

# KINGS CHAMBERS

## A SET APART FROM THE REST



### The Debt Respite Scheme

1. The Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) England and Wales Regulations 2020/1311 ('the **Regulations**') largely came into force on 4<sup>th</sup> May 2021.
2. The regulations were made by the Treasury under a power conferred by section 7 of the Financial Guidance and Claims Act 2018, which specifically contemplated the setting up of debt respite schemes after the receipt of advice from the "single financial guidance body" (which was renamed the Money and Pensions Service, MaPS, in April 2019).
3. Part 1 of the Regulations apply to all types of moratorium, of which there are currently two. Part 2 of the Regulations deals with the breathing space moratorium ('**BSM**') and Part 3 with the mental health crisis moratorium ('**MHCM**').
4. Part 4 deals with the administration of the schemes and the requirement for the Secretary of State to maintain a register. This is a private register with details of the debtor's name, date of birth, usual residential address, trading names and addresses and moratorium start and end dates. A creditor only has access to the information related to a notified debt owed to the creditor and cannot see information about other creditors, other moratorium debts or the debtor's residential address (if it is withheld).

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5. Part 5 provides for a review of the Regulations and for a report to be published setting out the conclusions of the review. The first report is to be published before 4<sup>th</sup> May 2026, with subsequent reports at intervals not exceeding 5 years.
6. There is also a plan to introduce a new statutory debt repayment plan, which is due to be available in 2024, but which is not presently part of the Regulations.<sup>1</sup>
7. The government has provided guidance for creditors at:  
<https://www.gov.uk/government/publications/debt-respite-scheme-breathing-space-guidance/debt-respite-scheme-breathing-space-guidance-for-creditors>. There is also guidance for money advisors: <https://www.gov.uk/government/publications/debt-respite-scheme-breathing-space-guidance/debt-respite-scheme-breathing-space-guidance-for-money-advisers>.

## Part 1 – General provisions

### Key definitions

8. Regulation 2, headed “Interpretation”, contains the general definitions used throughout the Regulations, but cross-refers to the definitions contained in other Regulations for certain important terms.
9. A “**debt advice provider**” is defined in Regulation 3 as a person who:
  - 9.1. (a) has Part 4A permission under the Financial Services and Markets Act 2000 (**‘FSMA 2000’**) to carry on debt-counselling activities of the kind specified in Article 39E of the FSMA (Regulated Activities) Order 2001; or
  - 9.2. (b) a local authority.

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<sup>1</sup> <https://www.gov.uk/government/publications/debt-respite-scheme-breathing-space/debt-respite-scheme-breathing-space-initial-equality-impact-assessment>

10. Regulation 4 contains a restriction on “**debt advice provider**” (**‘DAP’**) fees and referrals. Under Regulation 4(1) a DAP “must not charge a debtor a fee in connection with a moratorium”. Any referrals by one DAP to another must be notified in accordance with Regulations (3) and (4).
11. A “**qualifying debt**” is defined in Regulation 5(1) as “any debt or liability other than a “**non-eligible debt**” which is in turn defined by Regulation 5(4) to include:
  - 11.1. (a) secured debt **which does not amount to arrears** in respect of secured debt (note any new arrears may be an “**ongoing liability**”),
  - 11.2. (b) non-eligible business debt,
  - 11.3. (c) any debt which a debtor incurred by means of any fraud or fraudulent breach of trust by the debtor (this is analogous to the position in bankruptcy, where a discharge does not release a debtor from a debt incurred by fraud),
  - 11.4. (d) any liability in respect of a fine imposed by a court for an offence or from any liability under a recognisance except, in the case of a penalty imposed for an offence under an enactment relating to the public revenue or of a recognisance, with the consent of the Treasury, (note penalty charge notices, like parking tickets are not included)<sup>2</sup>
  - 11.5. (e) any obligation arising under a confiscation order made under various enactments,
  - 11.6. (f) any obligation (including an obligation to pay a lump sum or to pay costs) arising under an order made in family proceedings or any obligation arising under a maintenance assessment or maintenance calculation made under the Child Support Act 1991,
  - 11.7. (g) any obligation arising from a payment out of the social fund by way of crisis loan or budgeting loan under section 138(1)(b) of the Social Security Contributions

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<sup>2</sup> <https://www.gov.uk/government/publications/debt-respite-scheme-breathing-space-guidance/debt-respite-scheme-breathing-space-guidance-for-money-advisers> at paragraph 4.11

and Benefits Act 1992 or that Act as it continues in force by virtue of any savings made in connection with its repeal by the Welfare Reform Act 2012,

- 11.8. (h) any debt or liability to which a debtor is or may become subject in respect of any sum paid or payable to the debtor as a student loan and which the debtor receives whether before or after the moratorium starts,
  - 11.9. (i) 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 the death of or personal injury (including any disease or other impairment of physical or mental condition) to any person,
  - 11.10. (j) a payment on account of universal credit under regulations 4 or 11 of the Social Security (Payments on Account of Benefit) Regulations 2013, and
  - 11.11. (k) and (l) certain council tax and non-domestic rates liabilities.
12. Under Regulation 5(6), a **“non-eligible business debt”** means a “debt incurred in connection with a business carried on by a debtor where the debtor at the point of the application for a moratorium and for the purpose of that business is (i) registered under the Value Added Tax Act 1994, or (ii) is a partner in a partnership with any other person, and the debt solely relates to the business carried on by the debtor”.
13. Under Regulation 6, a **“moratorium debt”** is any **“qualifying debt”**:
- 13.1. (a) that was incurred by a debtor in relation to whom a moratorium is in place,
  - 13.2. (b) that was owed by the debtor **at the point at which the application for the moratorium was made**, and
  - 13.3. (c) about which information has been provided to the Secretary of State by a debt advice provider under these Regulations.

14. Many debts are liable to be qualifying debts, including credit and store cards, personal loans, pay day loans, overdrafts, utility bill arrears and mortgage or rent arrears. Tax and benefit debts are also likely to qualify unless excluded.
15. Joint debts can also be included, even if only one of the joint debtors applies for a moratorium. The enforcement action protections must then be applied to both debtors, but the other debtor can still be liable for interest and fees.
16. New debts incurred during a moratorium are not moratorium debts, neither are new arrears on secured debts.

### What is the effect of a moratorium?

17. The effect is specified in Regulation 7. Under Regulation 7(2):

“... **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.” [emphasis added]

18. Under paragraph (6) a creditor may not:

“(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).” [emphasis added]

19. Under Regulation 7(10), even after the end of a moratorium period, neither a creditor nor their agent is entitled to:

“(a) require a debtor to pay interest, fees, penalties or charges referred to in paragraph (6)(a) and (b) that accrued during the moratorium period, or

(b) treat the non-payment during the moratorium period by the debtor of interest, fees, penalties or charges as a default by the debtor under, or a breach of, the agreement between the debtor and the creditor.”

20. There are accordingly restrictions on:

20.1. what can be added to moratoriums debts during the moratorium and afterwards;

20.2. enforcement; and

20.3. contact with the debtor.

21. A creditor must also take steps to notify any agents of the moratorium or assignees of the debt. A creditor must also search for other qualifying debts.

#### Restrictions on enforcement

22. What amounts to “enforcement action”? There is an extensive definition in paragraph (7) which includes:

22.1. (a) taking a step to collect a moratorium debt from a debtor, (although see paragraph (9) in respect of secured debts, which provides that paragraph 7(a)

- “applies only to interest that accrues on any arrears on the debt during a moratorium period”),
- 22.2. (b) taking a step to enforce a judgment or order issued by a court or tribunal before or during a moratorium period regarding a moratorium debt,
  - 22.3. (c) enforcing security held in respect of a moratorium debt,
  - 22.4. (d) obtaining a warrant ...,
  - 22.5. (f) starting any action or legal proceedings against a debtor relating to or as a consequence of non-payment of a moratorium debt, (which are defined to include a bankruptcy petition, under paragraph (8));
  - 22.6. (g) making an applying for a default judgment in respect of a claim for money against the debtor ...
  - 22.7. (j) serving notice to take possession of a dwelling-house let to a debtor on grounds 8, 10 or 11 in Schedule 2 to the Housing Act 1988 or taking possession of a dwelling house let to a debtor having served such notice ...
  - 22.8. (l) contacting a debtor for the purpose of enforcement of a moratorium debt ...
  - 22.9. (n) taking any of the steps in this paragraph in relation to a joint debtor.
23. There are further sub-paragraphs (h) and (i) that (amongst other matters) relate the gas and electricity supplies, including taking steps to install pre-payment meters and disconnection.
24. Any action taken contrary to Regulation 7 is “null and void” (under Regulation 7(12)).

#### Restrictions on contact

25. During a moratorium period, neither a creditor nor the creditor's agent must contact a debtor in relation to the enforcement of a moratorium debt, including to demand payment or as a precursor to starting legal proceedings, save as set out in Regulation 11(2).
26. Regulation 11(2) does, however, permit contact:
  - 26.1. with debtor's debt advice provider regarding a moratorium debt or debt solution, or
  - 26.2. with a debtor for purposes unrelated to a moratorium debt, or
  - 26.3. at the debtor's request or in respect of a query or complaint raised by the debtor, or
  - 26.4. in relation to permitted legal proceedings, or
  - 26.5. if otherwise required to do so under the Consumer Credit Act 1974 or Part 9A of the FSMA 2000.
27. While a creditor can contact a debt advice provider about errors in the notification (such as a misspelled name or incorrect debt balance), if there is a concern that the moratorium may be invalid, or that a debt is not a qualifying debt, that should be addressed by way of a review.<sup>3</sup>

#### Notification of agents

28. A creditor is also responsible for **notifying any agents** of the moratorium after the creditor is notified itself (under Regulation 12). If the creditor fails to notify its agent, or fails to do so as soon as reasonably practicable, the creditor will be responsible for any losses incurred as a result (see paragraph (2), subject to the agent receiving notification under paragraph (3)). An "agent" includes a solicitor (under paragraph (6)).
29. This also includes the Department of Work and Pensions ('DWP') where it is collecting a moratorium debt on behalf of a creditor through third party benefit deductions,<sup>4</sup> although

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<sup>3</sup> *Ibid.* at paragraph 3.10

<sup>4</sup> <https://www.gov.uk/government/publications/debt-respite-scheme-breathing-space-guidance/debt-respite-scheme-breathing-space-guidance-for-creditors> at paragraph 3.4

existing universal credit deductions are not included. There are specific email addresses to use to contact the DWP, which can be found in the government guidance.

30. The government guidance provides that firms that report to credit reference agencies if payments are received or not can keep doing this during a moratorium, but there should be no automatic effect on a debtor's credit file triggered by starting a moratorium and no automatic flag or code that will stay on the file after the moratorium has finished.<sup>5</sup>
31. The guidance also explains, however, that a moratorium is not a payment holiday. So while a moratorium debt cannot be enforced, the debtor is still legally required to pay any debts and liabilities they owe and a creditor can continue to accept payments, including those from existing direct debits.<sup>6</sup>

#### Searches and assignees

32. Under Regulation 14, a creditor who receives a notification of the start of a moratorium under these Regulations must as soon as reasonably practicable undertake a reasonable search of their records to identify — (a) debt owed to the creditor by the debtor to whom the moratorium relates, and (b) any creditor by assignment (as defined in Regulation 13).
33. Interestingly, the requirement to identify debts applies to HMRC as well as other creditors.
34. Where a search identifies such a debt, which was not included in the notification to the creditor, the creditor must provide details of the debt to the debtor's debt advice provider (under paragraph (2)).
35. Any assignees of relevant debts must also be notified and details of the assignee provided to the debt advice provider (under paragraph (3)).
36. A failure to notify either the debtor or the assignee as soon as reasonably practicable can make a creditor liable for losses caused to the debtor or a creditor by assignment as a result (under paragraph (4)).

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<sup>5</sup> <https://www.gov.uk/government/publications/debt-respite-scheme-breathing-space-guidance/debt-respite-scheme-breathing-space-guidance-for-creditors> at paragraph 3.4

<sup>6</sup> *Ibid.* at paragraph 3.12

37. One point to note is that a moratorium starts on the day after the debtor's details are put onto the breathing space register. If the creditor is set up to receive electronic notifications, the creditor should receive that notification on the same day that details are put on the register (a creditor has to opt into the electronic service); but if notifications are received by post, the creditor will be likely to receive the notification after the moratorium has started. The Regulations consider that an electronic notification is received on the day it was sent and that postal notification is received 4 business days after it was sent.

### **When may a Court give permission to take a paragraph (6) step?**

38. Firstly, a Court may not give permission for a creditor or agent to take any of the steps specified in paragraphs 6(a) or (b) (under Regulation 7(3), i.e. collecting a moratorium debt or enforcing a judgment or order).

39. Under Regulation 7(4):

“... a court or tribunal may—

(a) determine an application for permission to take a step specified in paragraph 6(c) or (d) [enforcing security or obtaining a warrant] 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.”

40. But under Regulation 7(5), a court or tribunal may only grant permission 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.**” [emphasis added]

#### **What about the effect on limitation periods and other deadlines?**

41. If a creditor cannot issue legal proceedings during a moratorium in respect of a moratorium debt, that creates a problem if a limitation period is due to expire, so Regulation 8(1) provides that:

“This regulation applies where—

(a) a limitation time limit relates to a right of action in respect of a moratorium debt,

(b) a moratorium in relation to the debt starts before the limitation time limit expires, and

(c) if not extended by this regulation, the limitation time limit would expire before the end of the period of eight weeks beginning with the day on which the moratorium ends.”

42. Under Regulation 8(2):

“(2) For the purposes of bringing an action in respect of a moratorium debt, the limitation time limit expires instead at the end of the period of eight weeks beginning with the day on which the moratorium ends.”

43. Other “enforcement time limits” are considered in Regulation 9.

44. Another interesting limitation issue is that it is possible that including a qualifying debt in a moratorium could be an acknowledgment that would reset time for limitation purposes.<sup>7</sup> In which case, a debt advice provider would need to discuss the implications with their client.

#### **What is the effect on existing legal proceedings?**

45. There is a requirement on the creditor bringing proceedings to notify the court or tribunal of the moratorium (under Regulation 10(1)).
46. The court must stay any bankruptcy petition in relation to a moratorium debt until the moratorium ends or is cancelled (Regulation 10(2)(a)). Another other actions or proceedings must be dealt with in accordance with the Regulation (under 10(2)(b)).
47. Under paragraph (3), any other action or proceedings that relate to a moratorium debt, which are pending at the start of a moratorium, may continue until the court or tribunal makes an order or judgment in conclusion of such action or proceedings; but all necessary steps must be taken by the court or tribunal to ensure that any actions or proceedings to enforce a court order or judgment concerning a moratorium debt do not progress during the moratorium (under paragraph (5), but note Regulation 7(7)(g) which applies to default judgment applications).
48. “Progression” includes holding a hearing, making or serving an order, warrant or summons or instructing an enforcement agent to do so (under paragraph (6)) but the Regulation does not prevent a court or tribunal from sending notices or correspondence to a debtor in relation to an action or proceeding (under paragraph (7)).
49. Where a debtor makes an admission, a credit may enter judgment if they would otherwise be entitled to do so (under paragraph (4)).
50. Regulation 10 is subject to the power or the court to grant permission to take a step as set out in Regulation 7(2)(b) (under paragraph (8)).

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<sup>7</sup> <https://www.gov.uk/government/publications/debt-respite-scheme-breathing-space-guidance/debt-respite-scheme-breathing-space-guidance-for-money-advisers> at paragraph 4.10

## What obligations are on the applicant and debtor?

51. As set out above, there are significant obligations placed on creditors, but what about on applicants and debtors?
52. A person who applies for a moratorium must: (a) take reasonable care to provide accurate information to the debt service provider, and (b) not deliberately without relevant information from the application (Regulation 16(1)).
53. During a BSM, but not a MHCM, a debtor must also (under Regulation 16(2)):
  - 53.1. (a) inform their debt advice provider if there is any material change in their circumstances or financial position,
  - 53.2. (b) make any payment due in relation to an **ongoing liability** as it falls due to be paid during the moratorium period,
  - 53.3. (c) not obtain additional credit that collectively exceeds £500 at any one point in time, and
  - 53.4. (d) engage with the debt advice provider in such a way as the debt advice provider considers appropriate.
54. An “**ongoing liability**” is defined any payment, other than in respect of a payment shortfall, which is due in relation to—
  - 54.1. (a) a secured credit agreement where the obligation of the debtor to repay is secured by a mortgage on land used by the debtor as their primary residence,
  - 54.2. (b) a lease in relation to a property used by a debtor as their primary residence,
  - 54.3. (c) an insurance agreement,
  - 54.4. (d) taxes, duties and national insurance contributions,

- 54.5. (e) local taxes to fund local authority expenditure and rates, or
  - 54.6. (f) the supply of water, sewerage, electricity, gas, heating oil or solid fuel.
55. If a debtor fails to pay the “ongoing liabilities”, the debt advice provider may cancel the moratorium, but is not required to do so if the debtor does not have financial means to pay (under Regulation 27(7)). Any other debts or bills that fall due in the moratorium period are not ongoing liabilities.

### **Can the creditor request a review?**

56. A creditor who is notified of a moratorium may request that the debt advice provider 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 (under Regulations 17(1) and (2)):
- 56.1. (a) the moratorium unfairly prejudices the interests of the creditor; or
  - 56.2. (b) there has been some material irregularity in relation to (i) the eligibility criteria when the application was made; (ii) moratorium debt not being a qualifying debt; or (iii) the debtor has sufficient funds to discharge or liquidate their debt as it falls due.
57. A request under Regulation 17(1) must be made within 20 days beginning on the start date of the moratorium, or where an additional debt is included, within 20 days of the date that the moratorium took effect in respect of the additional debt.
58. Any request must be in writing and made to the debtor’s debt advice provider and contain a statement of the ground or grounds upon which the review is requested and evidence that supports the statement (under paragraph (6)).

59. Upon receipt of a request, a debt advice provider must conduct the review and carry out certain steps specified in Regulation 18(4) before the end of 35 days beginning with the date on which the moratorium started or took effect in respect of an additional debt.
60. A debt advice provider must cancel a moratorium in respect of some or all of the debts if it considers that the creditor has provided sufficient evidence of unfair prejudice or material irregularity, unless it considers that the debtor's personal circumstances would make the cancellation unfair or unreasonable.
61. The steps required by Regulation 18(4) are that the debt advice provider must:
  - 61.1. (a) inform the creditor who requested a review of the outcome of the review, and
  - 61.2. (b) if the debt advice provider considers that a moratorium should be cancelled in respect of some or all of the moratorium debts—
    - (i) consult the debtor to whom the moratorium relates prior to doing so to the extent that the debt advice provider is able to do so, and
    - (ii) if, after acting in accordance with paragraph (i), the debt advice provider remains of the view that the moratorium should be cancelled in respect of some or all of the moratorium debts, notify the Secretary of State and the debtor of the cancellation.
62. The cancellation takes effect on the day following the day on which the Secretary of State causes an entry to be made in the register.
63. A notification sent to the creditor or agent must also state the reason for the cancellation and specify the date on which the cancellation takes effect.
64. Where a breathing space moratorium is concerned, a review under Regulation 17 may be carried out as part of a midway review.
65. If a creditor is dissatisfied with the review, the creditor can make an application to the county court on the same grounds as requesting a review. An application must be made before the end of the period of 50 days beginning with the day on which the moratorium started or took

effect in respect of an additional debt (where the application is in respect of an additional debt).

66. A new practice direction (PD70B) has been inserted to provide guidance in respect of applications. An application under Regulation 19 (request for cancellation of a moratorium) must be made under Part 23, as does an application for permission to take certain steps (under Regulation 7). Under paragraph 2.2, the applications must be heard on notice to the debtor, any joint debtor and the relevant debt advice provider.
67. The practice direction also sets out how notification should be provided to the Court for the purpose of Regulation 10(1).
68. The court has power to cancel the moratorium in relation to a moratorium debt owed to the creditor who made the application or in respect of any other moratorium debt (under Regulation 19(3)) and, where it does so, can require the debtor to pay any interest, fees or charges that accrued during the moratorium period in respect of the debt.
69. In any case where the powers are exercised, the court can also give such supplemental directions as it thinks fit and must notify the creditor, the debtor and the Secretary of State that the moratorium has been cancelled in respect of the moratorium debt (under Regulation 19(5)). The cancellation again takes effect on the day following the day on which the Secretary of State causes an entry to be made in the register.

### **The effect of the death of the debtor**

70. Where a debtor dies during the moratorium period, the moratorium ends on the day after the day the debtor died (under Regulation 21(1)).

### **Part 2 – breathing space moratoria**

71. Following receipt of advice from a debt advice provider, a debtor may apply to that debt advice provider for a breathing space moratorium (Regulations 23(1) to (3)). “Advice” means advice as to the suitability, conditions and consequences of a breathing space moratorium (**BSM**) for the debtor.

72. The application must include the debtor's full name, date of birth, usual residential address and the trading name or names and address of any business carried on by the debtor. To the extent known by the debtor and relevant, the application must also include:
- 72.1. (a) details of the debts to which the debtor is subject at the date of the application and contact details of the creditor to whom each debt is owed, and
  - 72.2. (b) details of any enforcement agent or other agent instructed by a creditor for the purpose of collection or enforcement of the debt including the agent's contact details.
73. An application may also include an application for non-disclosure of the debtor's usual residential address (under Regulation 38). Under Regulation 38(4), the grounds for non-disclosure of a debtor's usual residential address are that disclosure of the debtor's usual residential address might reasonably be expected to lead to violence against the debtor or against a person who normally resides with the debtor as a member of the debtor's family.

### **Who is eligible?**

74. A debt advice provider must initiate a BSM if the debt advice provider considers that (under Regulation 24):
- 74.1. (a) the debtor meets the eligibility criteria in paragraph (3);
  - 74.2. (b) the conditions in paragraph (4) are met; and
  - 74.3. (c) the debts to be included are qualifying debts.
75. A debtor must have at least one qualifying debt.<sup>8</sup>
76. The eligibility criteria in paragraph (3) are that the debtor is:

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<sup>8</sup> <https://www.gov.uk/government/publications/debt-respite-scheme-breathing-space-guidance/debt-respite-scheme-breathing-space-guidance-for-creditors> at paragraph 2.5

- 76.1. (a) an individual,
  - 76.2. (b) owes a qualifying debt to a creditor,
  - 76.3. (c) is domiciled or ordinarily resident in England or Wales,
  - 76.4. (d) is not subject to a debt relief order,
  - 76.5. (e) is not subject to an interim order or individual voluntary arrangement,
  - 76.6. (f) is not an undischarged bankrupt,
  - 76.7. (g) is not subject to another breathing space moratorium and, if they have previously been subject to a breathing space moratorium, that moratorium ended more than 12 months before the date of the application, and
  - 76.8. (h) is not subject to a mental health crisis moratorium.
77. The conditions in paragraph (4) are that, in light of the information provide by the debtor and any other information obtained by the debt advice provider:
- 77.1. (a) the debtor is unable, or is unlikely to be able, to repay some or all of their debt as it falls due, and
  - 77.2. (b) a breathing space moratorium would be appropriate.
78. For the purpose of paragraph (4)(b), when considering whether a breathing space moratorium would be appropriate, the debt advice provider:
- 78.1. (a) must consider whether:

- 78.1.1. (i) the debtor has sufficient funds or income to discharge or liquidate their debt as it falls due,
  - 78.1.2. (ii) it would benefit the debtor to enter into a debt solution,
  - 78.1.3. (iii) the debtor may be eligible to enter into a debt solution during a moratorium or as soon as reasonably practicable after the moratorium ends, and
  - 78.1.4. (iv) the moratorium period is necessary in order for the debt advice provider to assess which debt solution would be appropriate for the debtor, to advise the debtor on which debt solution would be appropriate or for a debt solution to be put in place, and
- 78.2. (b) may have regard to any other factor the debt advice provider considers relevant, including but not limited to whether—
- 78.2.1. (i) it is necessary for the debtor to enter into a debt solution in order to discharge or liquidate their debt,
  - 78.2.2. (ii) it is necessary for the debtor to enter into a debt solution without delay and the debtor is in a position to do so, or
  - 78.2.3. (iii) the debtor is already subject to an appropriate debt solution.
79. A “**debt solution**” is “an arrangement, scheme or procedure, whether statutory or not, the aim of which is to pay, discharge or liquidate some or all of a debtor's debts.”
80. For an example of where a BSM may not be appropriate, the government guidance give the examples of:
- 80.1. a person who can access funds or income and who might be able to pay their debts with some budgeting help;

- 80.2. a person who has assets that could easily be sold to clear the debt; or
- 80.3. a person who can enter a more suitable debt solution straight away, without needing the protections.<sup>9</sup>

### **How long does a BSM last?**

- 81. A BSM generally lasts for 60 days, unless cancelled earlier (Regulation 26).
- 82. The debt advice provider responsible must review the moratorium to determine whether it should continue or be cancelled as part of the “midway review”, which must be completed before the end of a period of 35 days beginning with the day on which the moratorium started and started (Regulation 27 (1) and (2)).
- 83. The review must not be carried out in the period of 25 days beginning with the day on which the moratorium started (Regulation 27 (3)).
- 84. There are 3 steps to the midway review:<sup>10</sup>
  - 84.1. Assessing whether the debtor is complying with their obligations;
  - 84.2. Checking whether a debtor has entered into a debt solution. If he or she has, the BSM does not need to continue; and
  - 84.3. Deciding whether the BSM should continue.
- 85. Having carried out a midway review, a debt advice provider must cancel a moratorium in respect of some or all of the moratorium debts if it considers that:
  - 85.1. (a) the debtor has failed to comply with any of the debtor's obligations under Regulation 16,

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<sup>9</sup> <https://www.gov.uk/government/publications/debt-respite-scheme-breathing-space-guidance/debt-respite-scheme-breathing-space-guidance-for-creditors> at paragraph 2.1

<sup>10</sup> <https://www.gov.uk/government/publications/debt-respite-scheme-breathing-space-guidance/debt-respite-scheme-breathing-space-guidance-for-money-advisers> at paragraph 7.20

- 85.2. (b) a debt solution has been put in place in respect of all the moratorium debts, or
  - 85.3. (c) the debt advice provider is unable to consult the debtor as required under paragraph (8)(a), including for reasons of the unavailability of the debtor.
86. The requirement to cancel is subject to two provisos (under paragraphs (6) and (7)):
- 86.1. A debt advice provider is not required to cancel a moratorium in respect of a moratorium debt if the debtor's personal circumstances would make the cancellation unfair or unreasonable; or
  - 86.2. Where a debtor has failed to comply with the obligation in regulation 16(2)(b) to pay an ongoing liability, a debt advice provider is not required to cancel a moratorium in respect of a moratorium debt if the debtor does not have the financial means to pay the ongoing liability.

### **Part 3 – mental health crisis moratoria**

87. A mental health crisis moratorium ('**MHCM**') is a moratorium in respect of a debtor who is "receiving mental health crisis treatment", which is defined, under Regulation 28, as where the debtor:
- 87.1. (a) has been detained in hospital for assessment under sections 2 or 4 of the Mental Health Act 1983,
  - 87.2. (b) has been detained in hospital for treatment under section 3 of that Act,
  - 87.3. (c) has been removed to a place of safety by a police constable under sections 135 or 136 of that Act,
  - 87.4. (d) has been detained in hospital for assessment or treatment under sections 35, 36, 37, 38, 45A, 47 or 48 of that Act, or

- 87.5. (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.
88. A “**specialist mental health service**” means “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.” (under Regulation 28(3)).

**Who may submit an application and what should it contain?**

89. Any of the following persons may submit an application to a debt advice provider for a MHCM in relation to a debtor (under Regulation 29):
- 89.1. (a) the debtor,
  - 89.2. (b) the debtor's carer,
  - 89.3. (c) an approved mental health professional,
  - 89.4. (d) a care co-ordinator appointed in respect of the debtor,
  - 89.5. (e) a mental health nurse,
  - 89.6. (f) a social worker,
  - 89.7. (g) an independent mental health advocate appointed in respect of the debtor for the purposes of arrangements made under sections 130A(1) or 130E(1) of the Mental Health Act 1983,
  - 89.8. (h) an independent mental capacity advocate appointed in respect of the debtor for the purposes of arrangements made under section 35(1) of the Mental Capacity Act 2005,

- 89.9. (i) a relevant person's representative,
  - 89.10. (j) an approved mental capacity professional approved under paragraph 39 of Schedule AA1 to the Mental Capacity Act 2005, or
  - 89.11. (k) an appropriate person as specified in paragraph 42(5) of Schedule AA1 to the Mental Capacity Act 2005.
90. The application must include (a) sufficient information to identify the debtor and (b) evidence from an approved mental health professional that the debtor is receiving mental health crisis treatment (under paragraph (2)).
91. An applicant for a MHCM does not have to access debt advice first.
92. As for the evidence from an approved mental health professional, it must include the following:
- 92.1. (a) sufficient information to identify the debtor,
  - 92.2. (b) the name and contact details of the approved mental health professional,
  - 92.3. (c) the name and contact details of the debtor's nominated point of contact,
  - 92.4. (d) a declaration by the approved mental health professional that the debtor is receiving mental health crisis treatment, and
  - 92.5. (e) a signed statement by the approved mental health professional that the evidence is, to the best of their knowledge and belief, correct.
93. The application may also include the following, where it is known by the person submitting the application, is relevant and has not otherwise been provided:

- 93.1. (a) the debtor's full name, date of birth and usual residential address,
  - 93.2. (b) the trading name or names and address of any business carried on by the debtor,
  - 93.3. (c) details of the debts to which the debtor is subject at the date of the application and the contact details of the creditor to whom each debt is owed, and
  - 93.4. (d) details of any enforcement agent or other agent instructed by the creditor for the purpose of collection or enforcement of the debt including the agent's contact details.
94. The application may also include an application for non-disclosure of the debtor's home address under Regulation 38.

#### **Th eligibility criteria and the debt advice provider obligations**

95. Under Regulation 30(1), when considering an application for a MHCM, a debt advice provider must:
- 95.1. (a) assess whether the debts included in the application are qualifying debts, and
  - 95.2. (b) obtain information relevant to the financial standing of the debtor from at least one credit reference agency.
96. The debt advice provider must initiate a MHCM if it considers that (under paragraph (2)):
- 96.1. (a) the debtor meets the eligibility criteria in paragraph (3),
  - 96.2. (b) the conditions in paragraph (4) are met, and
  - 96.3. (c) the debts to be included in the moratorium are qualifying debts.

97. The eligibility criteria in paragraph (3) are largely the same as for a BSM save that the debtor must not be subject to a BSM or MHCM. Whether or not the debtor has been subject to a BSM previously and when is not part of the criteria. A debtor who has had a BSM or MHCM in the last 12 months may therefore be eligible for a BSM.
98. The conditions in paragraph (4) are that:
- 98.1. (a) the debtor is unable, or is unlikely to be able, to repay some or all of their debt as it falls due,
  - 98.2. (b) a mental health crisis moratorium would be appropriate, and
  - 98.3. (c) an approved mental health professional has provided evidence that the debtor is receiving mental health crisis treatment.
99. For the purpose of paragraph (4)(b), when considering whether a MHCM is appropriate, the debt advice provider:
- 99.1. (a) must consider whether the debtor has sufficient funds or income to discharge or liquidate their debt as it falls due, and
  - 99.2. (b) may have regard to any other factor that the debt advice provider considers relevant.

#### **How long does a MHCM last?**

100. Unless it is cancelled earlier, or there is a failure to respond by a nominated point of contact, or the debtor dies, the MHCM ends on the period of 30 days beginning with the day on which the debtor stops receiving mental health crisis treatment.
101. Under Regulation 33, a debt advice provider must before the end of the period of 30 days (but not before 20 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 not, when the treatment ended.

102. The request must be renewed every 20 to 30 days while the moratorium continues (under Regulation 33(3)).

### **When should a MHCM be cancelled?**

103. Under Regulation 34(1), a debt advice provider must cancel a MHCM if:

103.1. (a) the debt advice provider considers that the evidence from the mental health professional contains inaccurate, misleading or fraudulent information, or

103.2. (b) the debtor requests the cancellation.

104. In contrast, once a BSM starts, a debtor cannot ask for it to be cancelled.

105. But a debt advice provider is not required to cancel the MHCH under paragraph (1), if the debtor's personal circumstances would make the cancellation unfair or unreasonable, unless a request is made by the debtor (under paragraphs (2) and (3)).

106. The debt advice provider must consult the debtor before any cancellation insofar as it is able to do so and notify the Secretary of State and the debtor of the cancellation, who will then send notification to each creditor (under paragraphs (4) and (5)).

107. The notification must state the reason for the cancellation and the date that it takes effect on (under paragraph (8)).

## AXNOLLER EVENTS LIMITED V BRAKE AND ANOTHER

### [2021] EWHC 2308 (Ch)

1. HHJ Paul Matthews sitting at the Business and Property Courts in Bristol has provided the first reported decision on an application to cancel a mental health crisis moratorium under the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (*SI 2020/1311*) ("**the Regulations**").

#### The Background to the Issue before HHJ Matthews

2. The parties had been (and continue to be) involved in protracted litigation.
3. In September 2004, the first claimant (then Mrs D'Arcy, but whom the judge called by her current name, Mrs. Brake) acquired West Axnoller Farm ("**the Farm**"), near Beaminster in Dorset, from local landowners, the Vickery family (who continued to have substantial landholdings locally). This property included a substantial dwelling-house known subsequently as Axnoller House. In 2006, Mrs. Brake began to operate a holiday letting business at the Farm, subsequently joined in partnership in 2008 by her husband, the second claimant ("**Mr. Brake**"). Just outside the southern boundary of the Farm, on the other side of the private lane leading to the Farm, lay another, smaller residential property known as West Axnoller Cottage ("**the Cottage**").
4. In July 2002 a Mr. and Mrs. White had purchased the Cottage from the Vickery family and were living there when Mrs. Brake bought the Farm. Mrs. Brake borrowed money from bankers Adam & Co in 2006, secured by a first legal charge on the Farm. The financial crisis of 2008 made it impossible to obtain further bank finance to expand the business being carried on at the Farm. The claimants therefore looked for an outside investor.
5. In February 2010 the claimants entered into a partnership with a limited partnership called Patley Wood Farm LLP ("**PWF**"), whose principal was Mrs. Lorraine Brehme ("**Mrs. Brehme**"). The new partnership (known as "Stay in Style") was to carry on the business of providing luxurious weekend and other breaks, and hosting events such as weddings. The claimants contributed the Farm as partnership property, although it remained charged to Adam & Co to secure existing borrowings. With funds contributed by Mrs. Brehme, on 8 March 2010 the partnership acquired the Cottage, the legal title to which was transferred to the claimants and Mrs. Brehme jointly, who were registered as proprietors. At first the Cottage was used as accommodation for a housekeeper and then for a personal assistant (Simon Windus) and his family. After they left in 2012 it was used (*inter alia*) for the claimants to stay in when the main house was let.
6. Differences arose between the claimants on the one hand and PWF on the other, as partners in Stay in Style. In accordance with the partnership agreement, these were referred to

arbitration, which ended on 21 June 2013 with an award in favour of PWF, and the dissolution of the partnership. Following a failure to pay orders made against them for costs in the arbitration, the claimants were adjudicated bankrupt on 12 May 2015. Mr. Duncan Swift was appointed Trustee-in-Bankruptcy with another person, who later retired and was not replaced. The partnership itself subsequently went into Administration (in 2016), and then into Liquidation (in 2017).

7. In October 2014 Adam & Co, the bank which had lent money to Mrs. Brake against the security of the Farm, appointed receivers under the Law of Property Act 1925. After marketing the property, the LPA receivers sold it in July 2015 to a newly incorporated company, Sarafina Properties Limited ("**Sarafina**"), said to be a corporate vehicle for the Hon Saffron Foster ("**Mrs. Foster**"), a daughter of Lord Vestey, as well as a friend of Mrs. Brake.
8. In February 2017 Mrs. Foster sold the company to The Chedington Court Estate Ltd ("**Chedington**", the second defendant), and its name was changed to Axnoller Events Limited ("**AEL**"). It is the third defendant in this claim. Chedington is an investment vehicle for Dr. Geoffrey Guy ("**Dr. Guy**", the first defendant). Mr. and Mrs. Brake were employed to continue to run the wedding and rental accommodation business as before. Relations between the parties broke down, and on 8 November 2018 notice was given of the termination of their employment. This led to proceedings in the employment tribunal against Chedington and others by each of the claimants ("**the Employment Claims**"), and proceedings in the High Court by AEL against the applicants to recover possession of the Farm ("**the Possession Claim**").
9. Following this, in January 2019, Mr. Swift as Trustee-in-Bankruptcy entered into a transaction with the Liquidators of the partnership in relation to the Cottage, to acquire the Liquidators' rights in it. Chedington entered into back-to-back transactions with Mr. Swift in order to acquire those rights. The Brakes allege that Chedington and Mr. Swift acted collusively, implementing "unlawful arrangements to create the false appearance that Chedington had acquired title to the Cottage". Chedington subsequently took possession of the Cottage, the Brakes say unlawfully. They therefore commenced eviction proceedings against Chedington ("**the Eviction Claim**").
10. In addition, on 12 February 2019 the Brakes commenced insolvency proceedings (the "**Liquidation Application**" and the "**Bankruptcy Application**") against both the Liquidators of the partnership and their Trustee-in-Bankruptcy. The first purpose of these insolvency proceedings was to unwind the disputed transactions. The second purpose was (as against the Trustee) to establish that the Brakes' pre-existing interests in the Cottage and the adjacent parcels had reverted in them and Mrs. Brake respectively on 12 May 2018 under the Insolvency Act 1986, section 283A, on the basis that they were the Brakes' sole or principal residence at the date of bankruptcy, and Mr. Swift had taken no steps to realise them three years later. In April 2019, by consent, Chedington was joined as second respondent to the proceedings against Mr. Swift, because it claimed to be a successor in title to him. In June 2019 Mr. Jarvis QC made two orders by consent, one removing Mr. Swift from office, and another appointing his successors.
11. In January 2020 Chedington applied to strike out the proceedings against the Liquidators and most of those against Mr. Swift and itself, on the basis that the Brakes lacked standing to bring them. HHJ Matthews heard those applications in early March 2020, and acceded to them. He struck out the whole of the Liquidation Application ([\[2020\] EWHC 538 \(Ch\)](#)), and most of the Bankruptcy Application ([\[2020\] EWHC 537 \(Ch\)](#)), for lack of standing. An appeal against the judge's decision in the Liquidation Application was dismissed by the Court of Appeal. An appeal against the judge's decision in the Bankruptcy Application was however allowed, so

that that application was yet to be tried (see [\[2020\] EWCA Civ 1491](#) for both appeals). But, as at March 2020, the only significant matter left from the Liquidation and Bankruptcy Applications to be tried in May of that year, against the former trustee and Chedington, was the revesting issue under section 283A.

12. On 4 May 2020, the claimants applied by notice in relation to that section 283A claim for HHJ Matthews to recuse himself from trying it. He heard that application on 7 May and gave judgment on 11 May 2020, refusing the application: see [\[2020\] EWHC 1156 \(Ch\)](#), [\[2020\] BPIR 1254](#). Permission to appeal against the judge’s decision was refused by the Court of Appeal. So the section 283A claim was tried, and HHJ Matthews gave judgment in July 2020, in favour of Chedington ([\[2020\] EWHC 1810 \(Ch\)](#), [\[2020\] 4 WLR 113](#)). An application for permission to appeal was refused by the Court of Appeal on 30 October 2020.

#### The Issues in *Axnoller Events Limited v Brake and another*

13. On 6 May 2021, Mr. Brake entered into a mental health crisis moratorium under the Regulations. The applicants in the current application (AEL and Chedington, referred to in the judgment of HHJ Matthews as “the Guy Parties”) applied as follows:
  - (a) To cancel the moratorium; and
  - (b) For an order that, unless the Brakes paid certain existing costs orders in favour of the Guy Parties, they be debarred from defending and counterclaiming or claiming as applicable in the underlying litigation. There were five costs orders; three pre-dated the moratorium and two post-dated it.

#### Paragraphs 14 to 21 of the Judgment of HHJ Matthews

14. In these paragraphs of his Judgment, HHJ Matthews provided a helpful summary of the rationale behind and structure of the Regulations. These paragraphs are repeated in their entirety here:

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

#### *Interpretation*

In *Fothergill v Monarch Airlines Ltd* [\[1981\] AC 251](#), at 281B-C, Lord Diplock said:

"Where the Act has been preceded by a report of some official commission or committee that has been laid before Parliament and the legislation is introduced in consequence of that

report, the report itself may be looked at by the court for the limited purpose of identifying the 'mischief' that the Act was intended to remedy, and for such assistance as is derivable from this knowledge in giving the right purposive construction to the Act."

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

"In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria."

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".

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.

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

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

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

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

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

### *Structure*

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

For the moment I will simply note that the general effect of a moratorium under these Regulations is that during the moratorium period the creditor is unable to take any steps to require a debtor to pay interest or other fees or charges, or take any enforcement action, in respect of the moratorium debt. Moreover, for this purpose enforcement action includes any enforcement action taken in relation to a person jointly liable with the debtor in respect of whom the moratorium has come into effect: see regulation 7(7)(n). That is particularly significant in the present case, where the debts owed by Mr Brake to the Guy Parties are joint debts with Mrs Brake and (in the case of the Eviction Proceedings) Tom D'Arcy, but there is no moratorium in effect in relation to her."

### The decision of HHJ Matthews

15. The applicant creditors sought an order cancelling the debtor's mental health crisis moratorium, under Regulation 19 of the Regulations, on the grounds that it unfairly prejudiced their interests (having previously had a cancellation request rejected by the debt advice provider under Regulation 17).
16. The judge refused to cancel the breathing space moratorium but did order that Mr. Brake and his wife pay sums under costs orders made against them which post-dated the moratorium. He refused to make an unless order in relation to the pre-moratorium costs orders.
17. The judge dealt first with two preliminary matters.
18. First, whether the application to cancel the moratorium should have been made to the County Court or the High Court. An application to cancel the moratorium is made under Regulation 19 of the Regulations, which provides that the creditor "... *may make an application to the county court...*". HHJ Matthews held that this wording did not exclude the jurisdiction of the High Court. Ordinarily, the High Court would be expected to transfer the proceedings to the county court unless there was a reason to retain it. However, there was in the present case good reason to leave the application in the High Court because it was closely connected with existing High Court litigation.
19. Secondly, should the application to cancel the moratorium have been made by Claim Form instead of by ordinary Application Notice (as was the case here)?

20. In the judgment first posted on Bailii, HHJ Matthews held that, in principle, the appropriate method of making such an application was to issue a Claim Form. In a subsequent postscript to the judgment, at para [12A], the judge noted however that he had subsequently been referred to CPR PD 70B, paragraph 2, which provides that an application of the kind made here should be made by ordinary notice under CPR Part 23, rather than by Claim Form.
21. The Guy Parties argued that the moratorium caused “*unfair prejudice*” to them within Regulation 17. The judge noted that Government guidance on the Regulations gave a single example of unfair prejudice in this context, being a case where the terms of the moratorium are discriminatory against the particular creditor. The judge accepted that unfairness is to be assessed objectively, and the court must carry out a balancing exercise. He also accepted that, where the moratorium discriminates unfairly between creditors, so that the impact on one is significantly more severe than on another, that may well be a proper basis on which the court can say that the moratorium “*unfairly prejudices*” the applicant creditor.
22. HHJ Matthews considered that the phrase “*unfair prejudice*” should be given its ordinary meaning but the judge refused to lay down any firm guidelines for the future and concluded that “*unfair prejudice*” should be determined objectively on a case-by-case basis.
23. The judge did make three preliminary observations.
24. First, there may be cases where post-moratorium conduct can turn a moratorium which did not unfairly prejudice a creditor from the outset into one which now does. Improvement of the mental health of the debtor so as to enable him or her to engage with the debt problem might make the moratorium unfairly prejudicial if the debtor did not then so engage (**paragraph 34 of the judgment**).
25. Secondly, in considering at what level the amount of money that the creditor stands to lose justifies imposing the risk upon the debtor of further harm to his or her mental health, “*the answer may be that, like the elephant, you will know it when you see it*” (**paragraph 35 of the judgment**).
26. Thirdly, the application sought cancellation of the moratorium *as a whole*. That would expose Mr. Brake to the enforcement of other debts which were intended to be covered by the moratorium, and in respect of which the other creditors had not made a similar application to cancel it. Regulation 19(3) enables the court to make a tailored order, but the judge considered that he should proceed with caution (**paragraph 36 of the judgment**).
27. Additionally, HHJ Matthews determined that the considerations relevant to balancing the interests of the creditor against those of the debtor will be different depending on whether it is a standard breathing space or a mental health crisis breathing space.
28. HHJ Matthew noted at paragraph 37 of his judgment that it would be important on a challenge under Regulation 19 to have appropriate evidence from a suitably qualified professional about the debtor’s mental health, the treatment and the prognosis. In the present case, the only evidence before the court in relation to Mr. Brake’s mental health gave no sufficient detail of the duration and severity of Mr. Brake’s illness, no prognosis and no timescale for any improvement of his mental health. Nor did it explain how the removal of the moratorium would hinder Mr. Brake’s recovery when at the same time he continued to be involved, both as a party to and as a witness, in large-scale civil litigation, including three lengthy trials within the next ten months. The evidence was of little assistance to the court.

29. Regulation 30(4)(b) requires the debt advice provider to act on evidence from an approved mental health professional that the debtor is receiving mental health crisis treatment. On this application, there was no such evidence before the Court.
30. The judge accepted that the Guy Parties were exposed to further potential debts in the future, namely costs orders against the Brakes if they lost in the litigation. To that extent, the Guy Parties were prejudiced by the moratorium in a way in which other creditors may not be.
31. However, as the judge stated at paragraph 43 of his judgment, that prejudice was not so much the result of the moratorium, whose effects are the same for all creditors, as the result of the litigation system itself, and in particular the costs rules. If a deficiency in those rules did not provide sufficient protection to the Guy Parties, it was not for the provisions relating to a breathing space moratorium to make up for their lack.
32. The judge held (see below) that future debts are not covered by the moratorium. In the continuing litigation, further costs liabilities would in principle not be covered by the moratorium and the parties would litigate on the usual principles, and risks, as to costs. Any complaint by the Guy Parties that the Brakes were not in a position to satisfy future costs liabilities had nothing to do with the moratorium.
33. The judge also rejected the Guy Parties' argument that Mr. Brake did not appear to be obtaining any advice on debt restructuring and, as such, that the moratorium was being used in bad faith, not for the purpose of enabling Mr Brake to get to grips with his debt problem but rather simply to put off any enforcement procedures for as long as possible.
34. The judge noted – see paragraphs 45 and 46 of his judgment - that the whole point of the mental health crisis eligibility for a moratorium is based on the assumption that a person suffering a mental health crisis is either unable or at least less able, by reason of the mental health problem itself, to engage with debt advice. He would therefore need to see some evidence that Mr. Brake's mental health had improved to an extent that it would be reasonable to expect him to begin engaging with debt advice. Moreover, the time which had elapsed since the moratorium was imposed was relatively short.
35. There were five costs orders in all, three pre-dating the moratorium and two post-dating it. Whilst the court has general jurisdiction in principle to make an unless order, the judge had to take into account of the effect of the Regulations.
36. HHJ Matthews considered the relevant provisions, holding that the effect of Regulation 5 (Qualifying Debt) and Regulation 6 (Moratorium Debt) is that no debt, even if it is a "qualifying debt", which is incurred after the application for a moratorium can be a "moratorium debt", at least without more.
37. He rejected the Brakes' argument that Regulation 15 (Additional Debt) covered a debt incurred after the application for a moratorium has been made. "Additional debts" are restricted to those which were incurred before the moratorium but not then known about and therefore details of which were not given to the creditors.
38. In holding that the moratorium did not include future debts, the judge rejected in particular the Brakes' argument that such a conclusion would serve no purpose, because it would be open to a debtor to bring the moratorium to an end and apply again, this time including the previously future debts which would now be past debts, and therefore moratorium debts. The judge did not consider – see paragraph 69 of his judgment - that it would be so easy for a

debtor to bring to an end a mental health crisis moratorium and immediately obtain an unimpeachable further such moratorium. It would be transparent that this was not being done in good faith but simply in order to include debts which could not have been included in the original moratorium.

39. Applied to the present case, the debts constituted by the pre-moratorium costs orders were covered by the moratorium but the debts constituted by the later costs orders were not because neither of them was incurred before the moratorium came into effect.
40. The Guy Parties' application had been for an unless order in relation to all the costs orders.
41. In relation to the orders which were covered by the moratorium, Regulation 7(2) applied, and the Guy Parties were prohibited from taking any of the specified steps without the permission of the court, including (see Regulation 7(7)(b)) "*... a step to enforce a judgment or order issued by a court ... before or during ... a moratorium period regarding a moratorium debt*".
42. At paragraphs 71 and 72 of his judgment, the judge concluded that an unless order was not enforcement of a court order in the strict sense but the consequence would be that the debtor would be debarred from prosecuting his existing claims against the Guy Parties. In a practical sense, it would therefore be a step to enforce the order, because it put pressure on the debtor to comply with it. In the judge's view, that was inconsistent with the policy of the Regulations and Regulation 7(2) prevented the Guy Parties from applying for an unless order in relation to these costs orders.
43. The judge also referred to Regulation 10, holding that for the purposes of that provision, the present application as regards the earlier costs orders was a proceeding "*in relation to a moratorium debt*". Regulation 10(5) requires that a proceeding to enforce a court order concerning the moratorium debt should not "*progress*". In his judgment the notion of enforcing a court order in Regulation 10 was the same as that in Regulation 7, and for the same reasons. Accordingly, Regulation 10 also prevented the court from acceding to the "unless" order application so far as concerns the earlier costs orders.
44. In relation to the later costs orders, the judge held that the default rule is that a litigant should not be able to continue with a claim without satisfying an existing and non-appealed final costs order and the court should impose a condition requiring compliance. It is open to that litigant to show that its rights under Article 6 ECHR will be interfered with because the litigant cannot pay and the claim will therefore be stifled.
45. On the evidence, the judge concluded at paragraph 79 of the judgment that the Brakes had not demonstrated that paying the two later costs orders would stifle their claim. The evidence was that they did have available funds and assets and could have satisfied at least some of these costs orders but chose not to do so. The judge held that the case for the "unless" order in relation to the two later costs orders was made out.
46. The final point considered by HHJ Matthews at paragraph 81 of his judgment was whether he should order a stay as an alternative to setting aside or cancelling the moratorium. Although a stay would not be "starting" proceedings against the debtor within the meaning of Regulation 7(7)(f), it would still be taking a step to collect or enforce a moratorium debt, by putting pressure on the debtor to pay it, within Regulation 7(7)(a), (b). Although the judge did not need to decide whether it would also infringe Regulation 10(5), by parity of reasoning he thought it probably would.

## Conclusion

47. This was the first 'moratorium' related decision after the Regulations came into effect. It is probably unlikely to be the last word in relation to the same.
48. It is worth taking note of the issues around evidence (for claimant and defendant), the fact that a mental health crisis moratorium will not be lightly cancelled without cogent reasons and it is also worth noting that Regulation 30(4)(b) requires evidence of a debtor's mental health crisis treatment. On any future challenge under Regulation 19 made by Application Notice, such evidence is very likely to be a relevant matter for disclosure.

The authors do not accept any liability for the accuracy of these notes and the notes are not a substitute for obtaining legal advice in any given case.