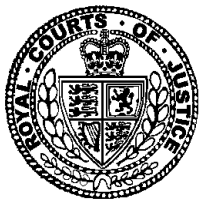

Neutral Citation Number: [2022] EWHC 3326 (KB)

Case No: KB-2022-002296

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2022

Before

MR JUSTICE SWIFT

- -

Between:

IVAN KAYE	**Applicant**
- and -	
AMANDA LEES	**Respondent**
- and -	
CHELSEA DIXON	**Interested Party**

PHILIP JUDD (instructed by **Perrin Myddelton**) for the **Applicant**
MARTIN WESTGATE KC, DANIEL CLARKE (instructed by **TV Edwards LLP**) for the **Respondent,**
AMANDA EILLEDGE (instructed by **Penman Sedgwick LLP**) for the **for the Interested Party**

Hearing dates: 13 September 2022 and 26 October 2022

- -

Approved Judgment

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MR JUSTICE SWIFT

A. Introduction

1. Mr Kaye's application was made on 21 July 2022 by reference to the provisions of the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium)(England and Wales) Regulations 2020 ("the 2020 Regulations"). The context in which the application arises is as follows.

2. In a judgment handed down on 30 July 2018 at Central London County Court, HHJ Roberts found in favour of Mr Kaye on his claim against Ms Lees in nuisance and under section 3 of the Protection from Harassment Act 1997, and dismissed Ms Lees' counterclaim for damages for nuisance and/or harassment. Those claims arose from the parties' respective residence in flats at 8 Leysfield Road London, W12. Mr Kaye was the leaseholder of the first floor flat; Ms Lees, the leaseholder of the ground floor flat. In this judgment I shall refer to the ground floor flat as "the Leysfield Road flat". In a further judgment handed down on 18 January 2019, Judge Roberts awarded Mr Kaye £96,963.00 in damages, and ordered Miss Lees to pay £50,000 on account of costs. Both sums were to be paid by 1 February 2019.

3. The amounts due were not paid and in consequence charging orders were made: an interim order on 4 March 2019; and a final order on 7 June 2019. The orders covered both the judgment debt and the interest accruing on that debt. On 6 March 2020 District Judge Kanwar, sitting at Willesden County Court, made an order for sale and possession. That order (1) required Ms Lees to pay £290,925.88 by 4pm on 3 April 2020 (that amount comprising the judgment debt, interest and costs); and (2) in default of payment provided for the sale of the Leysfield Road flat at a price not lower than £470,000. So far as concerns that sale, the Order included the following.

> "2. The Property shall be sold without further reference to the court at a price not less than £470,000 unless that figure is changed by a further order of the court.
>
> 3. Perrin Myddelton shall have conduct of the sale.
>
> 4. To enable the Claimant to carry out the sale, there be created and vested in the Claimant pursuant to section 90 of the Law of Property Act 1925 a legal term in the property one day less than the remaining period of the term created by the lease under which the Defendant holds the Property.
>
> 5. The Defendant must deliver … possession of the Property to the Claimant on or before 3rd April 2020.
>
> 6. The Claimant shall first apply the proceeds of the sale of the Property:
>
> (i) To pay the costs and expenses of effecting the sale; and
>
> (ii) To discharge any charges or other securities over the Property which have priority over the charging order.

> 7. Out of the remaining proceeds of the sale the Claimant shall:
>
> (i) Retain the amount due to him as stated in paragraph 1; and
>
> (ii) Pay the balance (if any) to the Defendant".

4. In June 2021 Mr Kaye obtained a warrant for Ms Lees' eviction. Notice of eviction was given in July 2021, and the eviction was scheduled for 24 August 2021. However, on 30 June 2021, Ms Lees obtained a breathing space moratorium under the 2020 Regulations and the eviction was cancelled. On 28 September 2021 Deputy District Judge Althaus, sitting at Wandsworth County Court, made an order transferring the proceedings to the High Court "for the purposes of enforcement".

5. On 12 October 2021 a further notice of eviction was issued, but this was cancelled following a decision on 26 October 2021 to grant Ms Lees a mental health crisis moratorium under the 2020 Regulations.

6. What happened next is set out in detail in the judgment handed down by HHJ Dight CBE, sitting as a Judge of the High Court on 13 May 2022 ([2022] EWHC 1151(QB)). In summary, notwithstanding a further moratorium granted under the 2020 Regulations on 12 January 2022, on 13 January 2022, Ms Lees was evicted from the Leysfield Road flat pursuant to a notice of eviction obtained by Mr Kaye on 5 January 2022. The eviction took place in aid of the order for sale and possession that had been made on 6 March 2020. Ms Lees then issued an application on 24 February 2022 for a declaration that the eviction, and the execution of the 6 March 2020 order, was null and void by reason of regulation 17(2) of the 2020 Regulations. That application was heard by Judge Dight and was the subject of his 13 May 2022 judgment. By the time that application was heard by Judge Dight, Mr Kaye had, on 10 March 2022, sold the Leysfield Road flat to Chelsea Dixon, and dispersed the proceeds of sale, in accordance with paragraph 6 and 7 of the 6 March 2020 Order, including payment of £188,963.90 to Santander to discharge the mortgage taken out by Ms Lees on the Leysfield Road flat.

7. Judge Dight granted Ms Lees' application. By an order sealed 16 May 2022 he granted a declaration that

> "Both the execution of the writ of possession on 13 January 2022 and the purported sale of the property to [Chelsea Dixon], said to have occurred on 10 March 2022 are null and void."

8. The application now before me is an attempt to address the consequences of Judge Dight's order. Section 3 of the Form N244 filed by Mr Kaye on 21 July 2022 states that the following order is sought.

> "A declaration that Mr Kaye ("the Applicant") is a subrogated debt holder following the order of HHJ Dight CBE on 13 May

> 2022, and that the subrogated debt is a qualifying debt for the purposes of Regulation 15 of the [2022 Regulations] …
>
> Further, for an order pursuant to Regulation 19 of the [2020 Regulations] that the Respondent's mental health crisis moratorium dated 13 January 2022 ("the Moratorium") be cancelled in respect of the Subrogated Debt because the Moratorium unfairly prejudices Mr Kaye's interests as a creditor.
>
> Further or alternatively, that the Moratorium be cancelled in respect of the judgment debt owed to Mr Kaye following the order of HHJ Roberts on 2 January 2019 ("the Judgment Debt") because the Moratorium unfairly prejudices Mr Kaye's interests as a creditor.
>
> Further or alternatively, for an order pursuant to Regulation 7(2)(b) that Mr Kaye be permitted to take enforcement action pursuant to Regulation 7(6)(c) in respect of the Subrogated and/or Judgment Debts, namely the possession and sale of the Respondent's interest in the property at 8 Leysfield Road, W12, London …"

The submissions made to me have concerned the following. (1) Whether the consequence of the payment Mr Kaye made to Santander is that he is subrogated to Santander's rights to collect the amount outstanding on the mortgage on the Leysfield Road flat, and if so, the significance of this for the purposes of regulations 13 and 15 of the 2020 Regulations. (2) Whether Mr Kaye can pursue an application under regulation 19 of the 2020 Regulations to cancel the moratorium granted on 12 January 2022 and/or a successor moratorium granted on 15 February 2022. (3) Mr Kaye's application under regulation (7)(2)(b) of the 2020 Regulations to take enforcement action in respect either of the subrogated mortgage debt, or the debt the arising from the judgment of HHJ Roberts of 18 January 2019 (i.e., the debt subsequently described in the 6 March 2020 Order).

B. Decision

(1) The 2020 Regulations

9. A mental health crisis moratorium is (by regulation 28(1)) a moratorium in respect of a debtor who is receiving mental health crisis treatment. Such treatment is defined at regulation 28(2). For present purposes regulation 28(2)(e) is material and is that the debtor

> "(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."

Regulation 28(3) defines "specialist mental health service" as

> "(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."

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 explains the position on consideration of the application as follows

> "(2) Having considered an application for a mental health crisis moratorium, a debt advice provider must initiate a mental health crisis moratorium on behalf of a debtor if the debt advice provider considers that—
>
> (a) the debtor meets the eligibility criteria in paragraph (3),
>
> (b) the conditions in paragraph (4) are met, and
>
> (c) the debts to be included in the moratorium are qualifying debts.
>
> (3) The eligibility criteria referred to in paragraph (2)(a) are that the debtor—
>
> (a) is an individual,
>
> (b) owes a qualifying debt to a creditor,
>
> (c) is domiciled or ordinarily resident in England or Wales,
>
> (d) is not subject to a debt relief order,

> (e) is not subject to an interim order or individual voluntary arrangement,
>
> (f) is not an undischarged bankrupt, and
>
> (g) is not subject to a breathing space moratorium or a mental health crisis moratorium.
>
> (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."

10. A debt advice provider initiates a moratorium by providing specified information to the Secretary of State (see regulation 31(1)). The Secretary of State must then cause an entry to be made in the Register maintained pursuant to regulation 35(1)(a) of the 2020 Regulations, and must notify the debtor, and such of the creditors whose contact information is available to him (see regulation 31(2)).

11. Once made, the duration of a mental health crisis moratorium is set by 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."

The 2020 Regulations provide for periodic review of whether the conditions for the moratorium continue to endure. Regulation 33 (referred to in regulation 32(2)(b)) is as follows.

> "**33. — Request by a debt advice provider for information about a debtor's receipt of mental health crisis treatment**
>
> (1) Subject to paragraph (2), a debt advice provider must, before the end of the period of 30 days beginning with the day on which the moratorium started, request from a debtor's nominated point of contact—
>
> (a) confirmation of whether the debtor is still receiving mental health crisis treatment, and
>
> (b) if the debtor is no longer receiving mental health crisis treatment, confirmation of the date on which the treatment ended.
>
> (2) The debt advice provider must not make the request to a nominated point of contact under paragraph (1) in the period of 20 days beginning with the day on which the moratorium started.
>
> (3) Having made a request under paragraph (1) and subject to paragraph (4), a debt advice provider must then request from the nominated point of contact the confirmation specified in paragraph (1) every 20 to 30 days beginning with the day on which the last request was made.
>
> (4) If a moratorium ends in accordance with regulation 32(2)(b) because a debt advice provider has not received a response to a request made under this regulation, then the debt advice

provider is not required to make further requests under paragraph (3)."

Regulation 34 deals with cancellation of a moratorium.

"**34. — Cancellation of mental health crisis moratorium**

(1) Subject to paragraph (2), a debt advice provider must cancel a mental health crisis moratorium if—

(a) the debt advice provider considers that the evidence from an approved mental health professional referred to in regulation 29(2)(b) contains inaccurate, misleading or fraudulent information, or

(b) the debtor requests that the debt advice provider cancels the moratorium.

(2) A debt advice provider is not required to cancel a mental health crisis moratorium if the debtor's personal circumstances would make the cancellation unfair or unreasonable.

(3) Paragraph (2) does not apply in circumstances where the debtor requests that the debt advice provider cancels the mental health crisis moratorium in accordance with paragraph (1).

(4) In order to cancel a mental health crisis moratorium, a debt advice provider must—

(a) consult the debtor prior to doing so to the extent that the debt advice provider is able to do so, and

(b) notify the Secretary of State and the debtor of the cancellation.

(5) Where the Secretary of State receives a notification under paragraph (4)(b), the Secretary of State must, by the end of the following business day—

(a) cause an entry to be made on the register, and

(b) send a notification of the cancellation of the moratorium to each creditor and agent in respect of whom the cancellation takes effect.

(6) Paragraph (5) is subject to regulation 38.

> (7) The cancellation takes effect on the day following the day on which the Secretary of State causes an entry to be made on the register in accordance with paragraph (5)(a).
>
> (8) A notification sent to a creditor or agent in accordance with paragraph (5)(b) must—
>
> > (a) state the reason for the cancellation, and
> >
> > (b) specify the date on which the cancellation takes effect."

12. A moratorium applies to all "moratorium debts", as defined at regulation 6.

> "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."

The effect of a moratorium is explained by regulations 7 to 11. For present purposes regulation 7(2) – (6) and (7)(a) to (g) are material.

> "(2) Subject to paragraph (3), during a moratorium period a creditor may not, in relation to any moratorium debt, take any of the steps specified in paragraph (6) in respect of the debt unless—
>
> > (a) these Regulations specify otherwise, or
> >
> > (b) the county court or any other court or tribunal where legal proceedings concerning the debt have been or could be issued or started has given permission for the creditor to take the step.
>
> (3) A court or tribunal may not give permission for a creditor or agent to take any of the steps specified in paragraph (6)(a) or (b).
>
> (4) Subject to paragraph (5), for the purposes of paragraph (2)(b), a court or tribunal may—

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

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

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

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

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

(b) the step will not—

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

(ii) significantly undermine the protections of the moratorium.

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

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

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

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

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

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

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

> (b) take a step to enforce a judgment or order issued by a court or tribunal before or during a moratorium period regarding a moratorium debt,
>
> (c) enforce security held in respect of a moratorium debt,
>
> (d) obtain a warrant,
>
> (e) subject to regulation 12(4)(d), sell or take control of a debtor's property or goods,
>
> (f) start any action or legal proceedings against a debtor relating to or as a consequence of non-payment of a moratorium debt,
>
> (g) make an application for a default judgment in respect of a claim for money against the debtor …"

13. The 2020 Regulations also establish a process by which a creditor may request a review of the moratorium. By regulation 17(1) to (2).

> "**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."

Regulation 17(3) and (4) state that any request for a review must be made within 20 days of either (a) the date the moratorium started; or (b) if the request arises following inclusion in the moratorium of an additional debt (pursuant to regulation 15), within 20 days of the day the debt was included. If a request for a review is made, the debt advice provider must complete the review and notify the creditor of the outcome within 35 days of the date the moratorium started, or, if an additional debt is the subject of the review application, the date the additional debt was added into the moratorium.

14. If the review is successful the moratorium must, so far as concerns the relevant debt or debts, be cancelled. Cancellation takes effect on the day the Secretary of State makes the required entry in the Register. If the review does not succeed, the creditor may apply to the court: see regulation 19. Any such application must be made within 50 days of the date the moratorium started (or the additional debt was added). The grounds for any such application are those specified at regulation 17(1). When an application is made, the court decides for itself whether any of the criteria are met, having the same power for the purpose as the debt advice provider.

(2) Subrogation of the mortgage debt. Regulations 13 and 15 of the 2020 Regulations.

15. The submission for Mr Kaye was to the following effect. Pursuant to paragraph 4 of the 6 March 2020 Order he had a relevant legal interest in the Leysfield Road flat. From the proceeds of the sale he settled the balance of Ms Lees' mortgage account with Santander. Notwithstanding that Judge Dight's Order declared the execution of the writ of possession to be void, Ms Lees has been enriched by the payment to Santander, such that Mr Kaye should be subrogated to the mortgage debt. It was next submitted that by reason of the subrogation there was, for the purpose of regulation 15 of the 2020 Regulations, an additional debt which should have been recognised by the debt advice provider, thus triggering a new right of review under regulation 18.

16. I accept the submission that, by reason of his payment of the balance owed by Ms Lees on the mortgage account, Mr Kaye should be subrogated to Santander's rights as creditor. The submission for Ms Lees, to the contrary, was that she had not been unjustly enriched because Mr Kaye had had no authority to pay the balance on the mortgage account. It was submitted that any mistake on Mr Kaye's part to the effect that he was acting in pursuance of the 6 March 2020 Order, could not be operative because of Judge Dight's order declaring that execution of the possession order and the subsequent sale of the Leysfield Road flat were void.

17. In support of the submission that there was no unjust enrichment, Mr Westgate KC, for Ms Lees, also drew attention to correspondence with Santander since Judge Dight's Order. On 23 August 2022 Ms Lees' solicitors wrote to Santander in anticipation of the hearing of this application, asking for the mortgage account to be "reinstated". To put this in context, by a letter dated 30 March 2022, Santander had confirmed to the solicitors who acted for Mr Kaye on the sale of the Leysfield Road flat, that the amount necessary to discharge the mortgage had been paid and that it had instructed its Deeds Centre to deal with the redemption of the mortgage. Santander did not reply to the 23 August 2022 letter. On 22 September 2022 Ms Lees' solicitors

wrote to Santander again, asking if it would agree to reinstate the mortgage account. This letter noted that Santander had applied to discharge its charge over the Leysfield Road flat but that application had not yet been considered by the Land Registry, and that Ms Lees had now raised an objection to the application before the Land Registry. Santander did not reply to that letter either. On 12 October 2022 Ms Lees' solicitors wrote for a third time. By the time of the second day of the hearing, there had been no reply to that letter. So far as anything can be inferred from this correspondence it is that Santander does regard the mortgage account as paid and has no interest in either reviving the account or entering into a new mortgage arrangement with Ms Lees. It would, therefore, be fanciful to conclude that the debt to Santander still exists[1].

18. In consequence of Judge Dight's Order, Ms Lees now has possession of the Leysfield Road flat. The practical position is that she has possession of the flat and is subject to no obligation to repay Santander. When he discharged Ms Lees' indebtedness to Santander, Mr Kaye did act under a mistake, i.e. that he was acting so as to discharge the terms of the 6 March 2020 Order. Judge Dight's subsequent conclusion that the steps taken were void simply proves the existence of Mr Kaye's mistake. His order is not a reason now to conclude that Ms Lees has not been unjustly enriched in consequence of the mistake. Mr Westgate submitted that there was no claim in restitution because Mr Kaye had acted "without authority". He relied on the judgment of the Court of Appeal *Crantrave Limited (in liquidation) v Lloyds Bank Plc* [2000] QB 917. However, the circumstances before the court in that case are no guide to the outcome in the present case. In *Crantrave* the defendant bank had made a payment to the Claimant's creditor without Crantrave's authority. It then attempted to resist an action by Crantrave's liquidator to recover the amount for the benefit of the liquidation. The liquidator's claim succeeded. That case does not appear to have been put on the basis of the unjust enrichment principle. However, on the facts of that case, the bank's lack of authority to disperse its customer's assets is obviously highly material to how that principle might apply.

19. In the present case the relevant question is not whether Mr Kaye had Ms Lee's authority to pay Santander. Rather it is whether Mr Kaye, when paying Santander, acted under a mistake that by reason of the terms of the 6 March 2020 Order he was required to discharge Ms Lee's liability, such that Ms Lees has been unjustly

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[1] On 9 November 2022, after the hearing had concluded, Santander did reply to Ms Lees' solicitors. In this letter, Santander refers to its "neutral stance with regard to the arguments advanced on behalf of … Mr Kaye and Ms Lees and, in particular, as to the issue of whether Ms Lees' mortgage account should be reinstated and the redemption moneys refunded to Mr Kaye". Santander goes on to state that it would "act in accordance with the decision of the Court". That letter was forwarded to the court by Ms Lees' solicitors, but no application to rely on the letter was filed, and no submission based on it was advanced. In those circumstances, I disregarded the letter for the purposes of preparing the draft of this judgment. In submissions made only after the draft of this judgment was sent to the parties, Mr Westgate now submits that this Santander letter is material, and "undermines" the conclusion reached at the end of paragraph 17 of the judgment. I disagree. The premise of the letter is that the payment made by Mr Kaye did discharge Ms Lees' debt. To that extent, the letter confirms the conclusion at paragraph 17 above. The fact that Santander (very properly) states that it would abide by any judgment of the court is beside the point. Ms Lees could, in response to Mr Kaye's application, have applied for an order to the effect that Santander should be required to reinstate her mortgage account and repay Mr Kaye. She did not take that course. In the premises, the submission Mr Westgate now makes is entirely opportunistic.

enriched. The answer to that question is that he did act under that mistake; that since then, Ms Lees has had the advantage of that payment; and that there is and never has been, any realistic possibility that Santander would now act to alter that state of affairs. In the premises, Ms Lees was unjustly enriched, and Mr Kaye should be subrogated to Santander's rights as creditor.

20. The next issue is the significance of this conclusion for the purposes of the 2020 Regulations. On 27 May 2022 Mr Kaye's solicitors wrote to Mr Casson of Mental Health and Money Advice (also known as "Rethink") the debt advice provider for the moratorium granted for Ms Lees, seeking a review under regulation 17 of the 2020 regulations on the ground that the consequence of Judge Dight's judgment Mr Kaye had become a creditor of Ms Lees. This was, it was contended, an "additional debt" for the purposes of regulation 15 of the 2020 Regulations which started time running under regulation 17 for a review application. Mr Casson's initial response (in an email of 1 June 2020) was that while Ms Lees' mortgage debt had been repaid, payment of that debt had given rise to no new indebtedness because no new demand for payment had been made. In response, Mr Kaye's solicitors took two steps. By an email dated 14 June 2022 they explained to Mr Casson their contention that Mr Kaye stood in Santander's shoes by reason of subrogation. Then, on 7 July 2022 they sent a further email to Mr Casson formally demanding payment of £188,963.90. Between those two steps, on 21 June 2022, Mr Casson wrote again. While he agreed that it was unlikely that the consequence of Judge Dight's judgment was that Ms Lees had avoided the mortgage debt, he explained that, even assuming Mr Kaye was a creditor by subrogation, that did not create an additional debt for the purposes of regulation 15. Instead, for the purposes of 2020 Regulations the original debt continued to exist albeit now owed to a different creditor.

21. Whether this conclusion is correct depends on the meaning and effect of regulation 13 of the 2020 Regulations.

> "**13. — Meaning of creditor by assignment**
>
> (1) In these Regulations references to a creditor as a person to whom a qualifying debt is owed by a debtor include a reference to any person who, by assignment or operation of law, before or after the date of the application for a moratorium has—
>
> (a) assumed or has the right to exercise the rights and duties of the creditor, or
>
> (b) to whom the right to claim the whole or any part of the debt has passed,
>
> (a "creditor by assignment").
>
> (2) In these Regulations, *"assignment"*, in relation to Scotland, means assignation and *"assigned"* shall be construed accordingly."

I am satisfied that the effect of this provision is that although Mr Kaye is now a creditor, that has not given rise to an additional debt. By the subrogation, Mr Kaye has, for the purposes of regulation 13, assumed the rights and duties of Santander "by … operation of law". The submission for Mr Kaye was that although the debt due to Santander had been discharged when he made the payment on 10 March 2022, his position as creditor only arose when subrogation was recognised either by the debtor or by the court. Thus, between those events, there was no debt so that when the subrogation is recognised an additional debt arises for the purposes of regulation 15. I doubt that analysis – that there is a gap between the original indebtedness and the subrogated debt – is correct. But, be that as it may, the position is put beyond argument by regulation 13. By that regulation Mr Kaye is deemed always to have been the relevant creditor. For that reason, the subrogation gives rise to no additional debt for the purposes of regulation 15, and does not start time running for an application to review under regulation 17. Given the purpose of the 2020 Regulations, there is good reason for this conclusion on the effect of regulation 13. Any other reading of the regulation would lay open the possibility of abuse – i.e., assignment or subrogation of a debt simply to give rise to repeated opportunities for review under regulation 17. I emphasise there is no question of any abuse on the facts of this case. I fully accept that Mr Kaye's request following subrogation of the mortgage debt was made in good faith. Nevertheless, the effect of regulation 13 is clear, and the subrogation of the mortgage debt did not give rise to any opportunity for review under regulation 17.

(3) The application for review under regulation 19

22. The conclusion just stated on the application of regulation 13, and the consequence of that for the purposes of whether there was a regulation 15 additional debt and an opportunity under regulation 17 to request a review, is determinative of Mr Kaye's submission on regulation 19. Since there was no additional debt there has been no event restarting the period permitted by regulation 17(3) and/or (5) within which an application for a review may be made. On this analysis, any review under regulation 17 had to be requested within 20 days of the start of this moratorium i.e. within 20 days of 15 February 2022. There was no such review.

23. The timing provisions within regulations 17 to 19 (regulation 17(3) and (5), regulation 18(1), and regulation 19(2)) provide a rigid timetable: the review must be requested within 20 days of either the start of the moratorium or the application of the moratorium to any additional debt ("the start date"); the debt advice provider must complete the review within 35 days of the start date; and any application to the court must be made within 50 days of the start date. The 2020 Regulations contain no provision to extend or alter this timetable. On the facts of the present case, the timetable set in the 2020 Regulations has long passed. The 20-day period to ask for a review ended on 7 March 2022; any review had to be completed by 22 March 2022; any application to the court under regulation 19 had to be made by 6 April 2022. The request for the regulation 17 review was not made until 27 May 2022. Mr Casson replied to that request. The email is undated but the parties agree it was sent on 1 June 2022. Mr Casson stated he was "unable" to conduct the review requested because the request had come outside the permitted period.

24. The submission for Mr Kaye is that those provisions notwithstanding, the court retains the power to entertain an application under regulation 19 made out of time. The submission continues along the line that because a moratorium can have a significant impact on a creditor's rights, it is wrong to construe the 2020 Regulations as imposing a definitive time-bar on the opportunity to request a review. Mr Kaye's submission relied on the judgment of the House of Lords in *R Soneji* [2006] 1 AC 340. However, what was decided in that case is, for present purposes, beside the point. In that case the House of Lords was concerned with whether confiscation proceedings that took place following a period of postponement longer than permitted under section 72A of the Criminal Justice Act 1988, were valid. The issue in the present case is far removed from that. The 2020 Regulations establish a scheme for the time within which review proceedings may be initiated, may be determined by the debt advice provider, and for any subsequent application to a court. The language used is prescriptive. I can see no reason to go behind the ordinary and clear meaning of those words. As made, the timetable the Regulations set serves a clear and obvious purpose – to ensure that any review is conducted promptly following the decision to make the moratorium. Further, any attempt to revisit the timetable in the Regulations will cause difficulty. Most obviously, if there is a power to extend time, against what standard should the power be exercised? Need it be no more than "reasonable" for time to be extended, or ought the parties who request the extension of time be required to show "exceptional circumstances" or the like? Put shortly, the court is in no position to set the standard required without itself stepping into the shoes of the legislator (here the maker of the Regulations). Further, if a power to extend time exists, does it only apply to regulation 19, or could it also apply to the time prescribed in either of regulations 17 or 18? If it did, who would exercise the power: the debt advice provider himself, or would he have to apply to the court to extend time? This point also demonstrates that there is no legitimate basis on which to read-in to the scheme of the 2020 Regulations some form of power to extend time. There is no reliable standard that the court could legitimately use to supplement that which is provided for in the Regulations. For these reasons Mr Kaye's application under regulation 19 must fail. The court has no power to extend time to allow an application to be made, and since that is the position, there is no need to consider the further submission made, that there was good reason to exercise the power to extend time.

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.

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 three-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 someway 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.

27. The application under regulation 19 must also fail for a further reason. By regulation 19(1) the opportunity to make an application to the court only arises 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 …". In this case, it is clear from Mr Casson's reply to the request, that he did not carry out a review because the request had been made outside the permitted period. In those circumstances, the right of application to the court does not arise. While I can see that the position might be otherwise if a debt advice provider declined to act in response to a request under regulation 17 made within the permitted time, that is not this case. On the facts of this case there can be no suggestion that Mr Casson acted incorrectly in declining to undertake the review.

(4) The application under regulation 7(2)(b) of the 2020 Regulations

28. Regulation 7 of the 2020 Regulations specifies the effect of a moratorium. Put generally, a moratorium prevents a creditor from taking any of a range of steps for the duration of the moratorium. He may not require payment of interest on a moratorium debt that accrues during the moratorium period, or charge any fee or penalty in relation to a moratorium debt that has accrued during the moratorium period, or take "enforcement action": see regulation 7(6). Enforcement action is defined at regulation 7(7). The term includes any of a range of a range of steps a creditor might otherwise take to protect his interests or recover the debt owed to him.

29. However, by regulation 7(2)(b), a creditor may take enforcement action with the permission of the court. By regulation 7(4) a court "may … determine an application for permission to take [enforcement action] … in anyway it thinks fit [and may] give permission subject to such conditions as it thinks fit …". However, regulation 7(5) provides that a court may only give permission to take enforcement action when it is "reasonable to allow the creditor to take the step, and the step will not … be detrimental to the debtor … or … significantly undermine the protections of the moratorium".

30. Mr Kaye's application under regulation 7(2) is to be permitted to take possession of the Leysfield Road flat and sell it, as permitted by the 6 March 2020 order. Submissions have focused on whether the action Mr Kaye wants to take would be "detrimental" to Ms Lees or would "undermine the protections of the moratorium". The submission for Mr Kaye is that there is no evidence that obtaining possession of the Leysfield Road flat would be detrimental to Ms Lees' mental health. In her letter

dated 15 August 2022, Dr Sophie Sacks responded to a question about the likely effect on Ms Lees of eviction by stating

> "I am unable to predict the effect on Ms Lees of further eviction while she remains in a period of mental health crisis as compared to when she has recovered from her mental health crisis".

Further, it is submitted that permitting Mr Kaye to evict Ms Lees would not in any meaningful way deprive her of the protection of the moratorium. It is pointed out that Ms Lees has had the benefit of successive moratoriums since June 2021, yet has taken no step to devise any sort of payment plan. It is unlikely, it is submitted, that she will now take advantage of the moratorium for the purpose it is intended to serve.

31. Notwithstanding the doubt I have expressed above as to whether Ms Lees continues to meet the criteria at regulation 28(2) of the 2020 Regulations, I must consider Mr Kaye's application on the premises (a) that the moratorium was properly granted and, (b) as at the date of the hearing before me, continues to properly remain in force in accordance with the requirements of the 2020 Regulations (including those at regulation 32). On those premises I do not consider it possible to conclude that eviction from the Leysfield Road flat would not be detrimental to Ms Lees. Detriment is not a term defined in the 2020 Regulations. It must be given its ordinary meaning. It is not, therefore, limited to mental health detriment (even when the moratorium in question is a mental health crisis moratorium). As a matter of principle, any detriment relevant for the purposes of regulation 7(5)(b)(i) should be material i.e. it must be something more than *de minimis*. What is *de minimis* for this purpose must depend on the circumstances in which the regulation falls to be applied, from case to case. In this case, Mr Kaye seeks permission to obtain possession of the Leysfield Road flat. Removing Ms Lees from the flat would, as a matter of ordinary language, be detrimental to her. That being so, Mr Kaye's application under regulation 7(2) of the 2020 Regulations is refused.

C. Disposal

32. I have concluded that Mr Kaye is subrogated to Santander's rights as creditor. However, I have found against him on the three specific applications made under the 2020 Regulations in the 21 July 2022 Application Notice: (a) the subrogated debt is not an additional debt for the purposes of regulation 15 of the 2020 Regulations; (b) the application under regulation 19 fails because it has been made outside the time permitted, there is no power to extend time to allow an application under regulation 19 to be made, and in any event the further condition in regulation 19(1) that a debt advice provider has undertaken a regulation 17 review is not met on the facts of this case; and (c) the application under regulation 7(2) of the 2020 Regulations fails because eviction from the Leysfield Road flat would be detrimental to Ms Lees.