# Lexis®Nexis Case Summaries

## Kayes v Lees

[2023] EWHC 758 (KB), [2023] All ER (D) 31 (Apr)

The King's Bench Division ruled that a creditor did not have a legitimate right to proceed with enforcement of a judgment without having to face the risk that the debtor would seek, and might 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 Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020, SI 2020/1311 (the Regulations), in a way that was not permitted by the Regulations. Accordingly, the court dismissed the applicant creditor's application to extend the period of an injunction granted to restrain the respondent debtor from making an application to a debt advisor for a mental health crisis moratorium (MHCM) under the Regulations, unless she had obtained prior approval from a High Court judge. The applicant was concerned that the grant of a further moratorium would thwart the sale of a flat in an effort to enforce orders made in his favour. The court considered that a case had not been made out that the respondent had been abusing her rights under the Regulations by making repeated applications for a breathing space moratorium (BSM) and MHCM, and that the fault primarily lay with the debt advisors who had granted her applications when they ought to have refused them. The court held that, while the purpose of giving the 'breathing space' was not to enable debtors to avoid payment of the debts entirely, Parliament had given them an unfettered right to apply to a debt advisor for a BSM or MHCM and that, even where a moratorium was set aside by the court, Parliament had not placed constraints on debtors applying for a new one. The court considered that, in those circumstances, the debt advisor undertook a quasi-judicial decision-making process in order to decide whether the statutory criteria were met and whether it was appropriate to grant the requested moratorium, and that the primary decision maker on the present matter, under the Regulations, was the debt advisor, not the court. If a moratorium were granted, the Regulations provided that, as a consequence, it would affect the right of the creditor to take enforcement action. Accordingly, the court held that the fact that parliament had given unfettered rights to a debtor and had allocated primary decision making to the debt advisor meant that it would not be right to grant an injunction which set up a different decision-making structure, and that a creditor could not properly ask the court to remove those statutory rights from the debtor for a period of time or to subject the exercise of those rights to judicial supervision when that was not part of the statutory scheme.

### Catchwords

*INJUNCTION – MENTAL HEALTH CRISIS MORATORIUM – CREDITOR'S APPLICATION FOR EXTENSION OF INJUNCTION TO RESTRAIN DEBTOR FROM MAKING APPLICATION TO DEBT ADVISOR FOR MENTAL HEALTH CRISIS MORATORIUM WITHOUT COURT'S PRIOR APPROVAL*

### Background

The applicant sued the respondent in the county court in nuisance and under s 3 of the Protection from Harassment Act 1997 (PHA 1997). The respondent counterclaimed for damages for nuisance and/or harassment. Those claims arose from the parties' respective residence in flats in London. The respondent was the leaseholder of the ground floor flat (the Flat).

The judge allowed the applicant's claim, awarded him £96,963.00 in damages and ordered the respondent to pay £50,000 on account of costs. The respondent's counterclaim was dismissed.

The respondent failed to pay the damages and costs, which remained outstanding. An order for sale of the respondent's leasehold interest in the Flat was made in order to enforce the damages and costs order. The applicant brought separate proceedings for possession of the Flat.

Shortly before a possession order was due to enforced, the respondent applied for, and was granted, a Breathing Space Moratorium (BSM). Subsequently, she was granted a mental health crisis moratorium (MHCM) by a debt advisor, as a result of which, the High Court Enforcement Officers declined to execute the Writ of Possession in October 2021. Further applications were made, and a further moratorium was granted (for further facts, see [2]-[20] of the judgment).

The applicant applied to extend the period of an injunction granted by a High Court judge (Judge Dight), on 27 January 2023, to restrain the defendant 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, SI 2020/1311 (the Regulations), unless, in effect, she had obtained prior approval from a High Court judge.

**Issues and decisions**

(1) The court considered the scope of the debt respite scheme in the context of the Regulations, and the duties of a debt advice provider.

The Regulations were made under the Financial Guidance and Claims Act 2018 (FGCA 2018). Section 6(1) imposed a statutory duty on the Secretary of State to seek advice on the establishment of a 'debt respite scheme' (see [22] of the judgment).

The present court agreed with and adopted the explanation of the background to the Regulations set out by Judge Paul Matthews, sitting as a High Court Judge, at paragraphs 14 to 17 of Axnoller Events Ltd v Brake and another (mental health crisis moratorium) (Rev1) [2021] All ER (D) 06 (Sep). That court's reasoning was supported by FGCA 2018 s 6(2), which explained the purpose of any such scheme as followed: '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' (see [22], [23] of the judgment).

Those three purposes had to be taken as a whole, as opposed to being looked at separately. The stated purpose of the making of any moratorium order was to give a debtor a period of time when the level of their debts stopped escalating and, for the period of the moratorium, protected them against enforcement action. However, the purpose of giving the 'breathing space' was not to enable the debtor to avoid payment of the debts entirely. The breathing space was 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 allowed for the possibility that the only way out for a debtor was to seek a bankruptcy order which might 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 a part of the sums that were owing, if they received anything at all (see [24] of the judgment).

However, those provisions explained that a central purposes of any debt respite scheme should be the development of a realistic repayment plan. Given the stated statutory purpose, it had to follow that it was 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 seemed that a financial advisor should be acutely aware that a moratorium had the capacity to prejudice the interest of the creditor and thus should be astute to ensure that any application was advanced for a proper purpose, namely that the debtor was 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 could not be enforced (see [25] of the judgment).

A key role was played under the Regulations by a 'debt advice provider'. Such a person was defined in reg 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 was that debt advice providers were required to undertake a quasi-judicial function of adjudicating on applications made by debtors for either a BSM or an MHCM (see [26] of the judgment).

The duty on someone who applied for either a BSM or an MHCM under the Regulations was set out in reg 16(1) of the Regulations. The duty to provide accurate information and not to withhold relevant information would, in the present case, include a duty to provide any debt advisor with copies of all three previous High Court judgments which concerned the Regulations and with a copy of the present judgment (see [27], [28] of the judgment).

The debt advice provider was required to decide whether the debtor met the qualification criteria under the Regulations, including whether the debtor owed one or more qualifying debts. In the case of an MHCM, the debt advice provider was also required to decide whether 'an approved mental health professional (AMHP) has provided evidence that the debtor is receiving mental health crisis treatment'. The present court agreed with the observations of Justice Swift in his judgment in the present matter of December 2022, and with Judge Dight in his judgment of January 2023, that the proper construction of the Regulations required a focus on the word 'mental health crisis'. It followed that the fact that an individual had a long-standing mental health condition or was in receipt of regular mental health treatment in an acute or community setting would not usually be sufficient, of itself, to amount to evidence that the debtor was receiving mental health crisis treatment. The medical evidence ought to focus on whether the debtor was genuinely suffering from a mental health crisis and, thus, whether he or she needed protection from creditors because his or her decision-making was being affected by that mental health crisis. Mental health treatment for serious conditions was often a slow process and could continue over many years and, it was not part of the purpose of the Regulations to give mental health patients permanent or semi-permanent protection from their creditors. Justice Swift and Judge Dight had been right to focus on the fact that an MHCM was protective tool which could properly be used to protect a debtor during the period of a mental health crisis, but it was not intended to be available as a permanent shield against creditors for anyone who was in receipt of mental health services, outside of a mental health crisis situation. Clearly it was for the AMHP to use his or her clinical judgment to decide whether the patient was or was not in a period of mental health crisis, but debtors were only entitled to be granted an MHCM if there was evidence from the AMHP that the debtor was suffering from a mental health crisis. That reasoning was supported by the fact that an MHCM was potentially open-ended because, once it was granted, it continued until one of a number of events had 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 showed that the debtor was in mental health crisis, as opposed to receiving regular or on-going treatment for a mental health condition. That did not appear to have been the approach adopted in the present case (see [29] of the judgment).

As well as asking themselves if the debtor was eligible for either a BSM or an MHCM, the debt advice provider was required to form a judgment on whether it was 'appropriate' to grant either a BSM or an MHCM, depending on the nature of the application: see reg 24(4)(b) for a BSM, and reg 30(4)(b) in respect of an MHCM. That test was a separate from that as to whether the debtor was entitled to apply for a BSM or an MHCM (as the case might be) (see [30] of the judgment).

The requirement under the Regulations that the debt advice provider satisfied himself or herself that the moratorium was 'appropriate' was an important part of the statutory framework. In reaching that decision, the debt advice provider was required to look carefully at the application and to decide if granting it would be consistent with the statutory purposes of the scheme. The statutory guidance published by the Secretary of State recognised that there was a duty on the debt advice provider to look carefully to see whether a moratorium was appropriate (see [31] of the judgment).

That guidance supplemented the duty on debt advice providers to make an assessment as to whether the making of a moratorium was 'appropriate'. That assessment should include an assessment as to whether the making of the moratorium was properly focused on the statutory objectives, including whether the debtor was 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 was hard to see how a debt advisor could properly conclude that it was appropriate to approve the moratorium (see [32] of the judgment).

The applicant, through his solicitor, submitted that the present case was one where the moratorium process had been misused because repeated applications had been made for moratoria without the respondent ever having been focused on making a realistic plan to pay the sums she owed to the applicant. On the contrary, he submitted that the applications had been made for the purpose of seeking to ensure that the respondent could avoid paying the sums that she owed to the applicant. There was considerable merit in that complaint, but it was really a complaint about the way that the debt advisors had responded to the respondent's applications, although it also stood as a criticism of the respondent herself. Authorised debt advisors were professionals and they should be expected to understand the role that they had been given under the Regulations and to appreciate what was and was not a proper purpose for a BSM or an MHCM. A level of misunderstanding was shown by the response from the debt advisor, C, to the applicant's November application to cancel the MHCM. The response showed that C appeared to have misunderstood his statutory decision-making functions in at least two respects. First, he did 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. The word 'crisis' had to 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. Second, under reg 17(a), the creditor was 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 was made to the debt advisor on that basis, the debt advisor had a legal duty as a quasi-judicial decision maker to make a decision on that issue. It was not open to a debt advisor to refuse to make a decision on whether there was unfair prejudice when the Regulations required him or her to do so (see [33]-[35] of the judgment).

There was also no evidence that, throughout the repeated granting of moratoria in the present case, the debt advisors had worked with the respondent to develop a realistic plan for the payment of her debts or have advanced any proposals to the applicant or his solicitors for the discharge of her debts. If, as appeared to be the case, the moratoria had simply been granted to give the respondent 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 was a strong case that the moratoria had been granted for an improper purpose. However, the fact that moratoria had or might have been granted improperly in the past did not, of itself, inevitably lead to a conclusion that the court should make an injunction to restrain the respondent from making any further applications for either a BSM or an MHCM (see [36], [37] of the judgment).

Axnoller Events Ltd v Brake and another; Brake and others v Chedington Court Estate Ltd [2021] EWHC 2308 (Ch), [2021] 1 WLR 6218, [2021] All ER (D) 06 (Sep) applied

Lees v Kaye and another [2022] EWHC 1151 (QB), [2022] 1 WLR 5121, [2022] All ER (D) 42 (May) applied

Kaye v Lees [2022] EWHC 3326 (KB), [2022] All ER (D) 76 (Dec) applied

(2) Whether the court should exercise its powers to grant an injunction to prevent the a debtor (the respondent) making a further application for a BSM or an MHCM.

The application for an injunction had to be dismissed (see [45] of the judgment).

The High Court had wide powers under s 37(1) of the Senior Courts Act 1981 (SCA 1981) to grant injunctions whenever the court concludes that it was just and convenient to do so. It was, therefore, clear that the court had power to grant an injunction for a defined period to restrain the respondent from applying for a BSM or an MHCM. The question was not one of simple jurisdiction, in the sense as to whether the court had the power to grant an injunction, but whether it was proper for the court to exercise its power to grant an injunction on the present facts. There was 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 had to be considered from first principles, bearing in mind that Judge Dight had granted such an injunction. The present court was extremely cautious of departing from the decision made by a highly experienced judge such as Judge Dight. However, it appeared that the relevant authorities had not been cited to him and thus it was appropriate for the present court to consider the matter afresh (see [38] of the judgment).

The Regulations set up a statutory scheme which gave every debtor a complete and unfettered the right to apply to a debt advisor for either a BSM or an MHCM. Decision making lay with the debt advisor and not with the debtor. The present court agreed with Justice Swift that the Regulations were to be read as a whole statutory scheme, that they defined the rights of the debtor and the creditor and that the Regulations set out the role of the court. Swift J had explained his approach to the scheme of the Regulations at paragraph 24 of his judgment. The present court would take the same approach in asking whether the High Court should, in the present circumstances, exercise its power to [restrain] the respondent from making an application to a debt advisor under the Regulations. The starting point had to be that Parliament had given the right to debtors to make the application, and that there was no provision in the Regulations which provided that the court was entitled to constrain that right by providing that a debtor needed to seek permission from the High Court before such an application could 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 reg 19 or provided that a court could restrain future applications for either a BSM or an MHCM in such a case. There was no such provision in the Regulations, and that appeared to be a clear indication that Parliament had not intended debtors to be subject to any form of limitation in their ability to make fresh applications (see [40] of the judgment).

The High Court had a wide power under SCA 1981 s 37 to grant an injunction where it was 'just and convenient' to do so. However, there were limits on its ability to make orders to restrain individuals from doing something that they were otherwise perfectly entitled to do (see [41] of the judgment).

Parliament had given debtors an unfettered right to apply to a debt advisor for a BSM or an MHCM and, even where a moratorium was set aside by the court, it had not placed constraints on debtors applying for a new moratorium. On each occasion on which an application was made, the debt advisor undertook a quasi-judicial decision-making process in order to decide: (a) whether the statutory criteria were met; and (b) whether it was appropriate to grant the requested moratorium. The primary decision maker on that matter, under the Regulations, was the debt advisor, not the court. If a moratorium were granted, the Regulations provided that, as a consequence, it would affect the right of the creditor to take enforcement action (see [45] of the judgment).

Given that parliament had given those unfettered rights to a debtor and had allocated primary decision making to the debt advisor, it would not be right to grant an injunction which set up a different decision-making structure. A creditor could not properly ask the court to remove those statutory rights from the debtor for a period of time or to subject the exercise of those rights to judicial supervision when that was not part of the statutory scheme. The applicant was, in effect, asking for a period of time during which the statutory rights of the debtor were suspended or applications could only be made with prior judicial approval when that was 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 were made, it could have included that power within the Regulations. It was of significance that it had not done so (see [46] of the judgment).

Applying the test at 55 of Re G (Court of Protection: injunction) [2022] All ER (D) 30 (Oct), a creditor did not have a legitimate right to proceed with enforcement of a judgment without having to face the risk that the debtor would seek, and might 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 was not permitted by the Regulations. It followed that the applicant did not have an 'interest which merits protection' (as per paragraph 55 of Re G) where that claimed interest was his right to enforce a judgment debt without being subject to the possibility that a debtor would lawfully exercise his or her rights to seek a BSM or MHCM (see [47] of the judgment).

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. Looked at objectively, the court was not sure that that case was made out, at least as far as the earlier applications were concerned. The respondent had been in receipt of mental health treatment and she appeared to have formed the view that that continuing mental health treatment meant she was entitled to apply for a series of MHCMs to prevent the respondent from being able to enforce the debt she owed to him. Her belief that she had been acting properly in making repeated applications would have been reinforced by the fact that all of her applications had been granted by the debt advisor. It was highly likely that those 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) because the respondent had not been 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 she had been making them for an improper purpose, namely to avoid having the debt enforced. If any application was not made for a proper purpose, the debt advisor ought to reach the decision that it was not appropriate to grant a moratorium. However, the fault in the present case primarily lay with the debt advisors, who had granted applications when they ought to have refused them, and not with the respondent, who might have thought she had been properly exercising her statutory rights (see [48] of the judgment).

Counsel for the applicant advanced a second line of argument, namely that an injunction should be granted because, on the facts of the case, no debt advisor who had had the full facts and had been properly directing himself could have granted a further BSM or an MHCM to the respondent and, therefore, an injunction was needed to prevent the respondent from making an application since, depending on what information was provided to the debt advisor, it might result in the debt advisor making an unlawful decision to grant a further BSM or an MHCM. Therefore, he applied to withdraw his concession that the respondent might be in a position to make an application for a BSM or a MHCM which a debt advisor could lawfully grant. The court could not accept that submission. Counsel's first position was correct, namely that the applicant had no knowledge of the respondent's mental health condition or her precise financial circumstances. Unless there were facts which were unknown to the court, it seemed highly, highly unlikely that the respondent would be able to put together an application which made it appropriate for her to be granted either a BSM or an MHCM. Thus, if the tests were applied properly by the debt advisor, based on the facts known at the present point, it appeared that any application the respondent made for either a BSM or an MHCM ought to be turned down. The applicant did not know the respondent's personal circumstances and, hence, it was not possible to conclude that those circumstances meant that any application the respondent made would have to be refused by a debt advisor (see [50] of the judgment).

It followed that the court was not prepared to extend the injunction granted by Judge Dight. 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 the applicant by way of judicial review. If the respondent were to be granted a new moratorium as a result of failure by a debt advisor to correctly apply the tests under the Regulations, any application to quash that decision would be against the decision maker, namely the debt advisor, and not against the respondent, 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 (see [51], [52] of the judgment).

However, the debt advisor could seek to avoid examination of the lawfulness of his or her actions by arguing that judicial review was inappropriate because the applicant had a 'adequate alternative remedy', namely following the review machinery under the Regulations and then seeking a court order to quash the moratorium under reg 19. Whether that argument was accepted or not would be a discretionary decision for a judge. If the applicant could convince a court that he either would or might lose a sale by reason of the delay that following the statutory machinery under the Regulations entailed, he might well be able to make a case to the Administrative Court that he had no adequate alternative remedy, and thus the court might elect to proceed to examine on an urgent basis whether the debt advisor had acted lawfully in granting the moratorium (see [53] of the judgment).

When appropriate, the Administrative Court was able to move with considerable speed in making decisions, including granting interim relief, where that was necessary to do justice. If history were to repeat itself and the respondent 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 owed, it seemed more than possible that a judge of the Administrative Court might 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 was lost (whatever decision was made). The defendant to such an application, and the person thus potentially liable in costs, would be the debt advisor, and not the respondent. Therefore, it was not accepted that the applicant 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 might not be able to meet a costs order. However, all that was in the future and, in the light of the fact that the Flat had been lawfully repossessed and, having given the present judgment, it might well be that no further application was made under the Regulations or, if an application were made, it might well not be approved (see [54] of the judgment).

Re G (Court of Protection: injunction) [2022] EWCA Civ 1312, [2022] 3 WLR 1339, [2022] All ER (D) 30 (Oct) applied

Broad Idea International Ltd v Convoy Collateral Ltd (British Virgin Islands); Convoy Collateral Ltd v Cho Kwai Chee (also known as Cho Kwai Chee Roy) (British Virgin Islands) [2021] UKPC 24, [2022] 1 All ER 289, [2022] 2 WLR 703, [2022] 1 LRC 443 considered

**Judgment date**
31 March 2023

**Judge**
Mr David Lock KC, (sitting as a deputy judge of the High Court) (Kings Bench Division)

**Representation**
Simon Braun of Perrin Myddelton for the applicant.
The respondent did not appear and was not represented.

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