Neutral Citation Number: [2023] EWHC 758 (KB)

Case No: QB 2022 02296

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 March 2023

Before:

Mr David Lock KC,
(sitting as a Deputy Judge of the High Court)

- -

Between:

IVAN KAYE	**Applicant**
- and -	
AMANDA LEES	**Respondent**

- -
- -

Mr Simon Braun of Perrin Myddelton for the Applicant
No appearance for the Respondent

Hearing date: 27 March 2023

- -

Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date for hand-down is deemed to be on 31 March 2023.

Mr David Lock KC, sitting as a Deputy Judge of the High Court:

1. This is an application by Mr Ivan Kaye ("**Mr Kaye**") to extend the period of an injunction granted by HHJ Dight CBE, sitting as a Judge of the High Court, on 27 January 2023 to restrain the Defendant, Ms Amanda Lees ("**Ms Lees**") from making an application to a debt advisor for a mental health moratorium under the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 ("**the Regulations**") unless, in effect, she has obtained prior approval from a Judge of the High Court. I have come to the conclusion that I should refuse to extent the injunction for the reasons set out below.

The facts

2. This matter has a long and unfortunate history which is summarised in a series of decisions of the County Court and the High Court. In order to set the present application in context it is necessary to explain something of the history of the litigation. There are three prior high Court judgments namely *Lees v Kaye* [2022] EWHC 1151 (QB) (a judgment of HHJ Dight CBE sitting as a Judge of the High Court), *Kaye v Lees* [2022] EWHC 3326 (KB) (a judgment of Swift J) and *Lees v Kaye* [2022] EWHC 1151 (QB) (a second judgment of HHJ Dight CBE). The order I am asked to extend was made by HHJ Dight in January 2023 as part of the order following [2022] EWHC 1151 (QB).

3. This litigation started when Mr Kaye sued Ms Lees in the county court in nuisance and under section 3 of the Protection from Harassment Act 1997. Ms Lees counterclaimed 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 ("**the Flat**"). On 30 July 2018 HHJ Roberts, sitting at Central London County Court, found in favour of Mr Kaye and dismissed the counterclaim made by Ms Lees. 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.

4. The damages and costs were not paid by Ms Lees and remain owing at the date of this judgment. The First Respondent applied for and was granted an order for sale of Ms Lees' leasehold interest in the Flat in order to enforce the damages and costs order. Mr Kaye then brought separate proceedings for possession of the Flat in in the Willesden County Court.

5. Ms Lees made her first application under the Regulations, namely for a Breathing Space Moratorium ("**BSM**"), on 30 June 2021. That application was made shortly before a possession order was due to enforced. That application was granted by a debt advisor and so a moratorium came into existence for a period of 60 days from 1 July 2021 to 29 August 2021: see Regulation 26(2). A further writ of possession was ordered and due to be executed on 27 October 2021. That writ was not executed because an Approved Mental Health Professional ("**AMHP**") confirmed Ms Lees' eligibility for a Mental Health Crisis Moratorium ("**MHCM**") on 26 October 2021 and the Applicant applied for and was granted a MHCM by a debt advisor. That moratorium was effective until 25 December 2021. As a result of the MHCM, the High Court Enforcement Officers declined to execute the Writ of Possession in October 2021.

6. By an application notice dated 22 November 2021 issued in the county court at Central London, purportedly in the Charging Orders Claim notwithstanding the fact that transfer of the order made in that claim had been transferred to the High Court, Mr Kaye sought permission to take enforcement action despite the existence of a moratorium. The application came before His Hon Judge Luba QC on paper and he dealt with the matter without a hearing. He struck out the application by his order made on 21 December 2021 but drawn on 6 January 2022 and gave detailed reasons for his decision, which included the following:

> "*6) The solicitors for the Claimant believe that the moratorium was wrongly imposed. They contend that the debt is not a qualifying debt because it is a "non-eligible debt" for the purposes of regulation 5(4)(i) which include "any debt which consists of a liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other duty, or to pay damages by virtue of Part 1 of the Consumer Protection Act 1987…, being in either case damages in respect of any death of or personal injury (including any disease or other impairment of physical or mental condition) to any person."*

> *7) It is unclear how the solicitors contend that this debt in this case is within the italicised words.*
>
> *8) Faced with the unsuccessful review, the Claimant had two choices: (1) dispute the review result and apply to the Court for cancellation of the moratorium (regulation 19); or (2) accept that the moratorium had been correctly applied but seek permission to take certain steps notwithstanding it (regulation 7).*
> *...*
> *10) It is equally unclear why, as enforcement is in the High Court, application has been made to the county court. The High Court has appropriate jurisdiction in these matters and since the matter of enforcement is with the High Court and in the hands of the HCEOs the application ought properly to have been made to that Court: see Axnoller Events Ltd v Brake (mental health crisis moratorium) [2021] EWHC 2308 (Ch)."*

7. Mr Kaye's solicitors then waited for the MHCM to expire on 25 December 2021 and obtained a fresh appointment for execution of the Writ of Possession. On 5 January 2022 the Applicant was told that it had been diarised for execution on 13 January 2022.

8. On 12 January 2022 Mr John McGovern, an AMHP, certified that the Applicant was receiving mental health crisis treatment and she was granted a further MHCM. However, notwithstanding the existence of a current MHCM, possession of the Flat was taken on 13 January 2022 pursuant to a writ of possession issued in the High Court. Thus, Ms Lees was required to leave the Flat despite the existence of a current MHCM.

9. Mr Kaye's solicitors then moved to an exchange of contracts to sell the Flat and completion of the sale of the Lease of the Flat to Ms Chelsea Dixon, for £505,000 took place on 10 March 2022. The mortgage held by Ms Lees over the Lease was discharged by the mortgagor, Santander, and the balance of the proceeds of sale were passed to Mr Kaye's solicitors.

10. On 12 February the MHCM expired but a further moratorium was granted on 15 February.

11. After being evicted from the Flat, by an application notice dated 24 February 2022, Ms Lees sought a declaration that execution of the Writ of Possession was null and void and sought an order from the court that she could return to live at the Flat despite not having paid any monies to Mr Kaye. Her application was made under regulation 7(12) of the Regulations alleging that a MHCM was in place to protect her at the time of execution of the writ and that she therefore ought not to have been evicted. That application came before HHJ Dight CBE on 30 March 2022, with a written judgment being handed down on 13 May 2022. In summary, the Judge granted Ms Lees' application and declared that the sale to Ms Dixon was null and void. The Judge allowed Ms Lees to re-occupy the Flat.

12. The MHCM granted on 15 February 2022 lapsed on 6 November 2022. On 7 November 2022 a further application for a MHCM was made by Ms Lees and it was granted by the debt advisor on 8 November 2022. Prior to these events, Mr Kaye's solicitors had applied for permission to challenge the January 2022 MHCM outside the statutory timetable in Regulation 19. That application came before Mr Justice Swift in December 2022 who decided that the court had no power to act outside of the statutory scheme and thus could not extend time to permit a challenge to the January 2022 MHCM. The Judge also declared that Mr Kaye should be subrogated to the rights held by Santander under the mortgage which had been discharged as part of the purported sale but refused an application by Mr Kaye to permit enforcement despite the existence of the MHCM.

13. Mr Kaye's solicitors invited the debt advisor to conduct a review of the MHCM under Regulation 17 on the basis that Mr Kaye was unduly prejudiced by the current MHCM. In his email response dated 15 November 2022 Mr Casson, the debt advisor, said that having undertaken a review the conclusion had been reached that the current MHCM should continue because, as a debt advice provider he was not in a position to challenge the assertion by the AMHP who had confirmed that Ms Lees was receiving treatment for a mental health crisis and therefore eligible for a mental health crisis moratorium and because his organisation was not in a position properly to undertake the envisaged balancing exercise to determine whether Mr Kaye had been unfairly prejudiced. Mr Casson did not disclose with his review decision any of the material on which the AMHP formed their view that Ms Lees was being treated for a mental health crisis.

14. Mr Kaye, through his solicitors, then applied under Regulation 17 to set aside the November 2022 moratorium. On this occasion he was within time and thus the application could be considered by the Court on its merits. Freedman J made an order for Ms Lees to disclose the medical evidence used to support the application for the current MHCM but Ms Lees' solicitors came off the record and she failed to comply with that order, and so full disclosure of the relevant medical evidence was not before the court when the matter was considered by HHJ Dight in January 2023. The only evidence before the court was that Ms Lees was receiving 3 monthly telephone support from a community mental health team. There was, accordingly, no evidence that she had suffered a mental health crisis at the time that the current MHCM was granted in November 2022 or that she was continuing to do so.

15. HHJ Dight decided that, based on the limited medical evidence available to him, there had been a material irregularity because the medical evidence did not justify the making of a MHCM. As a result he decided to cancel the MHCM pursuant to Regulation 19(3)(a) and (b). There has been no appeal against that decision and, in any event, in my judgment it was plainly correct.

16. The Judge was then asked to grant an injunction to prevent Ms Lees from making any further applications for either a BSM or a MHCM. His conclusions on this application were as follows:

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

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

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

45. For all those reasons I will cancel the Current Moratorium and grant the injunctive relief which I have just outlined"

17. An injunction was granted for a period of 2 months as follows:

"*3. The Respondent be restrained (whether by herself or by instructing or through any other person) from applying for any further moratorium (being either a breathing space or a mental health crisis moratorium) under the Regulations until 4pm on 31 March 2023, subject to the following:*

a. The Respondent has permission to apply to vary or discharge the provisions of paragraph 3 of this Order within 7 days of service of it

> *on her. Any such application is not to operate as a stay of the terms of this Order and shall be served by email on the Applicant's solicitors;*
> *b. In any event, during the period that paragraph 3 of this Order continues to be effective, the Respondent has permission to apply to vary or discharge this injunction provided that:*
> *i. on making any such application she simultaneously files with the court and serves on the Applicant's solicitors the evidence (including the medical evidence) which she intends to rely upon to support any application for a further moratorium under the Regulations which she shall serve by email on the Applicant's solicitors;*
> *ii. she does not to make an application for a further moratorium without permission of the court granted at the hearing of any such application;*
> *iii. any such application is not to operate as a stay of the terms of paragraph 3 of this Order;*
> *c. Any application under the terms of this paragraph shall be heard expeditiously but on not less than 7 days' written notice*"

18. The effect of this order is that, for a period of 2 months, Ms Lees was prevented by injunction from exercising her statutory rights under the Regulations to make an application to a debt advisor for either a BSM or a MHCM unless she obtains the prior permission of the court to do so. The plain purpose of this order, as Mr Braun explained it to me, was to give Mr Kaye an opportunity to secure possession of the Flat from Mr Lees and then sell the Flat without having the sale put at jeopardy by Ms Lees applying for and being granted a further MHCM or a BSM.

19. Following Order granted by HHJ Dight CBE, the High Court Enforcement Officers applied for a fresh warrant and then gave Ms Lees 14 days' notice of the proposed eviction. The eviction took place on 23 February 2023, and it is understood that Ms Lees vacated the property the previous day. No MHCM or BSM was in place when the eviction took place and accordingly this appears to have been an entirely lawful eviction. The Flat has stood empty since 23 February but, no sale has yet been completed.

20. Mr Braum, for Mr Kaye, explains the current state of affairs in his witness statement as follows:

> "*The property is now either about to be resold to Ms Chelsea Dixon who originally purchased the property prior to it being declared a nullity or alternatively, there is another purchaser for the property who has offered the sum of £580,000 with a view to completing the sale within one month. Whilst nothing has been heard from the Respondent to date, the Applicant fears that as soon as the prohibition expires On 31 March 2023, the Respondent will immediately apply for a further Breathing Space Order a Mental Health Crisis Moratorium in order to thwart the sale process*"

21. Mr Kaye therefore applies to extend the period of the injunction granted by HHJ Dight CBE to prevent Ms Lees from making a further application for either a BSM or a MHCM. That application was considered on paper by Mr Justice Chamberlain who made an order that it be considered at an oral hearing. That hearing took place on 28 March. Ms Lees did not attend the hearing. Mr Kaye was represented by his solicitor, Mr Braun. I am grateful for Mr Braun's assistance at the hearing.

The Regulations.

22. The Regulations are made under the Financial Guidance and Claims Act 2018. Section 6(1) imposes a statutory duty on the Secretary of State to seek advice on the establishment of a "*debt respite scheme*". I also agree with and adopt the explanation of the background to the Regulations set out by HHJ Paul Matthews, sitting as a High Court Judge, at paragraphs 14 to 17 of *Axnoller Events Ltd v Brake & Anor (mental health crisis moratorium) (Rev1)* [2021] EWHC 2308 (Ch). The Judge said as follows:

> "*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'. ...*
>
> .....
>
> *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."*

23. That reasoning is supported by section 6(2) of the Act which explains the purpose of any such scheme as follows:

> "*A debt respite scheme is a scheme designed to do one or more of the following—*
>
> *(a) protect individuals in debt from the accrual of further interest or charges on their debts during the period specified by the scheme,*
>
> *(b) protect individuals in debt from enforcement action from their creditors during that period, and*
>
> *(c) help individuals in debt and their creditors to devise a realistic plan for the repayment of some or all of the debts*".

24. It seems to me that these three purposes must be taken as a whole, as opposed to being looked at separately. The stated purpose of the making of any mortarium order is to give a debtor a period of time when the level of their debts stops escalating and, for the period of the moratorium, protects them against enforcement action. However, the purpose of giving this "breathing space" is not to enable the debtor to avoid payment of the debts entirely. The breathing space is granted for the specific purpose of allowing debtors to work with their advisors "*to devise a realistic plan for the repayment of some or all of the debts".* The reference to "*some or all*" of the debts allows for the possibility that the only way out for a debtor is to seek a bankruptcy order which may lead to the orderly unwinding of the debtor's affairs, including the payment of some or all of the secured debts and with unsecured debtors only receiving only a part of the sums that are owing, if they receive anything at all.

25. However, these provisions explain that a central purposes of any debt respite scheme should be the development of a realistic repayment plan. Given the stated statutory purpose, it must follow that it is not a proper purpose of any application for a moratorium for a debtor to use the mechanisms under a debt respite scheme to seek to achieve a permanent or semi-permanent cancellation of any debt. It also seems to me that a financial advisor should be acutely aware that a moratorium has the capacity to prejudice the interest of the creditor and thus should be astute to ensure that any application is advanced for a proper purpose, namely that the debtor is genuinely proposing to use the

time permitted to develop a realistic plan for the repayment of some or all of the debts as opposed to just seeking to navigate himself or herself into a position where a debt cannot be enforced.

26. A key role is played under the Regulations by a "debt advice provider". Such a person is defined in Regulation 3(1) as "*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*". The scheme of the Regulations is that debt advice providers are required to undertake a quasi-judicial function of adjudicating on applications made by debtors for either BSM or a MHCM.

27. The duty on someone who applies for either a BSM or a MHCM under the Regulations is set out in Regulation 16(1) as follows:

> "*Any person who makes an application for a moratorium under these Regulations must—*
>
> *(a) take reasonable care to provide accurate information to the debt advice provider, and*
>
> *(b) not deliberately withhold relevant information from the application*"

28. That the duty to provide accurate information and not to withhold relevant information would, in this case, include a duty to provide any debt advisor with copies of all 3 previous High Court judgments which concerned the Regulations and with a copy of this judgment.

29. The debt advice provider is required to decide whether the debtor meets the qualification criteria under the Regulations, including whether the debtor owes one or more qualifying debts. In the case of a MHCM, the debt advice provider is also required to decide whether "*an approved mental health professional has provided evidence that the debtor is receiving mental health crisis treatment*". I agree with the observations of Mr Justice Swift in his judgment in this matter of December 2022 and with HHJ Dight CBE in his judgment of January 2023 that the proper construction of the Regulations requires a focus

on the word "*mental health crisis*". It follows that the fact that an individual has a long-standing mental health condition or is in receipt of regular mental health treatment in an acute or community setting will not usually be sufficient, of itself, to amount to evidence that the debtor is receiving mental health crisis treatment. The medical evidence ought to focus on whether the debtor is genuinely suffering from a mental health crisis and thus whether he or she needs protection from creditors because his or her decision-making is being affected by that mental health crisis. Mental health treatment for serious conditions is often a slow process and can continue over many years and, in my judgment, it is not part of the purpose of these Regulations to give mental health patients permanent or semi-permanent protection from their creditors. Swift J and HHJ Dight were right to focus on the fact that a MHCM is protective tool which can properly be used to protect a debtor during the period of a mental health crisis but is not intended to be available as a permanent shield against creditors for anyone who is in receipt of mental health services, outside of a mental health crisis situation. Clearly it is for the AMHP to use his or her clinical judgment to decide whether the patient is or is not in a period of mental health crisis, but debtors are only entitled to be granted a MHCM if there is evidence from the AMHP that the debtor is suffering from a mental health crisis. That reasoning is supported by the fact that a MHCM is potentially open ended because, once it is granted, it continues until one of a number of events has happened including "*the end of the period of 30 days beginning with the day on which the debtor stops receiving mental health crisis treatment".* Debt advice providers should thus ask themselves whether the evidence from the AMHP genuinely shows that the debtor is in mental health crisis as opposed to receiving regular or on-going treatment for a mental health condition. That does not appear to have been the approach adopted in this case.

30. As well as asking themselves if the debtor is eligible for either a BSM or a MHCM, the debt advice provider is required to form a judgment on whether it is "*appropriate*" to grant either a BSM or a MHCM, depending on the nature of the application: see Regulation 24(4)(b) for a BSM and Regulation 30(4)(b) in respect of a MHCM. This test is a separate from the test as to whether the debtor is entitled to apply for a BSM or a MHCM (as the case may be).

31. The requirement under the Regulations that the debt advice provider satisfy himself or herself that the moratorium is "appropriate" appears to me to be an important part of the

statutory framework. In reaching this decision, the debt advice provider is required to look carefully at the application and to decide if granting the application would be consistent with the statutory purposes of the scheme. The statutory guidance published by the Secretary of State recognises that there is a duty on the debt advice provider to look carefully to see whether a moratorium is appropriate. It provides[1]:

> "*Although all applications must be considered, the debt adviser might decide a breathing space is not appropriate for a debtor.*
>
> *For example, if a person can access funds or income, they might be able to pay their debts with some budgeting help. Another example would be if they already have assets that could easily be sold to clear the debt. In these cases, a breathing space would not be the right solution. A breathing space might also not be appropriate for a someone who can enter a more suitable debt solution straight away, without needing the protections*"

32. That guidance supplements the duty on debt advice providers to make an assessment as to whether the making of a moratorium is "appropriate". That assessment should, in my judgment, include an assessment as to whether the making of the moratorium is properly focused on the statutory objectives, including whether the debtor is proposing to use the time of any moratorium to take advice with a view to devising a realistic plan for the repayment of some or all of the debts. Hence, if an application was made to a debt advisor which did not include any proposals to seek such advice, it is hard to see how a debt advisor could properly conclude that it was appropriate to approve the moratorium.

33. Mr Kaye, through his solicitor Mr Braun, submits that this is a case where the moratorium process has been misused because repeated applications have been made for moratoria without Ms Lees ever having been focused on making a realistic plan to pay the sums she owes to Mr Kaye. On the contrary, he submits that the applications have been made for the purpose of seeking to ensure that Ms Lees can avoid paying the sums that she owes to Mr Kaye.

[1] See https://www.gov.uk/government/publications/debt-respite-scheme-breathing-space-guidance/debt-respite-scheme-breathing-space-guidance-for-creditors

34. It seems to me that there is considerable merit in this complaint but I consider that it is really a complaint about the way that the debt advisors have responded to Ms Lees' applications although it also stands as a criticism of Ms Lees herself. Authorised debt advisors are professionals and they should be expected to understand the role that they have been given under the Regulations and to appreciate what is and is not a proper purpose for a BSM or a MHCM. A level of misunderstanding was shown by the response from the debt advisor, Mr Casson, to Mr Kaye's November application to cancel the MHCM. In his email response dated 15 November 2022 Mr Casson said that having undertaken a review the conclusion had been reached that the Current Moratorium should continue because as a debt advice provider he was not in a position to challenge the assertion by the AMHP who had confirmed that Ms Lees was receiving treatment for a mental health crisis and therefore eligible for a mental health crisis moratorium and because his organisation was not in a position properly to undertake the envisaged balancing exercise to determine whether Mr Kaye had been unfairly prejudiced. Mr Casson did not disclose with his review decision any of the material on which the AMHP formed their view that Ms Lees was being treated for a mental health crisis.

35. The response shows that Mr Casson appears to have misunderstood his statutory decision-making functions in at least 2 respects. First, he does not appear to have appreciated that the fact that a debtor was in receipt of on-going mental health treatment did not, of itself, mean that the test under the Regulations was met, namely that the debtor was receiving treatment of a sufficient severity to meet the threshold to be able to be described as being treatment for a mental health crisis. As explained above, the word "crisis" must have been chosen by parliament deliberately and hence the type of treatment that met the statutory criteria was more limited than on-going treatment for a serious mental health condition. Secondly, under Regulation 17(a), the creditor is entitled to ask the debt advisor to cancel the MHCM on the basis that its continuing existence "unfairly prejudices the interests of the creditor". Thus, if an application is made to the debt advisor on that basis, the debt advisor has a legal duty as a quasi-judicial decision maker to make a decision on that issue. It is not open to a debt advisor to refuse to make a decision on whether there is unfair prejudice when the Regulations require him or her to do so.

36. There is also no evidence that, throughout the repeated granting of moratoria in this case, the debt advisors have worked with Ms Lees to develop a realistic plan for the payment of her debts or have advanced any proposals to Mr Kaye or his solicitors for the discharge of her debts. If, as appears to be the case, the moratoria were simply granted to give Ms Lees protection from enforcement and not as part of an overall process of seeking to sort out her financial affairs and develop a plan for her to pay her debts, then there is a strong case that the moratoria were granted for an improper purpose.

37. However, the fact that moratoria have or may have been granted improperly in the past does not, of itself, inevitably lead to a conclusion that the court should make an injunction to restrain Ms Lees from making any further applications for either a BSM or a MHCM.

Should the court exercise its powers to grant an injunction to prevent a debtor making a further application for a BSM or a MHCM?

38. The High Court has wide powers under section 37(1) of the Senior Courts Act 1981 to grant injunctions whenever the court concludes that it is just and convenient to do so. It is therefore clear that the court has power to grant an injunction for a defined period to restrain Ms Lees from applying for a BSM or a MHCM. The question is not one of simple jurisdiction, in the sense as to whether the court has the power to grant an injunction, but whether it is proper for the court to exercise its power to grant an injunction on these facts. There is, as far as I am aware, no Court of Appeal authority on the question as to whether it would be right to restrain a debtor from applying for a BSM or a MHCM and thus it appears to me to be an issue which has to be considered from first principles, bearing in mind that HHJ Dight has granted such an injunction for the reasons and in the form set out above and giving all due respect to his decision. I am extremely cautious of departing from the decision made by a highly experienced Judge such as HHJ Dight but it appears to me that the relevant authorities were not cited to him and thus it is appropriate for me to consider this matter afresh.

39. The Regulations set up a statutory scheme which gives every debtor a complete and unfettered the right to apply to a debt advisor for either a BSM or a MHCM. Decision making lies with the debt advisor and not with the debtor. I agree with Swift J that the Regulations are to be read as a whole statutory scheme and that they define the rights of the debtor and the creditor and the Regulations set out the role of the court. Swift J

explained his approach to the scheme of the Regulations at paragraph 24 of his judgment where he said:

> "*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*"

40. It seems to me that I should take the same approach in asking whether the High Court should, in these circumstances, exercise its power to Ms Lees from making an application to a debt advisor under the Regulations. The starting point must be that Parliament has given the right to debtors to make the application and that there is no provision in the Regulations which provides that the Court is entitled to constrain that right by providing that a debtor needs to seek permission from the High Court before such an application can be made. It would have been possible for the Regulations to have included a provision which, for example, restrained a debtor seeking a new moratorium after one had been set aside under Regulation 19 or provided that a court could restrain future applications for either a BSM or a MHCM in such a case. There is no such provision in the Regulations and that appears to me to be a clear indication that Parliament did not

intend debtors to be subject to any form of limitation in their ability to make fresh applications.

41. Mr Braun makes the point that the High Court has a wide power under section 37 of the Senior Courts Act 1981 to grant an injunction where it is "*just and convenient*" to do so. Whilst that is correct, there are limits on the ability of the High Court to make orders to restrain individuals from doing something that they are otherwise perfectly entitled to do. In *Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA ("The Siskina")* [1979] AC 210 Lord Diplock said at page 256:

> "*A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court.*"

42. The question as to whether the relevant legal or equitable wrong has to be within the jurisdiction of the court which is granting the injunction was considered by the Privy Council in *Broad Idea International Ltd v Convoy Collateral Ltd (British Virgin Island)* [2021] UKPC 24 ("***Convoy Collateral***"). The Privy Council widened the scope of cases where an injunction can be properly granted. That Privy Council jurisprudence has now been adopted in relation to the scope of the powers of the High Court to grant injunctions generally as part of domestic law as a result of the decision of the Court of Appeal in *Re G (Court of Protection: Injunction)* [2022] 3 WLR 1339. The court gave a single judgment which adopted the approach in *Convoy Collateral.* I have read and carefully considered that helpful judgment. For present purposes, it seems to me that the key part is at paragraph 55 where the court identified two requirements which need to be present before an injunction can be properly granted namely (i) an interest of the claimant which merits protection and (ii) a legal or equitable principle which justifies exercising the power to order the defendant to do or not do something.

43. Mr Braun submitted that the interest of Mr Kaye in this case which merited protection was his ability to sell the leasehold interest in the Flat so as satisfy part of the sums owing to him by Ms Lees unincumbered by having to apply to set aside a moratorium granted

under the Regulations. His case is that Ms Lees has abused her right to make applications for moratoria under the Regulations in the past so as to thwart Mr Kaye's ability to enforce the judgment and that her past abuse of the moratoria justifies the grant of an injunction. He also submitted that it was justifiable to grant an injunction to prevent a sale being lost because of an abuse of the debtor's rights under the Regulations.

44. I pressed Mr Braun as to whether his case was that an injunction was needed because, if Ms Lees was free to make an application under the Regulations, it was possible that a debt advisor would be acting lawfully in granting her a further moratorium. Mr Braun responded by expressing a concern that, in the past, debt advisors had been too willing to grant moratoria when they ought not to have been granted and were unwilling to set them aside on review when they ought to be set aside. For the reasons I have explained above, I agree that this appears to be the case here. However, his initial position was that his client needed protection because (as I understood his case) Mr Kaye did not know the full facts about Ms Lees' personal circumstances and it was thus possible that her personal situation would enable Ms Lees would make a further application which could lawfully be granted by a debt advisor, based on facts unknown to his client. Hence, so he submitted, his client needed to be protected against the possibility of a debt advisor making a lawful BSM or MHCM.

45. I have considerable sympathy for Mr Kaye but on reflection it seems to me that, on this basis, his application for an injunction has to be dismissed. Parliament has given debtors an unfettered right to apply to a debt advisor for a BSM or a MHCM and, even where a moratorium is set aside by the court, have not placed constraints on debtors applying for a new moratorium. On each occasion on which an application is made, the debt advisor undertakes a quasi-judicial decision-making process in order to decide (a) whether the statutory criteria are met and (b) whether it is appropriate to grant the requested moratorium. The primary decision maker on this matter under the Regulations is the debt advisor, not the court. If a moratorium is granted, the Regulations provide that, as a consequence, it will affect the right of the creditor to take enforcement action.

46. In my judgment, given that parliament has given these unfettered rights to a debtor and has allocated primary decision making to the debt advisor, it would not be right to grant an injunction which sets up a different decision-making structure. I consider that a

creditor cannot properly ask the court to remove these statutory rights from the debtor for a period of time or to subject the exercise of those rights to judicial supervision when that is not part of the statutory scheme. The claimant is, in effect, asking for a period of time during which the statutory rights of the debtor are suspended or applications can only be made with prior judicial approval when this is not part of the framework brought in by Parliament. If Parliament had wanted to give the court the right to suspend the right of the debtor to make applications in defined circumstances or had wanted to give the court the power to vet applications before they are made, it could have included that power within the Regulations. It is of significance that it did not do so.

47. Applying the test at 55 of *Re G*, in my judgment, a creditor does not have a legitimate right to proceed with enforcement of a judgment without having to face the risk that the debtor will seek and may be granted a moratorium because such an order would seek to constrain the rights of the debtor as given to him or her by Parliament under the Regulations in a way that is not permitted by the Regulations. It follows that, in my judgment, Mr Kaye does not have an "interest which merits protection" (as per paragraph 55 of *Re G*) where that claimed interest is his right to enforce a judgment debt without being subject to the possibility that a debtor will lawfully exercise his or her rights to seek a BSM or MHCM.

48. Further, even if there was such an interest to protect, it would only be appropriate to grant an injunction to prevent a person abusing their rights under the Regulations. I appreciate that, from Mr Kaye's perspective, it looks as if Ms Lees has been abusing her rights throughout. However, looked at objectively, I am not sure that case is made out at least as far as the earlier applications were concerned. Ms Lees has been in receipt of mental health treatment and she appears to have formed the view that this continuing mental health treatment meant she was entitled to apply for a series of MHCMs to prevent Mr Kaye from being able to enforce the debt she owed to him. Her belief that she was acting properly in making repeated applications would have been reinforced by the fact that all of her applications were granted by the debt advisor. As I indicated above, it seems to me that it is highly likely that these applications ought to have been refused for at least two reasons namely (a) her mental health treatment was not treatment for a "crisis" but was on-going mental health treatment which did not meet the severity needed to qualify under the Regulations, and (b) in any event, it was not appropriate to grant the

applications because, as far as I can tell, Ms Lees was not making the applications for a proper purpose, namely to give herself an opportunity to seek advice with a view to making a realistic plan to pay the debts, but instead was making them for an improper purpose namely to avoid having the debt enforced. If any application is not made for a proper purpose, it seems to me that the debt advisor ought to have reached the decision that it was not appropriate to grant a moratorium. However, in my judgment, the fault in this case primarily lies with the debt advisors who granted applications when they ought to refused them and not with Ms Lees who may thought she was properly exercising her statutory rights (as she saw them).

49. During argument, and faced with that line of reasoning, Mr Braun accepted that he could not sustain an application for an injunction on the basis upon which the injunction had been originally granted by HHJ Dight. However, he advanced a second line of argument namely that an injunction should be granted because, on the facts of this case, no debt advisor who had the full facts and was properly directing himself could grant a further BSM or a MHCM to Ms Lees and therefore an injunction was needed to prevent Ms Lees from making an application since, depending on what information was provided to the debt advisor, it may result in the debt advisor making an unlawful decision to grant a further BSM or a MHCM. He therefore applied to withdraw his concession that Ms Lees may be in a position to make an application for a BSM or a MHCM which a debt advisor could lawfully grant.

50. I have considerable sympathy with this submission and am content to allow Mr Braun to withdraw his concession but, in the end, I cannot accept this submission. I consider that Mr Braun's first position was correct, namely that Mr Kaye has no knowledge of Ms Lees' mental health condition or her precise financial circumstances. Unless there are facts which are unknown to the court, it seems highly, highly unlikely that Ms Lees will be able to put together an application which makes it appropriate for her to be granted either a BSO or a MHCM. Thus, if the tests are applied properly by the debt advisor, based on the facts known at this point, it appears that any application she makes for either a BSO or a MHCM ought to be turned down. However, Mr Kaye does not know Ms Lees' personal circumstances and hence, in my judgment, it is not possible for me to be able to conclude that those circumstances mean that any application she makes will have to be refused by a debt advisor.

51. It follows that I am not prepared to extend the injunction granted by HHJ Dight. Mr Braun submitted that, without an injunction, Ms Lees is highly likely to make a further application for a BSM or a MHCM and, given the level of care with which such applications appear to be considered and the level of misunderstanding about when it is appropriate for them to be granted, it is highly likely that any such application will be granted. Mr Kaye fears that, if this happens, any sale of the Flat will be thwarted because the process of using the machinery under the Regulations to set aside the moratorium takes far too long.

52. Any decision of a debt advisor to grant a moratorium would be a quasi-judicial decision which could, at least in theory, be challenged by Mr Kaye by way of judicial review. If Ms Lees were to be granted a new moratorium as a result of failure by a debt advisor to apply the tests under the Regulations correctly, any application to quash that decision would be against the decision maker, namely the debt advisor, and not against Ms Lees, although she would have to be joined as an Interested Party. If that application were to be made, the debt advisor would need to explain the reasoning for reaching his or her decision and the court would decide if the debt advisor had acted lawfully or not.

53. However, the debt advisor may seek to avoid examination of the lawfulness of his or her actions by arguing that judicial review was inappropriate because Mr Kaye had an "adequate alternative remedy" namely following the review machinery under the Regulations and then seeking a court order to quash the moratorium under Regulation 19: see the cases and commentary in "Judicial Review: Principles and Practice" (Auburn and others: OUP) at 26.89ff. Whether that argument was accepted or not would be a discretionary decision for a Judge. If My Kaye could convince a court that he either will or may lose a sale by reason of the delay that following the statutory machinery under the Regulations entails, I can see that he may well be able to make a case to the administrative court that he has no adequate alternative remedy, and thus the court may elect to proceed to examine on an urgent basis whether the debt advisor has acted lawfully in granting the moratorium.

54. When appropriate, my experience is that the Administrative Court is able to move with considerable speed in making decisions, including granting interim relief, where that is necessary to do justice. Whilst I cannot, of course, express any views on how a Judge of

the Administrative Court is likely to approach a future application in this case, if history were to repeat itself and Ms Lees were to obtain a moratorium from a debt advisor mainly or substantially for the purpose of preventing the sale of the Flat without advancing any other realistic plan to pay the sums that she owes, it seems to me more than possible that a Judge of the Administrative Court may be inclined to consider the application and to truncate the judicial review timetable so that a judicial decision could be reached on the lawfulness of the debt advisor's decision within a very short period, and hopefully soon enough to make a decision before any potential sale is lost (whatever decision is made). The Defendant to such an application, and the person thus potentially liable in costs, would of course be the debt advisor and not Ms Lees. I therefore do not accept that Mr Kaye would inevitably lose the sale due to delays in following the processes under the Regulations or that, to challenge the moratorium, his only option would be to litigate against a party who may not be able to meet a costs order. However, all that is in the future and, in the light of the fact that the Flat has now been lawfully repossessed and having given this judgment, it may well be that no further application is made under the Regulations or, if an application is made, it may well not be approved.

55. The only decision that I can make today is to refuse the Claimant's application to extend the injunction granted by HHJ Dight for the reasons set out above.