instance, both at law and in equity. This currently derives from section 19 of the Senior Courts Act 1981, but reaches back, through section 18 of the Supreme Court of Judicature (Consolidation) Act 1925, to the jurisdiction previously enjoyed before 1875 by the old courts of common law and equity. By contrast, the jurisdiction of the county court is entirely statutory. Some statutory provisions, however, not only provide for the jurisdiction of the county court in certain matters, but expressly say that that jurisdiction is exclusive, so that the High Court has no parallel jurisdiction: see *eg* the County Courts Act 1984, section 21(3). Other provisions give jurisdiction exclusively to the county court below a certain value, but not exclusively above that level: see CPR Practice Direction 7A, paragraphs 2.1, 2.2. Other provisions again give jurisdiction to the County Court, *unless* the High Court is satisfied that it is appropriate for that court to deal with the matter: see *eg* CPR rule 55.3.

10. None of these applies to the present case. Regulation 19 does not say that the jurisdiction of the county court is exclusive, nor is it exclusive to a certain point, and neither is it stated that the High Court should have jurisdiction only if it thinks it appropriate. Instead, it is said that the application "may" be made to the county court. In my judgment, this wording does not exclude the jurisdiction of the High Court. Of course, the High Court has power to transfer the matter to the county court under section 40 of the County Courts Act 1984. It could normally be expected to transfer such an application to the county court if there was no reason to retain it in the High Court. But in the present case there is good reason to leave the application in the High Court, because it is closely connected with existing High Court litigation. In circumstances where the same court centre, the same court staff and the same judge would be involved, it would be simply inefficient to require that this matter be transferred formally to the county court, for no advantage gained.

Claim form or N244?

11. The second is the question of the appropriate procedure to adopt in initiating the application. Where an application is made within existing proceedings, for example for an adjournment of a hearing, for disclosure of documents, or for security for costs, the matter is dealt with by way of an ordinary application notice, in form N244. An application to set aside a moratorium under the 2020 Regulations is not made within any existing proceedings, even if there are existing proceedings which it will affect. So, in principle, I would have thought that the appropriate method of making such an application was to issue a claim form, either under CPR Part 7 or CPR Part 8, as appropriate. That would ensure that the full range of civil procedure management powers and orders is available to the court. For example, there may be a need for disclosure.

12. In the present case, the applicants have proceeded simply by way of ordinary application notice. No complaint was made by the Brakes about this, and indeed I cannot see how they were prejudiced by the procedure adopted. Given that this appears to be the first case on making such an application, I will not therefore require the issue of a separate claim form. But in another case the circumstances may be different, and the issue of an ordinary application notice instead of a claim form may prejudice the respondent. Accordingly, for the future the procedure to be adopted should be that by claim form. That does not prevent the court in the exercise of its case management powers from adopting a shortened procedural approach leading to a summary decision on witness statement evidence alone, rather than at trial after cross-examination, as for example is recommended in applications under section 117 of the Companies Act 2005: see *Burry & Knight Ltd v Knight* [2014] EWCA Civ 604, [2014] 1 WLR 4046, [28], [113], [117].

[12A. **Postscript:** Since delivering this judgment, I have been referred to CPR PD 70B, paragraph 2, which I was not aware of at the time of preparing it. That paragraph provides that an application of the kind made here should be made by ordinary notice under CPR Part 23, rather than by claim form. I therefore add this short correctional paragraph, without otherwise altering the text of my judgment, in order that litigants and their advisers should not be misled.]

Evidence

13. The evidence in this application was given entirely by witness statements. I was not asked to order, and did not order, any cross examination of the makers of those statements. In relation to the impact of the written evidence, I bear in mind the comments of the Court of Appeal in *Coyne v DRC Distribution Ltd* [2008] EWCA Civ 488, [2008] BCC 612, where Rimer LJ (with whom Ward and Jacob LJJ agreed) said:

> "58. As regards the need for oral evidence, Mr Ashworth reminded us that it is well-settled practice that if a court finds itself faced with conflicting statements on affidavit evidence, it is usually in no position to resolve them, and to make findings as to the disputed facts, without first having the benefit of the cross-examination of the witnesses. Nor will it ordinarily attempt to do so. The basic principle is that, until there has been such

> cross-examination, it is ordinarily not possible for the court to disbelieve the word of the witness in his affidavit and it will not do so. This is not an inflexible principle: it may in certain circumstances be open to the court to reject an untested piece of such evidence on the basis that it is manifestly incredible, either because it is inherently so or because it is shown to be so by other facts that are admitted or by reliable documents. Mr Ashworth referred us in support to *Re Hopes (Heathrow) Ltd, Secretary of State for Trade and Industry v. Dyer and others* [2001] 1 BCLC 575, at 581 to 582 (Neuberger J). He also referred us to paragraphs 17 and 18 of the judgment of Mummery LJ in *Doncaster Pharmaceuticals Group Ltd and Others v. The Bolton Pharmaceutical Company 100 Ltd* [2006] EWCA Civ 661, which provides a reminder of the caution the court should exercise in granting summary judgment in cases in which there are conflicts of fact which have to be resolved before judgment can be given. Mr Ashworth said that these principles apply equally to the case in which the evidence is given by witness statement rather than by affidavit, and I agree."

The 2020 Regulations

14. The 2020 Regulations were made on 17 November 2020 by the Economic Secretary to the Treasury under the Financial Guidance and Claims Act 2018, and came into force on 4 May 2021. They followed extensive consultation on establishing a so-called 'debt respite scheme', which had been a manifesto commitment of the Conservative Party at the 2017 General Election. The consequence is that there is a wealth of material, both parliamentary and non-parliamentary, dealing with the purpose of the 'debt respite scheme'. The parties have referred to some of this material. The question is how far the court is able to pay attention to it.

Interpretation

15. In *Fothergill v Monarch Airlines Ltd* [1981] AC 251, at 281B-C, Lord Diplock said:

> "Where the Act has been preceded by a report of some official commission or committee that has been laid before Parliament and the legislation is introduced in consequence of that report, the report itself may be looked at by the court for the limited purpose of identifying the 'mischief' that the Act was intended to remedy, and for such assistance as is derivable from this knowledge in giving the right purposive construction to the Act."

16. In *Pepper v Hart* [1993] AC 593, the majority of the House of Lords went further than this, Lord Browne-Wilkinson holding for the majority (at 634D-E) that:

> "In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases

> references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria."

17. The Treasury's published response in June 2018 to a call for evidence noted that "requiring someone to access debt advice before entering the breathing space could act as an important safeguard against abuse of the scheme". However, specific reference was made to persons experiencing mental health crises. The Treasury confirmed that "individuals in receipt of NHS treatment for a mental health crisis will be provided with an appropriate mechanism to access the scheme".

18. In October 2018 the Treasury published a policy proposal, which set out two policy objectives for the debt respite scheme, called "breathing space":

> "the first objective is to provide sufficient protections for individuals to help them to enter into a sustainable debt solution"; and
>
> "the second objective is to encourage more individuals to seek debt advice".

The proposal set out eligibility criteria for entering "breathing space". However, it also said:

> "There would be one exception to these eligibility criteria. Those experiencing a mental health crisis would be able to use an alternative access mechanism to enter the scheme … This is because it is difficult to effectively engage with debt advice during a mental health crisis".

However, "the protections afforded to individuals who access the scheme via the alternative access mechanism would be the same" as for those who satisfy the standard criteria.

19. The explanatory memorandum accompanying the draft legislation commented (at paragraph 7.3):

> "The policy objective is to incentivise more people in problem debt to access professional debt advice to do so sooner, and to enable them to enter the debt solution that is most appropriate in view of their individual circumstances…"

In relation to individuals in mental health crises, the memorandum said (at paragraph 7.14)

> "People receiving mental health crisis treatment will receive the protections of the scheme but through a different entry mechanism. This reflects the fact that while this group could benefit from the protections in

> the standard scheme, they may face challenges in meeting the requirement to engage with debt advice in order to meet the eligibility criteria."

Structure

20. Part 1 of the Regulations contains what are called "general provisions" covering interpretation of terms used and definitions of important concepts, such as "qualifying debt" and "moratorium debt". It also contains provisions dealing with the effects of a moratorium, on both existing legal proceedings (regulation 10) and generally (regulation 7). Part 2 of the Regulations contains provisions dealing with what it calls "Breathing space moratorium". These deal with applications for such a moratorium, and its initiation, duration and cancellation. Part 3 of the Regulations makes similar provision in relation to what it calls "Mental health crisis moratorium". Part 4 of the Regulations contains provisions dealing with what is called "Debt respite scheme administration", and Part 5 contains "Supplemental" provisions.

21. For the moment I will simply note that the general effect of a moratorium under these Regulations is that during the moratorium period the creditor is unable to take any steps to require a debtor to pay interest or other fees or charges, or take any enforcement action, in respect of the moratorium debt. Moreover, for this purpose 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 is particularly significant in the present case, where the debts owed by Mr Brake to the Guy Parties are joint debts with Mrs Brake and (in the case of the Eviction Proceedings) Tom D'Arcy, but there is no moratorium in effect in relation to her.

One moratorium or two?

22. The Guy Parties were particularly concerned to submit that the Regulations create only one debt moratorium, albeit with two sets of eligibility criteria, one for standard cases, and one for those suffering from mental health crises. The Brakes, by contrast, were at pains to argue that there were two different kinds of moratorium. In my judgment this argument is rather sterile. In the abstract, whether there is one moratorium or two seems to me to be an academic question. More practical, and therefore more important, is the question for what purpose do you need to know whether it is one kind of moratorium or another. If, for example, you are considering eligibility criteria, then for that purpose there are two kinds. But if, on the other hand, you are looking for the effects of the moratorium, then there is only one kind.

The first application

23. As I have said, Mr Andrew Brake entered a mental health crisis moratorium on 6 May 2021, that is, two days after the 2020 Regulations came into force. On that day the Guy Parties were notified by the Insolvency Service of the moratorium. On 20 May 2021, the Guy Parties asked the debt advice provider which had taken the necessary steps to initiate the moratorium to review and

cancel it under regulation 17, on the grounds that it unfairly prejudiced their interests.

24. Regulation 17(1), (2) provides as follows:

> "(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."

On 7 June 2021, the debt advice provider responded to the request, refusing to cancel the moratorium.

25. That refusal opened the way for the Guy Parties to apply to the court for an order cancelling the moratorium on the same ground. The application for the cancellation of the moratorium is made under regulation 19 of the 2020 Regulations. I have already set out the text of regulation 19(1). To that I should add regulation 19(3):

> "(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—
>
> > (a) cancel the moratorium in relation to a moratorium debt owed to the creditor who made the application to the court,
> >
> > (b) cancel the moratorium in respect of any other moratorium debt."

This enables the court to distinguish between the effects on the particular creditor who applies to the court and on other creditors generally.

26. The Brakes accepted that it was open to the Guy Parties to make an application under regulation 19, but pointed out that this was not an application for permission to take a step under regulation 7(2)(b), which reads as follows:

> "(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—
>
> […]
>
> (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."

I will return to this point later.

"Unfairly prejudices"

27. The ground on which the Guy Parties make their application is that the moratorium "unfairly prejudices" their interests. The first question therefore is the meaning of this phrase. Unfortunately, it is not defined by the legislation, and, so far as is known, this is the first case of an application for cancellation of a moratorium under the Regulations, so that there is no judicial guidance directly on the point. Every moratorium prejudices creditors. So, a moratorium cannot automatically "unfairly prejudice" creditors.

28. Equally, and as we have seen, every moratorium protects not only the particular debtor who is subject to the moratorium, but also those who are jointly liable with him or her. Historically this would have been necessary, given the common law rule that all joint debtors had to be sued in the same proceedings: *Kendall v Hamilton* (1879) 4 App. Cas. 504, 542-544. It is not so easy to understand the rationale for this extension of protection, now that one of two joint debtors can be sued individually, and so the protected co-debtor can be left alone, but that is not important now. What does matter is that protection for the other co-debtor also cannot be objected to as "unfair prejudice" to the creditor.

29. However, the Guy Parties suggest three possible analogies, arising from (i) unfair prejudice petitions in company law, under section 994 of the Companies Act 2005; (ii) creditors' challenges to administrators' decisions under the Insolvency Act 1986, Schedule B1, paragraph 74, and (iii) lifting a moratorium in administration cases, under the 1986 Act, Schedule B1, paragraph 43(6)(b). In each case, however, the Guy Parties accepted that the analogy could only be taken to a certain point. Mrs Brake suggests a fourth, namely challenges to an individual voluntary arrangement for discrimination, under section 262 of the Insolvency Act 1986. She also referred me to the decision of Hoffmann J in *Re a Debtor (No 259 of 1990)* [1992] 1 WLR 226.

30. Government guidance on the working of this legislation, *Debt Respite Scheme (Breathing Space) guidance for money advisers* (updated 6 August 2021),

gives three examples of grounds for a review at paragraph 7.18 ("This would be something like … "), but only the first relates to unfair prejudice. The other two refer instead to material irregularities. The unfair prejudice example is the case where the terms of the moratorium are discriminatory against the particular creditor.

31. The Guy Parties submit that unfairness is to be assessed objectively, requiring the court to embark upon a balancing exercise. The creditor must show that the prejudice suffered is *unfair*. The Guy Parties suggest that post-moratorium conduct of the debtor may suffice for this purpose. Moreover, they say that the debtor has to show that the moratorium will be used in good faith to help solve the debt problems, so that the debtor's post-moratorium conduct would be relevant. Where the unfair prejudice is based on the debtor's post-moratorium conduct, it may be appropriate to refuse the application on terms that that conduct cease. Where a mental health crisis moratorium is under consideration, it should not be possible to defeat an application to cancel the moratorium simply by claiming that the debtor's mental health will deteriorate outside it. Otherwise, they say, no mental health crisis moratorium could ever be successfully challenged.

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.

33. On the other hand, I am not going to try to lay down any firm guidelines for the future. It is too early in the life of the Regulations to do that. So, how much further these words go, and in what direction, will have to be determined on a case-by-case basis. That is, after all, how the common law (and for that matter the classical Roman law) developed: decide individual cases first, and infer a principle from the results later. So, I am going to focus particularly on the facts of this case.

34. But I add three preliminary observations. First, I accept that there may be cases where post-moratorium conduct can turn a moratorium which did not unfairly prejudice a creditor from the outset into one which now does. The moratorium is imposed in relation to the past. It is backward looking. But the improvement of the mental health of the debtor enables him or her to engage with the debt problem. If the debtor having sufficiently improved did not do so, that might make the moratorium unfairly prejudicial. On the other hand, it is hard to see that other subsequent conduct, not affecting the circumstances in which the moratorium was imposed, could by itself make a moratorium unfairly prejudicial to the creditor.

35. The second point is this. It is one thing to balance the interests of one creditor against another. It is another thing entirely to balance the interests of the

creditor against those of the debtor: they are chalk and cheese. How does one tell at what level the amount of money that the creditor stands to lose justifies imposing the risk upon the debtor of further harm to his or her mental health? The answer may be that, like the elephant, you will know it when you see it. It is after all no objection to say you do not know exactly where the line is to be drawn, as long as you can say, in a given case, that that case is either one side or the other of any reasonably drawn line: see *eg Wood v Wood* [1947] P 103, 106, per Lord Merriman P. Any uncertainties in a given case can be resolved by resort to the burden of proof.

36. The third point is that the relief sought by this application is that I should cancel the moratorium *as a whole*. If I were to do that, it would not only make it possible for past costs orders obtained by *the Guy Parties* to be enforced against the Brakes, but also the debts of *other* creditors. If the moratorium unfairly prejudices *the Guy Parties*, to cancel the moratorium would expose Mr Brake to the enforcement of *other debts* which were intended to be covered by the moratorium, and in respect of which the other creditors have not made a similar application to cancel it. Regulation 19(3) enables the court to make a tailored order, but nevertheless I consider that I should proceed with caution.

Evidence in relation to mental health

37. A further complication is that the considerations that will weigh in the case where the court is balancing the interests of the creditor against those of the debtor will be different depending on whether it is a standard breathing space or a mental health crisis breathing space. This case is one of the latter kind. It will therefore be important on a challenge under regulation 19 to have appropriate evidence from a suitably qualified professional about the debtor's mental health, the treatment and the prognosis. If this is not provided, it will be very difficult to assess the debtor's interests for the purposes of any balancing exercise. If the patient is likely to respond to treatment within a short time and return to normal, that is a quite different situation from one in which the health problems are more intractable and will take a considerable time to resolve, or indeed may never be resolved.

38. Unfortunately, the only evidence before the court on this occasion in relation to Mr Brake's mental health is a short letter, about half a page long, addressed "To Whom It May Concern", from Dr Suzanne Jefferies, consultant in old age psychiatry at the Bridport Community Hospital, dated 1 July 2021. This is within a week of the application being issued by the Guy Parties, and, I infer, sought and obtained as evidence to respond to that application. This letter gives minimal details of Mr Brake's diagnosis, states that treatment is in its early days, that the improvements in his mental health are fragile, and that any removal of the moratorium "will likely have a negative impact on his recovery … and would not be advised at this moment in time".

39. I comment on the letter as follows. Unfortunately, it gives no sufficient detail of the duration and severity of Mr Brake's illness, no prognosis and no timescale for any improvement of his mental health. Nor does it explain how the removal of the moratorium would hinder Mr Brake's recovery when at the

same time he continues to be involved, both as a party to and as a witness in large-scale civil litigation, including three lengthy trials within the next ten months. Indeed, it is unclear whether Dr Jefferies knows about the forthcoming trials, or understands what a moratorium is in this context and what its consequences may be. As to the latter point, I suspect that, being a doctor and not a debt adviser, she does not. I take this letter into account, but I am afraid that I regard it as of little assistance to the court in resolving this application.

40. I should say that regulation 30(4)(b) requires the debt advice provider to act on evidence from an approved mental health professional that the debtor is receiving mental health crisis treatment. On this application, I have not seen that evidence. On a challenge under regulation 19 made by claim form, that might well be a relevant matter for disclosure.

Discussion

41. Nevertheless, turning to the position in the present case, the first argument for the Guy Parties was that it was simply not fair for the Brakes to pursue their claims against the Guy Parties, putting them to considerable expense, whilst hiding behind the shield of the moratorium. Thus, it was said, the Brakes could continue the litigation without having to pay past costs orders, whilst the Guy Parties spent further costs which they would probably never recover. (They estimate a total of some £585,000 for the two forthcoming High Court trials, and another £400,000 for the employment proceedings.) As it seems to me, though, this is to look, in accordance with the Guy Parties' submissions, at the Brakes' post-moratorium conduct in general. Indeed, the only post-moratorium conduct of any importance is for the Brakes to continue with the litigation they had already commenced.

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 High Court 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.

44. There is however a question as to whether debts incurred or liabilities imposed *in the future* are covered by the moratorium. For the reasons that I give later in this judgment, I hold that they are not. So the position really is this. What is done is done. In the continuing litigation, further costs liabilities are in principle not covered by the moratorium, and the parties litigate on the usual principles, and risks, as to costs. Any complaint by the Guy Parties that the Brakes are not in a position to satisfy future costs liabilities has nothing to do with the moratorium. It is the familiar problem of a richer person litigating against a poorer.

45. The second argument made by the Guy Parties is that Mr Brake does not appear to be obtaining any advice on debt restructuring and so on. Therefore this moratorium is being used in bad faith, not for the purpose of enabling Mr Brake to get to grips with his debt problem, but instead simply to put off any enforcement procedures for as long as possible. The difficulty with this argument is that the whole point of the mental health crisis eligibility for a moratorium is based on the assumption that a person suffering a mental health crisis is either unable or at least less able, by reason of the mental health problem itself, to engage with debt advice. What I would therefore need to see would be some evidence that Mr Brake's mental health has improved to an extent that it would be reasonable to expect him to begin engaging with debt advice.

46. But there is no such evidence. The only evidence in fact (the letter from Dr Jefferies) goes the other way. Moreover, the time which has elapsed since the moratorium was imposed is relatively short, especially where mental health treatment is concerned. Dr Jeffries says it is "early days". I cannot assume that there has been a sufficient improvement, and therefore the moratorium does not unfairly prejudice the Guy Parties. (In parenthesis, I add that this would perhaps be the kind of case, where if the application had been made by claim form it would have been appropriate for the court to order disclosure by the debtor of information relating to his current state of mental health.)

Conclusion

47. Accordingly, I conclude that, even if the moratorium prejudices the Guy Parties in any meaningful way, that prejudice is not *unfair*. In my judgment, the Guy Parties have not made out their complaint, and the application to cancel the moratorium cannot be acceded to, at least in that form. The Guy Parties suggested at the hearing that I might nonetheless grant some lesser relief, for example a stay of the eviction proceedings. (This would correspond to the Guy Parties' suggestion that the court might seek to prevent the continuance of the prejudicial conduct.) The Brakes opposed this, saying that this was not the application that the Guy Parties had made under regulation 19, and no sufficient notice had been given of seeking such lesser relief. Because related issues arise, in relation to this form of relief, in the unless order application, I will postpone consideration of this question until later.

The second application

48. I turn therefore to consider the other application in the application notice. This is for an order that, unless the Brakes pay all sums outstanding under costs orders owed to the Guy Parties, the defence and counterclaim in the Possession Proceedings be struck out and the Brakes be debarred from defending and counterclaiming, and the claim in the Eviction Proceedings be struck out and the Brakes be debarred from defending. There are three costs orders from 13 and 21 April, amounting to some £900,000 in total, one from 17 May 2021, for £63,851.50, and one from 4 June 2021, for £15,391.95. There is no doubt that the court has jurisdiction in principle to make such an order.

Authorities

49. In *Siddiqi v Aidiniantz* [2020] EWHC 699 (QB), Saini J said this in the context of an application for a stay pending payment of existing costs orders:

> "30. Accordingly, when considering whether to stay a claim until an existing costs order is paid, I would summarise the correct general approach of the court position as follows:
>
> > (i) The ultimate aim of the Court is to identify the just order from a case management perspective, bearing in mind the overriding objective.
> >
> > (ii) In approaching that task, the 'working' or 'default rule' is that a litigant should not be able to continue with his or her claim without satisfying an existing and non-appealed final costs order, and the court should impose a condition requiring compliance.
> >
> > (iii) However, if a claimant can show his or her Article 6 rights will be interfered with by such a condition (because they cannot pay, and a genuine claim will therefore be stifled) that is a material, but not conclusive, consideration pointing against such a condition.
> >
> > (iv) Finally, the Court must take into account all other circumstances of the case, including the procedural behaviour of the defaulting party in deciding on the just order to make."

In my judgment, the position where the applicant seeks an unless order, rather than merely a stay, can be no less rigorous from the applicant's point of view.

50. It is clear that in such a case the burden lies on the Brakes to show that the order if made would stifle their claims, because they could not afford to satisfy the costs orders. In *GL v PM* [2018] EWHC 3502 (QB), Julian Knowles J said:

> "33. There is no doubt that an order requiring a party to pay an interim costs order as a condition of his/her claim proceeding may in some circumstances infringe that party's right of access to a court that is an aspect of the right to a fair trial contained in Article 6 of the European

> Convention on Human Rights: *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442; *Ford v Labrador* [2003] 1 WLR 2082. It is not necessary in this judgment to discuss the principles in detail. In *Michael Wilson & Partners Ltd v Sinclair and others* [2017] EWHC 2424 (Comm) Sir Richard Field, sitting as a deputy judge of the High Court, considered at [23]-[29] the relevant authorities on the making of unless orders as a means of enforcing interim costs orders, and extracted a number of principles from them. Two of those principles in particular are relevant on this appeal [29(4) and (5)]:
>
> > '(4) A submission by the party in default that he lacks the means to pay and that therefore a debarring order would be a denial of justice and/or in breach of Article 6 of ECHR should be supported by detailed, cogent and proper evidence which gives full and frank disclosure of the witness's financial position including his or her prospects of raising the necessary funds where his or her cash resources are insufficient to meet the liability.
> >
> > (5) Where the defaulting party appears to have no or markedly insufficient assets in the jurisdiction and has not adduced proper and sufficient evidence of impecuniosity, the court ought generally to require payment of the costs order as the price for being allowed to continue to contest the proceedings unless there are strong reasons for not so ordering.'
>
> 34. These principles are analogous to the principles which apply where a party seeks to avoid an order for security for costs on the grounds of impecuniosity. As Lambert J said at [8] of her judgment a claimant who contends that an order for security will stifle their claim carries the burden of establishing that fact. Convincing supportive evidence should be deployed. Where a party opposes the making of an order for security or seeks to limit the amount of security by reason of their impecuniosity, the onus is upon them to put proper and sufficient evidence before the court and that, in doing so, they should make full and frank disclosure. This approach is derived from the principles set out in the House of Lords decision in *MV Yorke Motors v Edwards* [1982] 1 WLR 444, 449-450 where Lord Diplock emphasised the need for sufficient and proper evidence by observing that for example, the existence of a legal aid certificate with a nil contribution would not amount to sufficient evidence. Lord Diplock also observed that the party claiming impecuniosity and consequential stifling of the claim must demonstrate, not that the security would be difficult to meet, but that the security would be 'impossible to fulfil'."

The impact of the 2020 Regulations

51. But, even if I conclude that the *Siddiqui* criteria would otherwise justify the imposition of a stay or an unless order, in the present case I must of course take account of the effect of regulations 7 and 10 of the 2020 Regulations. I have already set out the material parts of regulation 7(2) above. Its effect is to

prevent a creditor from taking any of certain steps in relation to any "moratorium debt". This concept is defined by regulation 6, which provides:

> "A 'moratorium debt' is any qualifying debt—
>
> > (a) that was incurred by a debtor in relation to whom a moratorium is in place,
> >
> > (b) that was owed by the debtor at the point at which the application for the moratorium was made, and
> >
> > (c) about which information has been provided to the Secretary of State by a debt advice provider under these Regulations."

52. It will be seen that this concept in turn depends on the concept of a "qualifying debt". That is defined by regulation 5. So far as relevant for present purposes, that regulation provides:

> "(1) A 'qualifying debt' means any debt or liability other than non-eligible debt.
>
> (2) A debt is a qualifying debt for the purpose of these Regulations whether or not it is entered into, or due to be paid or repaid, before these Regulations come into force.
>
> (3) A qualifying debt includes—
>
> > (a) any amount which a debtor is liable to pay under or in relation to—
> >
> > > (i) an order or warrant for possession of the debtor's place of residence or business,
> > >
> > > (ii) a court judgment, or
> > >
> > > (iii) a controlled goods agreement;
> >
> > (b) any debt owed or liability payable to the Crown."

53. The Brakes say that the language of regulation 5 is not just backward-facing, but also forward-looking, and covers debts to be incurred in the future. They rely in particular on the language of regulation 5(4)(h) (concerning an example of 'non-eligible debt'), which reads:

> "(h) any debt or liability to which a debtor is or may become subject in respect of any sum paid or payable to the debtor as a student loan and which the debtor receives whether before or after the moratorium starts …"

54. As I say, this is dealing with 'non-eligible debt', which cannot be qualifying debt and therefore could never be caught by the moratorium anyway. But in any event it seems to me that the wording of this particular subparagraph has

more to do with the nature of liability for student debt, in that it depends on events occurring perhaps a long time after the loan was taken out, and cannot be taken as an indication generally of the scope of the Regulations.

55. In any event, a moratorium debt is only a subcategory of qualifying debt, and so, even if the concept of qualifying debt *could* include future debt, that does not mean that the subcategory must do so. That is a narrower subset. The Guy Parties point out that the second of the three conditions in regulation 6 for a qualifying debt to be a moratorium debt is that it "was owed by the debtor at the point at which the application for the moratorium was made". That is undoubtedly a backward-looking provision. In my judgment, no debt, even if it is otherwise a qualifying debt, which is incurred after the time when the application was made can be a moratorium debt within regulation 6, at least without more.

"Additional debt"

56. The Brakes however refer me also to the "additional debt" procedure arising under regulation 15. So far as relevant, that regulation provides:

> "(1) This regulation applies where a debt advice provider has initiated a moratorium under these Regulations and subsequently—
>
> > (a) receives details under regulation 14(2) of a debt not specified as a moratorium debt in a notification from the Secretary of State referred to in regulation 14(1), or
> >
> > (b) otherwise becomes aware of a debt that is owed by a debtor in relation to whom a moratorium is in place but which was not included in the information provided to the Secretary of State under regulations 25(1)(b) or (c) or 31(1)(b) or (d), (an 'additional deb'").
>
> (2) Where this regulation applies, a debt advice provider must consider whether an additional debt is a qualifying debt.
>
> (3) Subject to paragraph (4), if a debt advice provider considers that an additional debt is a qualifying debt, the debt advice provider must provide to the Secretary of State details of the additional debt, including contact details of the creditor to whom the debt is owed."

57. The Brakes say that a debt incurred *after* the application for the moratorium has been made is capable of being an "additional debt", and thus covered by the moratorium from the date specified in regulation 15(7). They also say that, where the debt advice provider becomes aware of a debt not previously specified as a moratorium debt or of a debt owed by a debtor under a moratorium but not previously notified to the Secretary of State, the debt advice provider has to consider whether that additional debt is a qualifying debt and if so must provide details of the additional debt to the Secretary of State. The Secretary of State must then notify the creditors.

58. I reject this submission. The requirement in regulation 6 that a moratorium debt be past debt is perfectly consistent with regulation 15, if regulation 15 extends only to debts already in existence, but not known about at the time of the application for a moratorium. So the question is, what does regulation 15 extend to?

59. Regulation 15(1)(a) only applies where the debt advice provider receives details under regulation 14(2) of a debt not specified as a moratorium debt in the original notification from the Secretary of State under regulation 14(1). That provision then requires the creditor to undertake a reasonable search of its records to identify further debts owed by the creditor to the debtor. It is clear that that provision applies only once, *ie* at "the start of a moratorium". There is no requirement for the creditor to make a search for additional debt at any other time. Thus, regulation 15(1)(a) simply cannot apply to future debts, incurred after the start of the moratorium.

60. As for regulation 15(1)(b), that refers to debts "not previously notified to the Secretary of State" under regulations 25(1)(b) or (c) or 31(1)(b) or (d). But regulation 25(1) is dealing with the *initiation* of a breathing space moratorium, and the information that must be provided at that stage, and regulation 31(1) is similarly dealing with the *initiation* of a mental health crisis moratorium and the information that must be provided at that stage. Thus regulation 15(1)(b) similarly cannot apply to debts incurred after the start of the moratorium.

61. The consequence is that regulation 15 itself cannot apply to future debts, and therefore additional debts are restricted to those which were incurred before the moratorium but not then known about, and therefore details of which were not given to the creditors.

The Brakes' objections

62. The Brakes however object to my reaching this conclusion, for a number of reasons. First, they say that, as the Guy Parties have not applied under regulation 7(2)(b), it is procedurally wrong for the Guy Parties to be able to argue that moratorium debts do not include debts incurred after the moratorium begins. Second, they rely on the opinion given to them by their debt advice provider, who has told them in letters dated 11 and 12 August 2021 that the later costs orders were notified on 17 May 2021 and 4 June 2021, and therefore by implication that future debts are included in the concept of moratorium debt. Third, they say that the Guy Parties at an earlier stage conceded that future debts could be moratorium debts, and they ought not to be able to resile from that. Fourth, they say that, if moratorium debts cannot include future debts, then the moratorium can be brought to an end and Mr Brake can simply apply again. I will deal with each of these in turn.

63. **As to the first objection**, I do not consider that regulation 7(2)(b) (the terms of which I quoted above) has anything to do with the matter. That provision is concerned with giving permission to a creditor to take one of the prohibited steps. Asking the court to decide whether a particular debt is a moratorium debt is not a prohibited step. More importantly, the arguments which the Guy Parties put forward, both in their application under regulation 19 and in their

application for an unless order, as well as the arguments put forward by the Brakes in resisting those applications, depend upon the relevant debts being moratorium debts. The court therefore necessarily has to decide whether they are such debts, and for that purpose it is necessary to consider whether the way in which future debts are dealt with is through the provision for "additional debts". Accordingly, there is nothing in this objection.

64. **As to the second objection**, there is nothing in this either. The debt advice provider is perfectly entitled to express an opinion as to whether future debts are or are not within the concept of moratorium debts. But that provider is not empowered to decide the point as between the Brakes and the Guy Parties. Indeed, even if the debt advice provider had some kind of adjudicative power under the 2020 Regulations, it could not have been properly exercised, because the Guy Parties were not, and had no opportunity to be, involved. That would be contrary to natural justice. But I do not rest my decision on that ground. The point is that it is the court that decides the law, and not the debt advice provider. In my view the debt advice provider's (implicit) opinion was incorrect. I can understand the Brakes' frustration at having been told by a debt professional that the law is one thing, and then to have the court say another. But I cannot help that. Even if the party's own lawyer advised that that was the law, it could not bind the court.

65. **The third objection** is that the Guy Parties are said to have conceded the point for the purposes of an earlier judgment in this litigation, given on 4 June 2021, and found under neutral citation [2021] EWHC 1500 (Ch). It is correct that the question whether a future debt could be a moratorium debt, by means of the additional debt procedure, was raised at the hearing which gave rise to that judgment. In my judgment I said this:

> "25. Certainly … regulation [15] creates a procedure whereby other debts not previously known to the debt advice provider can become a moratorium debt. It is not clear to me whether, in order to become so, it needs actually to be a 'qualifying debt', or whether it is enough that the debt advice provider so considers it to be. The scheme of the regulations seems to require the former. It is also not clear to me whether the procedure is intended to cover debts incurred in the future, or is restricted to debts incurred before the moratorium was put in place, but not then known to the debt advice provider or the Secretary of State. *It appears from the parties' submissions that they consider that it does extend to future debts.*
>
> 26. *But I need not decide either point in this case,* because, as the Guy parties point out, the debt created by the order will not come into existence until the order is made, and, even if a subsequent debt can become a moratorium debt under reg 15, that process *ex hypothesi* will not yet have happened. Hence making the order cannot be a prohibited step under the regulations, even taking reg 15 into account." (Emphasis supplied.)

66. Even if it were true that the Guy Parties *had* conceded the point, there would be nothing to prevent them changing their minds and arguing for a different

interpretation now. This is because, on the occasion when (it is said) the concession was made, I made no decision to that effect based on the concession. The matter has accordingly not been *decided*. It is therefore still open for decision on this application. In any event, I only recorded that it *appeared to me* that the Guy Parties conceded the point. In correspondence (copied to both sides) at the time of my judgment, the Guy Parties made clear that, whatever the position might have appeared from their written submissions to be, they did not in fact concede the point. There is therefore nothing in this objection either.

67. I note in passing that the Brakes themselves were concerned to emphasise to me at various points in their evidence that the purpose of the moratorium is to deal with past debts and not future debts. For example, in her first witness statement at paragraph 64, she says this:

> "The MHCM regulations stipulate that you must keep up with your ongoing liabilities like, utilities, insurance and council tax etc."

But "ongoing liabilities" means debts incurred after the moratorium came into effect, that is, future debts. They too can change their minds.

68. **The final objection** made by the Brakes to my preferred interpretation of moratorium debt is that it would serve no purpose, because it would be open to a debtor to bring the moratorium to an end and apply again, this time including the previously future debts which would now be past debts, and therefore moratorium debts. I do not accept this objection. The fact that it may be possible in some circumstances to bring a moratorium to an end and then in other circumstances to apply for and obtain a new one does not mean that there is no point in moratorium debts not including future debts.

69. Moreover, I do not consider that it would be so easy for a debtor to bring to an end a mental health crisis moratorium and immediately obtain an unimpeachable further such moratorium. It would be transparent that this was not being done in good faith but simply in order to include debts which could not have been included in the original moratorium. I accept that under regulation 34(1)(b) the debtor may request the debt advice provider to cancel the moratorium, and the provider must do so. I also accept that the debtor could apply again and if the relevant conditions were met the provider would have to initiate a fresh moratorium. But it would almost certainly be susceptible to challenge under regulation 19. So, I do not consider that there is anything futile or pointless in my preferred interpretation of moratorium debt.

Application to the present case

70. Accordingly, I reach the conclusion that moratorium debts cannot include future debts. Applied to the present case, I am satisfied on the material before me that the debts constituted by the costs orders of 13 April 2021 and 21 April 2021 *are* covered by the moratorium. Indeed, at the hearing the Guy Parties accepted as much. On the other hand, it is equally clear to me that the debts constituted by the costs orders of 17 May 2021 and 4 June 2021 are *not* covered by the moratorium, because neither of them was incurred before the

moratorium came into effect. Although it appears that an additional debt was notified to the Guy Parties by a letter of 2 June 2021, which might have been meant to include the first of these two costs orders (but the letter does not specify the debts concerned), in any event they are both future debts, and future debts cannot be additional debts. Accordingly, regulation 7(2) does not apply to the debts constituted by the costs orders of 17 May 2021 and 4 June 2021, and cannot prohibit the Guy Parties from applying for an "unless" order in respect of them.

71. In relation to the debts constituted by the earlier costs orders of 13 April 2021 and 21 April 2021, the position is obviously different. They are moratorium debts, regulation 7(2) *does* apply, and the Guy Parties are prohibited from taking any of certain specified steps without the permission of the court. One of those prohibited steps is specified in regulation 7(7)(b), that is, "take a step to enforce a judgment or order issued by a court … before or during … a moratorium period regarding a moratorium debt". The Guy Parties have applied for an "unless" order, which, if made, will require the Brakes to choose between paying those debts and giving up their claims against the Guy Parties. That is not enforcement of a court order in the strict sense that the debtor has no choice but to comply. Here the debtor would have a choice. He could refuse to pay without any penalty being imposed.

72. But there would be an unwelcome consequence, in that he would be debarred from prosecuting his existing claims against the Guy Parties. In a practical sense, therefore, it *would* be a step to enforce the order, because the default leads to the loss of something else which may be desirable to the Brakes. It therefore puts pressure on the debtor to comply with the order. That is the only point of doing it. In my judgment that is inconsistent with the policy of the 2020 Regulations. Accordingly, I hold that regulation 7(2) prevents the Guy Parties from applying for this order in relation to the debts constituted by the earlier costs orders. Indeed, regulation 7(12) says that the step taken (that is, the application, to that extent) is "null and void". Certainly, the court cannot accede to it.

73. I should also mention regulation 10, at least briefly. That relevantly provides as follows:

> "(1) If at the start of a moratorium a creditor to whom a moratorium debt is owed has a bankruptcy petition or any other action or other proceeding in any court or tribunal pending in relation to a moratorium debt, then the creditor must notify the court or tribunal of the moratorium.
>
> (2) After a court or tribunal has received a notification referred to in paragraph (1) or is otherwise made aware of a moratorium—
>
> > (a) any bankruptcy petition in relation to a moratorium debt must be stayed by the court until the moratorium ends or is cancelled, and
> >
> > (b) the court or tribunal must deal with any other action or proceeding in relation to a moratorium debt in accordance with this regulation.

> (3) Subject to paragraph (5), if at the start of a moratorium any action or proceeding that relates to a moratorium debt is pending in a court or tribunal then such action or proceeding may continue until the court or tribunal makes an order or judgment in conclusion of such action or proceeding.
>
> (4) Where a debtor makes an admission before or during a moratorium in connection with an action or other proceeding relating to a moratorium debt, a creditor who is a party to the action or proceeding may enter judgment in that action or proceeding during the moratorium if they would otherwise be entitled to do so.
>
> (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.
>
> […]"

74. This regulation is different from regulation 7, because it deals with existing legal proceedings. Regulation 10(1) requires me to consider whether the present application is a proceeding "in relation to a moratorium debt". In relation to the debts constituted by the earlier costs orders, the answer is Yes. In relation to the debts constituted by the later costs orders, the answer is No. By regulation 10(2), the court must therefore deal with this application, so far as concerns the earlier costs orders, in accordance with the terms of this regulation. Regulation 10(5) requires that a proceeding to enforce a court order concerning the moratorium debt should not "progress". In my judgment the notion of enforcing a court order in this regulation is the same as that in regulation 7, and for the same reasons. Accordingly, my conclusion is the same. Regulation 10 prevents the court from acceding to the "unless" order application so far as concerns the earlier costs orders, but not the later.

The later costs orders

75. I turn therefore to consider the question whether the court should make an unless order in relation to the later costs orders, which had not been made at the date of the moratorium. As made clear in the decision of Saini J in *Siddiqi*, the default rule is that a litigant should not be able to continue with a claim without satisfying an existing and non-appealed final costs order, and the court

should impose a condition requiring compliance. But it is open to that litigant to show that its rights under the ECHR article 6 will be interfered with, because the litigant cannot pay and the claim will therefore be stifled. If so, that is a relevant, but not a conclusive, consideration. The court in making its decision will take into account all the circumstances of the case, including the behaviour of the defaulting party. As made clear in the decision of Julian Knowles J in *GL v PM*, the burden lies on the Brakes to show that their rights will be interfered with and that the claim will be stifled. That depends on showing that they cannot pay the two costs orders in question, which amount to approximately £80,000.

76. As I mentioned earlier, I bear in mind that, in the absence of cross-examination, I am not entitled to disbelieve witness statement evidence put forward by a witness, at all events unless it is manifestly incredible, taking account of all the other evidence available. Mrs Brake's first witness statement of 22 July 2021 dealt in some detail with the Brakes' financial position. In particular, it dealt with a number of bank accounts belonging to Mr Brake, Mrs Brake, Tom D'Arcy and Loxley & Brake Ltd, details of horses (or shares in horses) said to belong to them, and a horsebox which was recently sold. However, as pointed out in a responsive witness statement from Frances Baird dated 29 July 2021, no information was given regarding pension funds, or valuable antique furniture, said to belong to the Brakes. Some information in relation to these matters was given in Mrs Brake's second witness statement of 10 August 2021, but in relation to pensions Mrs Brake said that she was in the process of finding out what the situation was in relation to them and "will update the court". Unfortunately, that had not happened by the time of the hearing.

77. The witness statement of Frances Baird referred to the preliminary bankruptcy questionnaires completed by the Brakes themselves in 2015, which disclosed pension funds with a combined value at that date of over £200,000. It is likely that, unless already drawn down, in 2021 they have a greater value. The Guy Parties suggest they would have grown at 3% per annum, but individual funds vary and I cannot speculate as to where these might be now. But I have no basis for supposing that they are worth less than they were in 2015. In her second witness statement, Mrs Brake said that she did not previously give any information about pensions because she thought "they were exempted from this sort of application". Although she said that she would find out more about them, she did not challenge the evidence of Frances Baird. It also appears from an exhibit to Mrs Brake's second statement that Mr Brake has a SIPP account currently worth nearly £120,000. The unchallenged evidence therefore is that the Brakes have pension funds worth over £320,000. Mr Brake is 66 years old, and in receipt of the state pension. Mrs Brake is 56 years old. It is therefore perfectly possible that they have access to these funds, and there is no evidence to the contrary.

78. To the pension funds must be added the funds in various bank accounts belonging to the Brakes, amounting to some £39,000. Mrs Brake says £15,000 of the money in her son's bank account is held on trust for him to have only when he reaches 25 years old. There is no evidence (*eg* an *inter vivos* or will

trust) to make this assertion good, and it is controverted by a note in the bundle from her son's uncle saying that he should not have the money until *18* years (which age he has already attained). In any event, the money is self-evidently not held on trust for him: it is in his own bank account. So I treat the money as available resources. Of course, the Brakes must live, and they are not currently working. But the evidence of Mrs Brake is that her sisters are "comfortably off" and will support the Brakes' living expenses for the time being.

79. On this evidence, my conclusion is that the Brakes have not demonstrated that having to pay the two costs orders amounting to approximately £80,000 will stifle their claims. (Accordingly, I do not need to deal with the question of the antique furniture, and say nothing more about it.) Indeed, as far as it goes, I consider that the evidence before me actually establishes, on the balance of probabilities, that they could afford to pay them. So far as I can see, there is nothing else of any weight in the circumstances of this case that supports the rejection of the "unless" order application. In particular I do not think that the lateness of the application is a bar. The application is a fallback to the application for the cancellation of the moratorium, and that was an application that could not even have been contemplated, let alone prepared, before May this year. The application itself was issued in June, after the refusal in that month of the debt advice provider to cancel the moratorium. For present purposes it is not necessary for me to say any more about this.

80. The Guy Parties ask for an unless order, rather than simply a stay in relation to the later costs orders. This is a more severe sanction against the Brakes. The facts of the present case disclose a long history of litigation between the parties, far from finished at the present day. Although some earlier costs orders made against the Brakes have been satisfied by them, the more recent ones have not. The Brakes ascribe this to their impecuniosity. Whilst it is evident that the Brakes have spent a lot of money on legal and other expenses in this litigation, it is far from clear that they are now impecunious. On the contrary, apart from cash at bank, there are significant pension funds whose existence and value was not previously dealt with by the Brakes. They could have satisfied at least some of these costs orders, but chose not to do so. In my judgment, the case for the "unless" order in relation to the two later costs orders is made out.

Stay?

81. The final point with which I need to deal is the possibility of ordering a stay instead of setting aside the moratorium. When I dealt with the moratorium earlier I left this point over, because the question of a stay impacts with the effect of the Regulations. The Brakes also complained that the Guy Parties did not apply for this in their application notice. I think this objection is misplaced for the reasons I gave earlier in relation to the Brakes' argument in relation to regulation 7(2)(b) (at [62]), but in the view I take of the effect of the regulations, this does not matter. Although a stay would not be "starting" proceedings against the debtor within regulation 7(7)(f), in my view it would still be taking a step to collect a moratorium debt or to enforce a moratorium debt, by putting pressure on the debtor to pay it, within regulation 7(7)(a), (b).

I need not decide whether it would also infringe regulation 10(5), but by parity of reasoning I think it probably would. So, as at present advised, I do not think I can order a stay as an alternative to cancelling the moratorium (in whole or in part).

Conclusion

82. For the reasons given above, the substantive orders that I will therefore make are as follows:

1. The application to cancel the moratorium is refused;

2. There will be unless orders in respect of the two debts constituted by the costs orders of 17 May 2021 and 4 June 2021, with payment dates of 30 August 2021 (for the smaller costs debt) and 30 September 2021 (for the larger). I realise that this is not quite as I stated in my email on 13 August 2021. This is because, on reflection, given the funds in the Brakes' bank accounts, there is no reason not to pay at least one of the costs orders out of them before the Possession Claim, even though funding the other (out of pension funds) may take longer.

83. If the parties are unable to agree an order giving effect to this judgment, I will deal with consequential matters in the first instance on paper. Each side should let me have a short submission as to the orders it seeks by 4 pm on Tuesday 17 August 2021 (copied to the other side), and any submission in reply by 4 pm on Wednesday 18 August 2021 (again copied to the other side).