Neutral Citation Number: [2025] EWHC 524 (Ch)

Case No: CH-2024-000014

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11th March 2025

Before :

SIR ANTHONY MANN sitting as a judge of the High Court

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Between :

Seculink Ltd	**Appellant/ Claimant**
- and -	
David James Terence Forbes	**Respondent/ Defendant**

- -
- -

Mr Tom Morris (instructed by JMW Solicitors LLP) for the **Appellant/Claimant**
Mr Martin Westgate KC and **Mr Daniel Clarke (**instructed by **TV Edwards LLP**) for the **Defendant/Respondent**

Hearing date: 26th February 2025

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Approved Judgment (second Judgment)

This judgment was handed down remotely at 10.00am on 11th March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives and other websites.

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SIR ANTHONY MANN

Sir Anthony Mann :

Introduction

1. This judgment takes up a point left open in my earlier judgment at [2024] EWHC 3339 (Ch) in which I ruled on whether the courts have jurisdiction to decide whether or not a given debt owed by a debtor was a moratorium debt, and therefore qualified for a moratorium, under the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (" the Regulations"). I held that it did have that jurisdiction but did not go on to exercise it to decide the point in issue because it was not argued out at the time, so it was left over to be decided in a separate hearing. These various matters come before this court by way of an appeal from the county court, and I could have remitted the particular question to the county court for decision, but the parties were content, if not keen, to have the matter decided in this court in this appeal environment and I agreed to do so. A further hearing was therefore arranged and the result is this judgment.

2. One of the reasons for the wish of the parties to have the matter decided in this court is that there is an appeal pending in the Court of Appeal on a very similar point (with a hearing that has just been fixed for May of this year), and the parties were keen to have the opportunity of having any appeal from a decision on the point in this case determined at the same time in the Court of Appeal if that court will entertain that. The point that is dealt with in this judgment is a point that is capable of arising in a significant number of cases under the Regulations, and it is for that reason that the parties are anxious to have a Court of Appeal determination of it. It is, of course, for the Court of Appeal to decide whether to take any appeal from this decision. I did not go into the full circumstances of the other case (to which reference is made below) to see whether this case has any differentiating features, but doubtless that will be considered by the Court of Appeal if the unsuccessful party here tries to interest that court.

3. Putting it shortly, the issue can be described thus. The moratorium which arises under the Regulations prevents a creditor from enforcing a liability for certain debts, defined as "moratorium debts" in the Regulations. The question in this appeal is whether the principal under a secured debt which has fallen due is or is not a moratorium debt for these purposes. If it is not then the restrictions on enforcement do not apply and there are other consequences for accruing interest. If it is then restrictions on recovery and on future interest apply. Thus stated it can perhaps be readily seen how the question might arise in a lot more cases than this one.

4. On this limb of the appeal, as on the last limb, the appellant Seculink Limited was represented by Mr Morris and Mr Westgate KC led for Mr Forbes. I am grateful for their clear and concise submissions on a difficult point.

Factual background

5. A fuller narrative of the factual background appears in my earlier judgment at paragraphs 3 to 7. Those paragraphs describe how the whole dispute came into existence and how the matter got before the court. The procedural background no longer matters. The relevant factual background is all agreed between the parties, and, extracting it from that judgment and from limited further detail shown to me at this hearing, I can set it out as follows.

6. Mr Forbes borrowed £260,000 from the appellant, Seculink Ltd, by way of bridging loan. The interest was 2.5% per month for 4 months, with default interest of 12% per month compound in the event of default. The loan was secured over various properties. There was a default and it is said that the default rate kicked in. Seculink commenced proceedings to recover the debt, and as appears from my first judgment proceedings were compromised on the terms of a Tomlin order dated 17th June 2021 which annexed a written agreement between the parties. The agreement provided (in essence) for the liability on the loan to be compromised on terms that Mr Forbes would pay £589,000, to be paid as to £389,000 by 26th August 2021 and the balance of £200,000 to be paid by 17th June 2022. In default of payment the liability of Mr Forbes was fixed at £600,000 (plus costs and expenses). He defaulted and the proceedings were duly restored as provided for in the order (in the usual way) to enforce Mr Forbes' obligation to give up possession of the mortgaged properties. Before they were fully determined a mental crisis moratorium was initiated and the issues arising on this appeal had to be determined.

7. For the purposes of the appeal on the present point it has been agreed between the parties that the analysis of the payment obligations is as follows. Despite the provisions for lump sum payments in the Tomlin order, on the terms of the Tomlin order non-payment of those sums throws one back on to the original payment obligations (it does not matter why for present purposes). So it is accepted that the present dispute arises in the financial context of there being £260,000 outstanding as principal and the rest amounts to some form of arrears. The precise analysis of how those arrears breaks down (for example, whether it is all interest, or some of it is penalties or has other characteristics) is not agreed, but that does not matter. What matters is that those non-principal sums are sums due and unpaid and, as will appear, "arrears" for the purposes of the Regulations. The issue that arises on this appeal is whether the moneys representing the principal (the £260,000) is "arrears" for the purposes of the

Regulations. If it is then it is a moratorium debt. If it is not then it is not a moratorium debt and is not caught by the moratorium.

The relevant provisions of the Regulations

8. The relevant provisions of the Regulations on this issue, and their relevance, are as follows. I will emphasise key concepts or words.

9. If a debt is a "moratorium debt" under the Regulations then enforcement is essentially barred by the provisions of Reg 7 during a moratorium. So the starting point is the definition of "moratorium debt" under Reg 6:

> "**6.** A "moratorium debt" is any *qualifying debt*—
>
> (a) that was incurred by a debtor in relation to whom a moratorium is in place,
>
> (b) that was owed by the debtor at the point at which the application for the moratorium was made, and
>
> (c) about which information has been provided to the Secretary of State by a debt advice provider under these Regulations.

10. The key concept is "qualifying debt". A development of that takes one into a land of double-negatives and inter-locking. It is defined in Reg 5:

> "5(1) A "qualifying debt" means any debt or liability other than *non-eligible debt*".

The dispute on this part of this appeal is whether the principal debt is a "non-eligible debt", so one turns to the definition of that in Reg 5(4):

> "(4) In these Regulations "non-eligible debt" means—
>
> (a) *secured debt* which does not amount to *arrears* in respect of *secured debt* …"

11. "Secured debt" is defined under Reg 2 (the principal definition Regulation). Under that Regulation "Secured debt" means … "a secured credit agreement", and "secured credit agreement" means:

> "an agreement under which a creditor provides credit to a debtor and the agreement provides for the obligation of the debtor to repay to be secured—

> (a) by a mortgage on land …"

12. It is agreed that the obligations of Mr Forbes are a secured debt because they are secured by the mortgage which he granted. It is odd that the definition of "secured debt" should be described not by reference to the nature of the debt, but by describing the agreement giving rise to the debt, but that is what the drafter has chosen to do.

13. As I have indicated, the dispute in this matter revolves around the word "arrears" in Reg 5(4)(a), so that concept has to be pursued. It is defined in Reg 2 thus:

> ""arrears" means any sum other than *capitalised mortgage arrears* payable to a creditor by a debtor which has fallen due and which the debtor has not paid at the date of the application for a moratorium in breach of the agreement between the creditor and debtor or in breach of the legislation or rules under which the debtor incurred the debt or liability"

14. "Capitalised mortgage arrears" is not a concept directly applied in this case, but it is heavily relied on by Mr Morris as supporting his construction of "arrears". It is defined in Reg 2 thus (in a manner which shows it means what it sounds like):

> ""capitalised mortgage arrears" means any arrears in relation to a mortgage that have been added to the outstanding balance to be paid over the duration of the mortgage".

15. There is one further provision which is said to provide a piece of informative context for Mr Morris's interpretation, and that is Reg 7(10). This provides:

> "(10) 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."

This refers to interest on a moratorium debt, as one can see by following back into paragraph (6)(a) which prevents recovery of interest on a moratorium debt during a

moratorium. Thus for the entire period of a mental health crisis moratorium interest accruing on a moratorium debt is irretrievably lost save in the limited circumstances of an initial appeal to the county court under Reg 19 where the court makes an order providing for the recovery of interest under Reg 19(4) on such an appeal. Otherwise the lender loses interest, and this could go on for a long time, because the circumstances in which the moratorium is brought to an end are if the debt advice provider brings that about as a result of false information provided to him or if he is informed the treatment that started it has been brought to an end. If the treatment continues then so does the moratorium. There is no provision requiring some debt repayment scheme to be put in place.

The dispute in the context of those definitions

16. Having set out those definitions I can summarise the dispute between the parties. The whole debt is now due as a debt. The principal has been called in or is otherwise treated as having been due as is the rest of the outstanding loan. That much is common ground. It is also common ground that the outstanding liability of Mr Forbes other than the outstanding principal is "arrears" and subject to the moratorium as a moratorium debt.

17. The dispute is as to the characterisation of the principal within the definitions above. Mr Morris's case starts with the uncontestable proposition that a moratorium debt has to be a "qualifiying debt". That excludes "non-eligible debts", and secured debts are non-eligible debts (Reg 5(4)(a)). While "arrears" are then taken out of that exemption, the unpaid principal, although called in and due, is not "arrears" for these purposes on the true construction of Reg 5(4)(a) for reasons to which I will come. Thus the principal remains "secured debt"; therefore it is "non-eligible"; therefore it is not a qualifying debt; therefore it is not a moratorium debt. It therefore escapes the clutches of the moratorium.

18. Mr Westgate's case acknowledges that the whole debt, including principal, may technically be secured debt in ordinary parlance, but it is not secured debt within the meaning of Reg 5(4)(a) because the whole, including the principal, is taken out by the exclusion of "arrears" in that provision. The principal, being due, is as much "arrears" within the definition of that term in Reg 2 as the rest of the sums due. There is no reason, on the true interpretation of Reg 5(4), to treat it otherwise. It is therefore "arrears"; it is therefore taken out of the exemption for "secured debt"; it is therefore not a non-eligible debt; it is therefore a moratorium debt and within the moratorium.

19. Thus the dispute is as to the construction of the word "arrears" in Reg 5(4)(a)

The argument of the parties in more detail and my determination

20. The issue here is one of construction of a piece of legislation in the context of private commerce and property. Mr Morris emphasised heavily the "Principle of Legality" as it is set out in *Bennion, Bailey and Norbury on Statutory Interpretation, 8th edn*. This principle is said to require that interference with established rights should be expressed in clear terms (para 27.1). General and ambiguous words cannot override fundamental rights and there is a presumption, with a high threshold, that general words are subject to the basic rights of the individual (ibid). "Even in cases where some degree of interference with a person's proprietary rights is clearly intended, legislation will be construed as interfering with those rights no more than the statutory language and purpose require" (para 27.6).

21. I do not doubt those principles in general terms, but I do not find them of much assistance in the present case. The present case involves the interpretation of Regulations which clearly interfere with the rights of individuals, within certain parameters, and the problem is in ascertaining how that works within the parameters set out the legislation. I consider that the resolution of the problems in this case lies more in understanding the language of the Regulations (whose drafting it is impossible to admire) and the rationality of the drafting in the light of the apparent object of the Regulations. Accordingly, while I have the Bennion principles in mind, I did not find that they helped.

22. The point in this case has arisen for determination in one previous county court case (that referred to above in the context of a possible appeal). In *Interbay Funding Ltd v Forbes* in the County Court at Central London (involving the same Mr Forbes as in the present case) HHJ Evans-Gordon decided that the principal debt did not amount to arrears and so was not caught by the moratorium. Mr Morris did not rely on that case as binding authority (obviously he could not) but relied on the reasoning of the judge as being reasoning that he adopted, and his skeleton argument in this case set out several paragraphs of the judgment followed by his adoption. Since he re-argued his points before me there is no point in setting out the reasoning of HHJ Evans-Gordon as well, and I shall not do so. This is not in any way an appeal from her judgment.

23. Mr Westgate started by pointing up what he said was the background and purpose of the moratorium. He pointed to the recitation of the background (or part of it) set out by HHJ Paul Matthews, sitting as a High Court judge, in *Axnoller Events Ltd v Brake* [2021] 1 WLR 6218 at paragraphs 17 to 19. The main thrust of what was extracted and said in those paragraphs was that an HM Treasury consultation document indicated that the same protection was to be provided by both forms of moratorium created by the Regulations (the short term "breathing space" moratorium and the potentially longer term "mental health crisis moratorium") but with different "entry points". Those matters do not seem to me to be of much assistance in deciding the interpretation question which I have to decide.

24. He also showed me a further HM Treasury document from June 2019 entitled: "Breathing space scheme: response to policy proposal". Again, I did not glean much assistance from this document. It is very much focused on the "breathing space" moratorium (which is not Mr Forbes' moratorium) and references to another type of moratorium (presumably what became the mental health crisis moratorium) are limited to questions of the gateway rather than substance. There are general references to the width of the debts to be covered by the moratorium which would presumably apply to both types, but they do not help in dealing with precise limits.

25. I therefore turn to focus on the wording of the Regulations in the context of their obvious purpose. Mr Westgate's interpretation follows a straightforward line. It follows this line (which is my summary of his submissions):

(i) The whole mortgage debt is a debt which fulfils the requirements of paragraphs (a) to (c) of Reg 6. The question is, is it a "qualifying debt"?

(ii) It is a debt or liability, therefore it falls within the first part of Reg 5(1) as a qualifying debt, unless it is a non-eligible debt.

(iii) Is it a non-eligible debt? One of the categories of non-eligible debts is a secured debt of the kind referred to in Reg 5(4). Is the mortgage debt a secured debt (the opening words)? The answer is Yes, so at that stage the debt is taken out of the moratorium as being non-eligible.

(iv) However, Reg 5(4) goes on to take "arrears in respect of secured debt" out of the exception, and makes the debt eligible again and puts arrears back in the moratorium.

(v) The definition of "arrears" is very broad - <u>any sum</u> … payable to a creditor by a debtor which has fallen due and which the debtor has not paid at the date of the application for a moratorium…". It makes no distinction between the capital and periodic repayment elements which have fallen due and the both elements fall fairly and squarely within that broad definition.

(vi) Accordingly, the principal sum which has fallen due before the moratorium, is (like the periodic payments in arrears) arrears and thus taken out of the exception for secured debts.

26. Mr Morris's argument is more subtle. He starts by pointing out what he said were anomalies were Mr Westgate's case correct, relying on the following effects:

(a) There would be what he described as an irrational distinction between capital

elements which had fallen before the moratorium was initiated, which would be arrears and subject to the moratorium, and capital sums which were not due (perhaps because not called in) until after the moratorium was initiated, which would not be so caught. He drew attention to the fact that on Mr Westgate's case a principal debt called in the day before the moratorium would be caught, but if the lender waited for 24 hours and then called it in (after the initiation of the moratorium) it would not be.

(b) The effect would be what he described as a forcible extension of the term of the mortgage in the case of a mental health crisis moratorium. That is because arrears of periodic payment arrears already accrued would be unenforceable (without leave), the principal would be unenforceable (without leave) and future accruing interest would be ultimately irrecoverable because of the provisions of regulation 7(10). Since there is no finite period for the moratorium this may go on for a long time. The only way in which it can come to an end is if the debt advice provider brings it to an end under one of his/her limited powers, or if the crisis (including crisis treatment) comes to an end, which might be long postponed. Mr Morris says that that state of affairs is anomalous and would be avoided on his interpretation of the Regulations.

(c) "Capitalised mortgage arrears" are excluded from the scope of "arrears", and so remain secured debt and are therefore excluded from the moratorium as a non-eligible debt. It would be anomalous if they were excluded and yet the capital itself were <u>included</u>. This anomaly was one of the factors leading HHJ Evans-Gordon to come to the conclusion that capital arrears were also excluded from the concept of "arrears".

(d) It is said that if Mr Westgate's case were correct then Reg 5(4)(a) would become otiose because there would never be any secured debt to which it would apply. Imagine secured debt which is not due at the date of the moratorium. It would not qualify as a moratorium debt simply because it was not due (Reg 6(b) – it would not be a debt owing "at the point at which the application for the moratorium was made" (Reg 6(b) describing moratorium debts) and so it would not get over that threshhold. If all mortgage debt which has fallen due as at the date of the moratorium is "arrears" and therefore due, then its status as secured debt is irrelevant. Either way Reg 5(4)(a) has no useful work to do.

27. Mr Morris relies on these anomalies to resolve a question of interpretation which is said to arise out of the wording of Reg 5(4)(a). Mr Morris submits that "in respect of" has two possible meanings. One would be the equivalent of "arrears on"; the other would be the equivalent of "arrears of". The first of those ("arrears on") would impliedly distinguish between the thing that generates the arrears and the arrears themselves - the arrears derive from the thing (the capital debt) but are not the thing itself. On this footing the secured debt would be the principal and the arrears would be the arrears "on" that principal. The second ("arrears of") would encompass all aspects of the debt. He invites me to choose the former because of the anomalies arising out of the latter, and especially the apparent complete exclusion of capitalised mortgage arrears on any footing. The principles of statutory interpretation which he relied on are also said to support this analysis. It is also said to further the fair working of the moratorium because it enables interest to continue to run and be recoverable during the moratorium and it would not be completely lost - Reg 7(10) would not apply because the principal would not itself be a moratorium debt. This was said to be a more rational scheme and in compliance with the "principle of legality".

28. This is not an easy question to resolve. It is tempting to accept the submission that the definition of "arrears" is clear as Mr Westgate suggests that it is and that "any sum" means just what it says, because it looks clear at first sight. However, I also consider (like HHJ Evans-Gordon) that one has to look at the wider context. There are anomalies and oddities on either interpretation, but what Mr Westgate's interpretation does not successfully address is the significance of the express exclusion of "capitalised mortgage arrears". On his case those arrears are a complete outlier, left as not being a moratorium debt when everything else, including capital is. It is not possible to advance a rational explanation for that. He attempted to say that the problem did not arise. He said that once the capital was called in then that would include the capitalised mortgage arrears, because they became a "sum … payable" within the definition of arrears and so would join regular arrears. That is not a satisfactory explanation. If that were the case then there would have been no purpose in excluding them from "arrears" at all. If they were not called in then they would not be a sum due and there would be no need to refer to them. If the capital were called in then they would be a sum due, and there would be no point in referring to them.

29. There must be some point in referring to them expressly, and the only apparent explanation is that the drafter (and Parliament) wished to keep them in the category of non-eligible debt because they were like the capital of the mortgage. If that is the case then the drafter had in mind that the capital would <u>not</u> generally be removed from the realms of non-eligible debt and should therefore not be treated as arrears. The reference to "capitalised mortgage arrears" betrays this intention. Mr Morris's construction of "in respect of", while appearing a little forced, is an interpretation which is capable of giving effect to such an overall intention in relation to capital, which I consider the Regulations to manifest.

30. This interpretation avoids some of the anomalies arising out of Mr Westgate's interpretation though it probably gives rise to what might be thought to be others. I agree with Mr Westgate that other instances of the use of the words "in respect of" include the item itself and any other associated liabilities; for example, Reg 5(4)(d) - "any liability in respect of a fine imposed by a court …". However, the fact that Mr Morris's construction would not work in those instances does not necessarily mean that it cannot work for Reg 5(4)(a).

31. Mr Westgate sought to justify his interpretation, as a sensible implementation of the moratorium debt, in terms which somehow sought to provide a justification for treating loans called in and loans not called in differently. He submitted that it made sense to require continuing payments to be made on an uncalled loan notwithstanding the moratorium, and the exclusion of secured debt was necessary to achieve that. However, he said, once the sums fall due they amount to arrears and should be treated accordingly. I am afraid I do not understand how this analysis helps him. It explains the effect of a distinction between uncalled and called loans (on his interpretation) but it does not justify it. In fact it highlights, or at least re-states, one of the anomalies relied on by Mr Morris. One should bear in mind that the consequences of treating the called principal as arrears, and therefore a moratorium debt, is not only that further accruing interest payments are caught by the moratorium; they are actually rendered irrecoverable by Reg 7(10). That makes the distinction even harder to justify.

32. It might have been easier to rationalise some of these distinctions and anomalies if it were apparent why secured debt was excluded from the moratorium in the first place, but that did not appear from the policy document shown to me, nor was a reason suggested by counsel. One is therefore left with the Regulations in the context of the moratorium created, without that potentially important piece of context. That has the result appearing above. I consider Mr Morris's case is correct.

Conclusion

33. I therefore decide the point before me in the sense that the called in capital is not a moratorium debt. The consequences of that, in terms of its effect on the proceedings, will have to be the subject of debate after the hand-down of this judgment.