Neutral Citation Number: [2022] EWHC 1151 (QB)

Case No: F01WI909

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/05/2022

Before:

HIS HON JUDGE DIGHT CBE
(Sitting as a Judge of the High Court)

- -

Between:

AMANDA LEES	**Applicant**
- and -	
1. IVAN KAYE	
2. CHELSEA DIXON	**Respondents**

- -
- -

Daniel Clarke (instructed by **TV Edwards LLP**) for the **Applicant**
Ian Peacock (instructed by **Perrin Myddleton**) for the **First Respondent**
The **Second Respondent** appeared in person

Hearing date: 30 March 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HON JUDGE DIGHT CBE

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 2pm on 13 May 2022.

His Hon Judge Dight CBE:

Introduction

1. 8 Leysfield Road, London W12 ("the Building") is a house divided into two maisonettes, formerly owned and occupied by the Applicant and the First Respondent respectively. They jointly owned the freehold of the Building through a limited company of which they were both shareholders and directors. They each had a long lease of their respective flats. The First Respondent has since sold his interest in the upper flat to the Second Respondent's partner.

2. The Applicant and First Respondent were parties to litigation ("the Substantive Claim") which was tried in the county court at Central London in connection with the Applicant's use and occupation of her flat, being the Ground Floor Flat, ("the Flat"). In the Substantive Claim the First Respondent, who was the claimant in the litigation, alleged that the Applicant, who was the defendant in the litigation, had been guilty of nuisance and harassment and had disturbed the First Respondent in his enjoyment of his flat on the upper floor of the Building. The First Respondent succeeded in the Substantive Claim and was awarded damages and costs which he subsequently secured by a (final) charging order over the Applicant's long leasehold interest in the Flat ("the Lease"). Ultimately the First Respondent was granted an order for sale of the Lease and possession of the Flat in separate proceedings brought in the Willesden County Court, which is the claim in which the application ("the Application") now before me has been made, and which I will refer to as "the Order for Sale Claim".

3. Possession of the Flat was taken on 13 January 2022 pursuant to a writ of possession number HP122/2021/HIG293375 issued in the High Court ("the Writ of Possession"). Exchange of contracts and completion of the sale of the Lease of the Flat to the Second Respondent for the sum of £505,000 took place on 10 March 2022. The mortgage over the Lease has been repaid and the balance of the proceeds of sale passed to the First Respondent. This left the Second Respondent and her partner as the owners of the entire Building, although registration of the transfer of the Lease to the Second Respondent at HM Land Registry has yet to take place.

The Application

4. By her application notice dated 24 February 2022 the Applicant seeks a declaration that execution of the Writ of Possession was null and void in accordance with regulation 7(12) of the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England & Wales) Regulations 2020 ("the Regulations") because there was a mental health crisis moratorium in place to protect the Applicant at the time of execution ("the Moratorium"). Alternatively the Applicant submits that execution of the Writ of Possession in the circumstances amounted to oppression. She also seeks an order permitting her to retake possession of the Flat. In the interim she has been staying with friends.

5. The First Respondent opposes the Application and argues, in general terms, that there is no clear evidence that the Moratorium was in force at the date of the eviction, in any event the eviction and sale were not breaches of the Moratorium and finally, that the

court should not exercise its discretion in favour of the Applicant even if she otherwise succeeds in the Application.

6. The Second Respondent appeared before me in person and adopted the submissions made by Mr Peacock on behalf of the First Respondent.

The issues

7. The issues between the parties in relation to the Application are as follows:

   i) Whether the Moratorium was properly registered and effective at the date of execution of the Writ of Possession in accordance with regulation 31(2)(a);

   ii) Whether the judgment debt in the Substantive Claim was exempted from the effect of the Moratorium because it was a "non-eligible debt" by reason of regulation 5(4)(i) of the Regulations as a debt consisting of damages for personal injury because £12,000 of the sum awarded was in respect of what was in effect personal injury;

   iii) Whether the judgment debt was excluded from the effect of the Moratorium by reason of regulation 7(13) because it was secured by a charging order;

   iv) Whether at the time of the sale to the Second Respondent the Applicant had an interest in the Lease of a type which was caught by the Moratorium, it being said that the sale was of legal interest in the Lease whereas the interest of the Applicant was solely a beneficial interest under a trust;

   v) Whether, on a proper construction of regulation 7(12), the sale of the Lease to the Second Respondent is null and void even if the execution was in breach of the Moratorium;

   vi) Should the court exercise its discretion in favour of the Applicant if she otherwise succeeds in the Application?

The facts

8. The First Respondent acquired his long lease of the upper maisonette in the Building in the summer of 2013. By then the Applicant had already owned the Lease of the Flat for a number of years. His case is that the behaviour of the Applicant which led him to bring the Substantive Claim had already been going on for a number of years by that point.

9. The Substantive Claim was tried by His Hon Judge Roberts, in the absence of the Applicant who had unsuccessfully sought an adjournment of the trial. The judge handed down a written judgment on liability on 30 July 2018. In the course of his judgment the judge directed himself as to the relevant legal principles relating to the tort of nuisance and those relating to the statutory tort of harassment under the Protection of Harassment Act 1997. He held [77] that the Applicant's behaviour over a number of years caused the claimant alarm and distress and "amounted to a course of conduct which amounted to harassment…and interfered with the [First Respondent's]…use and enjoyment" of his flat. The judge appears to have accepted the First Respondent's evidence that there had been multiple acts of nuisance at

common law and that they had "a dramatic effect on [the First Respondent's] well-being" which had rendered him "exhausted, depressed and mortified that [he] had moved into a property with such an unstable and vicious neighbour.". He granted injunctive relief against the Applicant to restrain recurrence of the acts of nuisance and harassment which he had found and left the assessment of damages to a further hearing.

10. In a further written judgment handed down on 2 January 2019, following the hearing which dealt with the assessment of damages, which the Applicant again did not attend, His Hon Judge Roberts awarded damages for (1) diminution in value of the First Respondent's flat in the sum of £69,000 [16], (2) distress and anxiety caused by the harassment [21], and (3) other consequential losses. As to the claim for damages for distress and anxiety he said [21]:

> "The personal distress or discomfort which the claimant may experience as a result of nuisance is part of the assessment of the claimant occupier's loss of amenity. Therefore if the claimant is compensated for personal distress or discomfort as well as diminution in the amenity value of the land, which has already been informed by the personal distress or discomfort of the claimant, there will be double recovery. In contrast, the 1997 Act is different in that it provides a civil remedy for harassment. Section 3(2) of the 1997 Act expressly provides that damages can be awarded for any anxiety caused by the harassment and any financial loss resulting from it. Such financial loss in my judgment includes diminution in value of the land. The damages for anxiety and the damages for diminution in value are distinct and separate losses and therefore there is no double recovery."

11. The judge found that "the Claimant's distress was the reasonably foreseeable consequence of the Defendant's harassment" [25] and led both to "distress and anxiety" [27(iv)] in respect of which he awarded the sum of £12,000 [29]. He declined to award aggravated damages [31].

12. The total award, including consequential losses, was £96,963.00 in addition to which he ordered the Applicant to pay the costs of the assessment hearing on the standard basis, directing that she should pay the sum of £50,000 on account of such costs.

13. For reasons which I will come to in due course Mr Peacock, for the First Respondent, submitted to me that His Hon Judge Roberts had awarded damages for psychiatric harm. However, it is apparent to me, from a close reading and analysis of both the specific findings of the judge, some of which I have set out above, and from the case law according to which he directed himself in assessing damages, that he made no award in respect of psychiatric harm. The written judgments do not identify psychiatric harm as a type of injury or loss being claimed by the First Respondent. There are no express findings of psychiatric harm and it cannot be said that there is a necessary inference to be drawn from the court papers and the judgment that such harm was in issue.

14. A final charging order was granted over the Lease in favour of the First Respondent by the order of Deputy District Judge Colquhoun sitting in the County Court Money Claims Centre on 7 June 2019. On 10 September 2019 and 6 February 2020 the First

Respondent was granted two further charging orders over the Lease to secure the costs of the litigation payable by the Applicant.

15. In order to realise the charging orders the First Respondent commenced, as he was obliged to by the rules, a second set of proceedings which were issued in the county court at Willesden under Claim Number F01WI909, namely the proceedings before me. The Order for Sale Claim came on for hearing before District Judge Kanwar on 6 March 2020. He directed that the Applicant should pay the total sum of £297,888.68 by 3 April 2020 failing which he ordered, so far as material, as follows:

> "2. The Property shall be sold without further reference to the court at a price no less than £470,000 unless that figure is changed by a further order of the court."
>
> 3. [The First Respondent's solicitors] shall have conduct of the sale.
>
> 4. To enable the [First Respondent] to carry out the sale, there be created and vested in the [First Respondent] pursuant to section 90 of the Law of Property Act 1925 a legal term in the property of one day less than the remaining period of the term created by the lease under which the [Applicant] holds the property.
>
> 5. The [Applicant] must deliver up possession of the property to the [First Respondent] on or before 3 April 2020."

The order also made provision for how the shareholding in the freehold owing company should be dealt with and what should happen in the event that the Applicant failed to cooperate with the mechanics involved in sale of the Lease.

16. The order for possession contained in paragraph 5 of the order had been due to be enforced on 8 July 2021 but on 30 June 2021 the Applicant successfully applied for a breathing space moratorium which was granted (reference BSS-0000013788) for the period 1 July 2021 to 29 August 2021 and the eviction, therefore, did not go ahead. The notification of the grant of the moratorium contained details of the Applicant's creditors, one of which was stated to be Wandsworth county court, which I take to be a reference to the judgment in the Substantive Claim because that is the court which, as I understand it, would have been responsible at that stage for the planned eviction.

17. The Applicant was sent a further notice of eviction for 24 August 2021 but because of the existence of the breathing space moratorium this too was cancelled.

18. On 28 September 2021 Deputy District Judge Althaus, on the First Respondent's application, transferred enforcement of the order made in the Charging Orders Claim to the High Court. Ultimately the Writ of Possession was issued and eviction was due to take place on 27 October 2021.

19. Mr Darren Caisley, a Mental Health and Money Advisor, working for Rethink, a national debt charity contracted by the Government to run the Mental Health Access to Breathing Space Scheme was appointed to assist the Applicant under the scheme. An

Approved Mental Health Professional ("AMHP") confirmed the Applicant's eligibility for a Mental Health Breathing Space and on 26 October 2021 the Applicant was granted a Mental Health Crisis Moratorium under the Regulations 2020, effective until 25 December 2021, as a result of which the High Court Enforcement Officers declined to execute the Writ of Possession which was due for the following day.

20. In a detailed and comprehensive application form, the solicitors for the First Respondent sought a review of the then mental health crisis moratorium on 4 November 2021. They argued that the application for a moratorium was not *bona fide*, that the First Respondent had faced unreasonable delay in executing the judgment which he had been granted against the Applicant and that it was detrimental to his wellbeing and his financial situation. By their decision notified on 12 November 2021 the Mental Health & Money Advice organisation declined to cancel the moratorium and reminded the First Respondent's solicitors that they had the option of making an application to the court to cancel the moratorium.

21. The solicitors for the Applicant then sought to challenge the moratorium on the basis that the debt did not fall within the breathing space scheme but that argument was also rejected on 16 November 2021, albeit without the merits of the argument being addressed.

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

> "6) The solicitors for the Claimant believe that the moratorium was wrongly imposed. They contend that the debt is not a qualifying debt because it is a "non-eligible debt" for the purposes of regulation 5(4)(i) which include "any debt which consists of a liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other duty, or to pay damages by virtue of Part 1 of the Consumer Protection Act 1987…, being in either case damages in respect of any death of or personal injury (including any disease or other impairment of physical or mental condition) to any person."
>
> 7) It is unclear how the solicitors contend that this debt in this case is within the italicised words.
>
> 8) Faced with the unsuccessful review, the Claimant had two choices: (1) dispute the review result and apply to the Court for cancellation of the moratorium (regulation 19); or (2) accept that the moratorium had been correctly applied but seek permission to take certain steps notwithstanding it (regulation 7).
>
> …

> 10) It is equally unclear why, as enforcement is in the High Court, application has been made to the county court. The High Court has appropriate jurisdiction in these matters and since the matter of enforcement is with the High Court and in the hands of the HCEOs the application ought properly to have been made to that Court: see Axnoller Events Ltd v Brake (mental health crisis moratorium) [2021] EWHC 2308 (Ch)."

23. Notwithstanding the order of HHJ Luba QC and the reasons which he gave the First Respondent obtained a fresh appointment for execution of the Writ of Possession. On 5 January 2022 the Applicant was told that it had been diarised for execution on 13 January 2022.

24. On 12 January 2022 Mr John McGovern, an AMHP, certified that the Applicant was receiving mental health crisis treatment and she was granted a further mental health crisis moratorium, which I have referred to in the Introduction above as the Moratorium. In his witness statement dated 23 March 2022 Mr Caisley explained his understanding of the mechanics of the scheme and start dates of a mental health crisis moratorium in general, and this Moratorium in particular, as follows:

> "6. Part of my role is to check whether an individual is eligible for a Mental Health Moratorium and that a Moratorium is appropriate for them. Once I have decided that an individual is eligible and the Moratorium is appropriate for them, I enter their details and their debts onto the Government Mental Health Breathing Space portal, maintained by the Insolvency Service. Once I have entered the details in the portal the electronic service sends out a notification to the individual to confirm the start date of the Moratorium. The electronic service also sends out a notification to the individual's creditors."
>
> 7. My understanding is that the Moratorium comes into force the day after I enter the individual's details onto the portal…
>
> 10. The portal confirms that the Applicant's Moratorium started on 13 January 2022 and ended on 12 February 2022…the Applicant was entered into a new Breathing Space Moratorium on 15 February 2022 and this remains live…

The email notification from the Gov.UK portal to the Applicant timed at 15.56 on 12 January stated that she had been put into a breathing space on 13 January. It appears to me to be an automatically generated notification. I was also shown what appears to be a print-out from the government breathing space portal setting out the debts which had been reported to the administrators. The information on the portal does not specifically identify the First Respondent as a creditor. It gives the appearance that the relevant creditors were the solicitors who represented him.

25. Although the First Respondent's solicitor was notified of the grant of the Moratorium the following morning, he formed the view that the debt fell within an exception and that the eviction should proceed, a view which was confirmed by the advisors to the

High Court Enforcement Officers (see paragraph 4(i) of Mr Braun's witness statement dated 14 March 2022).

26. The Writ of Possession was executed by the end of the day on 13 January 2022. There is a live dispute as to what happened on 13 January but I am not in a position to resolve that dispute in the course of determining the Application nor is it necessary for me to do so.

27. On 12 February the Moratorium expired but a further moratorium was granted on 15 February. According to a screenshot of the register the creditor was identified as the First Respondent's solicitors rather than the First Respondent himself.

28. On 24 February 2022 the Application was issued.

29. On 10 March 2022 the First Respondent purported to sell the Lease to the Second Respondent and applied for the Transfer to be registered at HM Land Registry. The Applicant has subsequently sent an objection to HM Land Registry under section 73 of the Land Registration Act 2002, objecting to the Second Respondent's application for registration as proprietor of the Lease following completion of the sale to her. Registration of the Transfer is therefore being held in abeyance for the time being.

30. On 15 March 2022 Bourne J declined to grant interim relief permitting the Applicant to return to the Flat but made a limited injunction against the Respondents pending determination of the Application and listed it to determine "the validity of the steps taken to enforce the Judgment Debt and, if the First Respondent's actions were in breach of regulation 7 of the Regulations, what the consequences are and what relief (if any) should be granted." He directed that the court should consider in particular whether

> "a….the Judgment Debt is a non-eligible debt by reason of regulation 5(4)(i) of the Regulations. "
>
> b….the Judgment Debt is excluded from the scope of regulation 7 of the Regulations by reason of regulation 7(13)(a).
>
> c…regulation 7(12) of the Regulations does not render the sale of the Property to the Second Respondent null and void."

The legal framework

31. By section 7 of the Financial Guidance and Claims Act 2018 the Secretary of State was given power to make regulations "for establishing a debt respite scheme". The Regulations were made by the Secretary of State on 17 November 2020 and came into force on 4 May 2021 (regulation 1(2)). They provide for two different types of moratorium, a "Breathing Space Moratorium" (under Part 2 of the Regulations) and a "Mental Health Crisis Moratorium" (under Part 3 of the Regulations). It is the latter type of moratorium which was in place in this case at the date of eviction.

32. By virtue of regulation 7 a moratorium has effect "in relation to a moratorium debt" during the relevant period.

33. A "moratorium debt" is, in accordance with regulation 6, "any qualifying debt", "about which information has been provided to the Secretary of State by a debt advice provider under these Regulations" (regulation 6(c)).

34. By regulation 35 the Secretary of State is obliged to maintain an electronic system for the purpose of giving and receiving communications and notifications in connection with moratoria and maintaining a register of them (paragraph 1). Both the debt advice provider (paragraph 3) and creditors who have received notification of a moratorium (paragraph 4) are entitled to information contained on the electronic system. The information held on the electronic system must include the date on which a moratorium started (regulation 36(1)(b)).

35. The "initiation" of a mental health crisis moratorium is provided for in regulation 31 which, so far as material, says as follows:

> "(1) In order to initiate a mental health crisis moratorium a debt advice provider must provide to the Secretary of State –"
>
> (a) confirmation that –
>
> (i) the debtor meets the eligibility criteria in regulation 30(3), and
>
> (ii) the conditions in regulation 30(4) are met,
>
> …
>
> (2) Where the Secretary of State receives the confirmation and information referred to in paragraph (1), the Secretary of State must, by the end of the following business day –
>
> (a) cause an entry to be made on the register, and
>
> (b) send a notification of the start of the mental health crisis moratorium to –
>
> (i) the debtor's nominated point of contact…"

36. A mental health crisis moratorium starts on the day following the day on which the Secretary of State causes an entry to be made on the register in accordance with regulation 31(2)(a) (see regulation 32(1)). There is no suggestion in the Regulations that the commencement of the moratorium is dependent on its existence being notified either to the debtor, or indeed, to the creditor, even though regulation 31(2)(b)(ii) requires the debtor's nominated point of contact to be notified of the start of the moratorium.

37. As to what amounts to a "qualifying debt" so as to be a "moratorium debt" under regulation 6 one has to look at regulation 5(1), which defines a qualifying debt as "any debt or liability other than non-eligible debt" and includes the type of debts set out in the non-exhaustive list contained in regulation 5(3). The phrase "non-eligible debt" includes, according to regulation 5(4), among other things, "(a) secured debt which does

not amount to arrears in respect of secured debt". Regulation 2, the Interpretation regulation, defines "secured debt" as:

> "(a) a secured credit agreement,"
>
> (b) a hire-purchase agreement, or
>
> (c) a conditional sale agreement;"

Also included within the category of non-eligible debts are:

> "(i) any debt which consists of a liability to pay damages for negligence or 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 other impairment of physical or mental condition) to any person."

38. Once granted the effect of a moratorium is provided for by regulation 7, which reads as follows:

> "7 – Effect of a moratorium"
>
> (2) Subject to paragraph (3), during a moratorium period a creditor may not, in relation to any moratorium debt, take any of the steps specified in paragraph (6) in respect of the debt unless-
>
> (a) these Regulations specify otherwise, or
>
> (b) the county court or tribunal where legal proceedings concerning the debt have been or could be issued or started has given permission for the creditor to take the step.
>
> (3) A court or tribunal may not give permission for a creditor or agent to take any of the steps specified in paragraph (6)(a) or (b).
>
> "…
>
> (6) The steps mentioned in paragraph (2) that a creditor is prevented from taking are any steps to –
>
> (a) require a debtor to pay interest that accrues on a moratorium debt during a moratorium period,
>
> (b) require a debtor to pay fees, penalties or charges in relation to a moratorium debt that accrues during a moratorium period,
>
> (c) take any enforcement action in respect of a moratorium debt (whether the right to take such action arises under a contract, by virtue of an enactment or otherwise), or

> (d) instruct an agent to take any of the actions mentioned in sub-paragraphs (a) to (c).
>
> (7) A creditor takes enforcement action if they take any of the following steps in relation to a moratorium debt –
>
> (a) take a step to collect a moratorium debt from a debtor,
>
> (b) take a step to enforce a judgment or order issued by a court or tribunal before or during a moratorium period regarding a moratorium debt,
>
> (c) enforce security held in respect of a moratorium debt,
>
> (d) obtain a warrant,
>
> (e) subject to regulation 12(4)(d), sell or take control of a debtor's property or goods."

39. The effect of taking a step in contravention of the above prohibitions is spelled out in unequivocal terms in paragraph (12):

> "(12) Any action taken contrary to this regulation shall be null and void."

40. As to the effect of and on legal proceedings there are two provisions which are of potential relevance. Regulation 7(13) excludes from the effect of regulation 7

> "…the following to the extent that they relate to a debtor –
>
> (a) a charging order made before the start of the moratorium under the Charging Orders Act 1979…"

Regulation 10, headed "Existing legal proceedings at the start of a moratorium", says:

> "(1) If at the start of a moratorium a creditor to whom a moratorium debt is owed has a bankruptcy petition or any other action or other proceedings in any county court or tribunal in relation to a moratorium debt, then the creditor must notify the court or tribunal of the moratorium."

Finally, by virtue of paragraph (5), subject to paragraph (7) which has no bearing on the issues before me,

> "…during a moratorium a court or tribunal must take all necessary steps to ensure that any action or proceedings to enforce a court order or judgment concerning a moratorium debt does not progress during the moratorium period."

The parties' submissions

41. Mr Peacock, on behalf of the First Respondent, submits that the Applicant has failed to establish that any moratorium was in place either when the eviction took place or when the Lease was sold. He says that there is a lack of evidence to confirm whether the Moratorium was entered on the register maintained under regulation 35 and, if so, when. He also relies on the fact that the creditor is said in the electronic register to be the First Respondent's solicitors rather than the First Respondent himself, which he says does not comply with the requirements of regulation 6(c) which defines a "moratorium debt".

42. The Applicant relies on the register as showing conclusively the start dates of the various moratoria.

43. If he is wrong about compliance with the notification and registration requirements the First Respondent submits that nevertheless neither the eviction from the Flat nor the sale of the Lease were in breach of the Regulations. In relation to the eviction he says, first, that by virtue of regulation 7(13)(a) the enforcement of charging orders is outside the scope of the restrictions created by a moratorium and that eviction of the Applicant from the Flat in the course of enforcing the charging order was not therefore prohibited by the moratorium. Secondly, he argues that part of the debt was a non-eligible debt by virtue of regulation 5(4)(i) because it arose from an award of damages for personal injury, being, in particular, psychiatric injury. He reminded me of the evidence and findings in the Substantive Claim relating to the adverse impact of the Applicant's behaviour on the First Respondent's mental health.

44. As to the meaning and effect of regulation 7(13)(a) in respect of the charging orders granted in the Substantive Claim Mr Clarke submits that the regulation properly construed simply means that the charging orders continue in existence during the period of a moratorium although they may not be enforced.

45. As to the second basis advanced for the conclusion that there was no breach of the Regulations, namely that the judgment debt was a non-eligible debt, Mr Clarke submits that the damages for distress awarded to the First Respondent in the Substantive Claim were not damages for personal injury for the purposes of regulation 5(4)(i). He relies on the definition of personal injury adopted by the common law (eg *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39, per Lord Scott at [65]) and the definition used in statutes, including the Limitation Act 1980 (see sections 11 and 38(1)). Further, he says, that regulation 5(4)(i) requires the debt to "consist" of a liability to pay damages for personal injury before it can be held to be exempt and he relies on the decision of Turner J in *R (Gate) v Secretary of State for Transport* [2013] EWHC 2937 (Admin) at [18].

46. As to the sale of the Lease Mr Peacock submits that the sale was not of the Applicant's property, which would be prohibited by regulation 7(7), but sale of an interest which, by virtue of paragraph 4 of the order made on 6 March 2020 in the Charging Orders Claim, was created and vested in and therefore belonged to the First Respondent and was not caught by the prohibition in regulation 7(7). Thus he says that even if there

was a moratorium in place it did not prevent the Applicant from disposing of the leasehold interest which he had acquired under the order of 6 March 2020.

47. The Applicant points out that she is still registered as the legal owner of the Lease, albeit subject the First Respondent's charges but that however one analyses the transaction undertaken by the First Respondent in selling to the Second Respondent it was plainly enforcement action in relation to a moratorium debt in breach of regulation 7.

48. Mr Peacock then argues that even if the eviction and sale were breaches of regulation 7 it is far from clear what the effect of paragraph (12) ("Any action taken contrary to this regulation shall be null and void") means given that the sale has, he says, completed, the TR1 executed and an application for it to be registered has been made to HM Land Registry. He also submits that the effect of the vesting order made on 6 March 2020 was to leave the Applicant with an interest in possession of only one day on expiry of the term vested in the First Respondent and the court should not give effect to it. It follows, he therefore says, that if the court can not or should not grant any relief in respect of the sale it can not or should not grant relief in respect of the eviction.

49. The Applicant submits that the construction of regulation 7(12) is obvious and the word "void" which is used in this paragraph is to be distinguished from "voidable" which is not. Insofar as material Mr Clarke points out that because registration at HM Land Registry of the transfer to the Second Respondent has not taken place, and because the Register of Title is conclusive as to the legal title to real property, the legal estate in the Lease remains with the Applicant, who continues to be registered at HM Land Registry as sole proprietor of the Lease.

50. Finally the First Respondent argues that in any event the court should not exercise any discretion it may have in favour of the Applicant given her behaviour over the years that led to the Substantive Claim (and would continue were she to return to the Flat), the substantial outstanding judgment, the failure of the Applicant to vacate the Flat for a period of nearly two years after the possession order was made, and the alleged poor condition of the Flat when she was evicted.

51. Mr Clarke submits that grant of the declaratory relief sought should not depend on the exercise of a discretion because there is a genuine dispute about the meaning of the Regulations which both sides need resolved. As to any injunctive relief he submits that if I come to the conclusion that the Applicant has wrongly been excluded from her own property and that the current occupiers are trespassers there are no real competing discretionary factors to weigh or balance.

Discussion

Issue (i). Was the Moratorium properly registered and effective?

52. The evidence shows, in my judgment, that the Secretary of State established an electronic system and register in accordance with regulation 35 onto which information about the Applicant and the moratoria granted to her from time to time were loaded, including the dates when they started.

53. A moratorium is initiated when a debt advisor provides the Secretary of State with the information specified in regulation 31(1). The crucial information to be registered are the details of the debtor and the date on which the moratorium started (regulation 36(1)). No active decision or step needs to be taken by the Secretary of State. Indeed from what I have seen and from the face of the Regulations it seems to me that save for the loading of information onto the system by the debt advisor there is no physical or mental activity required by anyone; the whole process thereafter, including the generation of notices and emails, is automated.

54. Contrary to what is suggested by the First Respondent it seems to me that it is not a question of the burden of proof in respect of demonstrating what is to be found on a register maintained by the State. What is contained on the register is, in my judgment, a matter of record and should be taken at face value. There is no basis for going behind the register or for assuming that the correct procedure and process leading to the registration has not been followed.

55. Specifically there is no basis for doubting the accuracy of the registration of the moratoria or the dates of their commencement. Nor is there any basis in the Regulations for concluding that the registration or the moratoria are in some way invalid because the name of the creditor's solicitors is specified as the owner of the debt instead of the First Respondent himself.

Issue (ii). Was the debt a non-eligible debt because it consisted of damages for personal injury.

56. Although counsel referred me to a number of authorities on the definition of personal injury I need specifically only mention one. In *Brown v Commissioner of Police of the Metropolis* [2019] EWCA Civ 1724, Coulson LJ, in considering what amounted to a claim for damages for personal injury for the purposes of qualified one-way costs shifting under CPR rr.44.13-44.16, looked at the definition of that phrase used in the Civil Procedure Rules. He held [13], as follows:

> "13. A claim 'for personal injuries' (rule 44.13(1)(a)) is defined at rule 2.3 as follows:
>
> "'claim for personal injuries' means proceedings in which there is a claim for damages in respect of personal injuries to the claimant or any other person or in respect of a person's death, and 'personal injuries' includes and disease and any impairment of a person's physical or mental condition…"
>
> This is the same definition as appears in the Limitation Act 1980 at section 38(1). It is trite law that "distress", "upset", "fear" and other similar human emotions do not constitute personal injury: see most recently Stewart J in *Kimathi v Foreign and Commonwealth Office* [2018] EWHC 1305 (QB)."

The other two members of the Court of Appeal agreed with the judgment given by Coulson LJ.

57. It is apparent that Coulson LJ's decision was based on a consistent meaning of the expression "personal injuries" across English civil jurisprudence whether used in a statute or at common law. No distinction was to be made. Secondly, his statement that it was trite law that "distress…and other similar human emotions do not constitute personal injury" is not only consistent with authority but is a principle which binds me.

58. No good reason has been advanced as to why the expression "damages in respect of…personal injury" used in regulation 5(4)(i) should bear a different and wider meaning than used elsewhere in Acts of Parliament and at common law. Moreover the argument that the expression should be used consistently is a compelling one.

59. The first question therefore in this case is into which category did the damages awarded by His Hon Judge Roberts to the First Respondent fall. I accept that damages for psychiatric harm would be damages for personal injury. However, as I have already found in my analysis of the facts above there was no claim for damages for psychiatric harm in the Substantive Claim nor was there was any factual or expert evidence to support such a claim. More importantly the trial judge made no findings of such harm nor is it possible to construe his award as one which was intended to compensate the First Respondent for such harm. The damages were awarded in respect of distress and anxiety and other human emotions experienced by the First Respondent falling short of psychiatric harm.

60. In any event I accept Mr Clarke's submission that for the debt to be "non-eligible" in accordance with regulation 5(4)(i) the whole of the damages must be in respect of personal injury otherwise the use of the words "consists of" in that subparagraph of the regulation would not be given proper effect to. The sub-paragraph excludes "any debt which consists of a liability to pay damages…in respect of…personal injury". In my judgment the words "consists of" bear a different meaning to the word "includes" which is what the draftsman of the Regulations could have used instead of or in addition to the words "consists of". The natural meaning of the expression is that the liability comprises only a personal injury award. Support for this construction is to be found, as submitted by Mr Clarke, in the decision of Turner J in *R (Gate) v Secretary of State for Transport* [2013] EWHC 2937 (Admin) who, in construing section 14 of the Planning Act 2008 as to the meaning of nationally significant infrastructure projects held:

> "The wording of s.14 of the 2008 Act establishes that a 'nationally significant infrastructure project' means a project 'which consists of any of the following…'. In their ordinary meaning the words "consists of" require that the project must fall entirely within the relevant definitions of an NSIP to fall within the scope of s.14. Otherwise, the word "includes", or an equivalent, would have been used."

61. Therefore, even if it were otherwise possible to come to the conclusion that the award of damages made by His Hon Judge Roberts in the Substantive Claim included damages for personal injury the debt would still fall outside the definition of a non-eligible debt because the award giving rise to the debt did not fall entirely within the expression "personal injuries" but merely included an element in respect of such a head of damages.

Issue (iii). Was the judgment debt excluded from the effect of the Moratorium because it was secured by a charging order?

62. This turns on the proper construction of regulation 7(13) which provides that nothing in regulation 7 "affects…(a) a charging order made before the start of the moratorium". In my judgment the obvious meaning of this provision, in the context of a regulation which prevents the creditor from taking steps to enforce a judgment debt, is that while the charging order is preserved and remains as security for the underlying debt, the creditor is prevented from enforcing payment of the debt by seeking the remedies which would otherwise be available to an equitable chargee. The words "affects…a charging order" are plain and, in my judgment, relate to the existence or status of the charging order, which is to remain unaffected by the existence of a moratorium. They need not be stretched, and there is no justification for stretching them, to mean that the chargee could seek the usual remedies during the moratorium period in the face of the very specific prohibition contained in regulation 7(6)(c) which prevents a creditor during the period of the moratorium from taking "any enforcement action in respect of a moratorium debt". See also the duties of the court under regulation 10(5). That construction would, in my view, be consistent with the policy underlying the Regulations which protect the debtor from action during the period of the moratorium but do not deprive the creditor of their rights in respect of the debt, which will become exercisable again when the moratorium comes to an end. Indeed the fact that regulation 7(13) only applies to charging orders "made before the start of the moratorium" reinforces this conclusion.

63. I should add, for the sake of completeness, that in my view it is unarguable that the judgment debt in this case was a non-eligible debt by virtue of being secured by a charging order. Regulation 5(4)(a) excludes as a non-eligible debt a "secured debt", which is specifically defined for the purposes of the Regulations by regulation 2 as a secured credit agreement, a hire-purchase agreement or a conditional sale agreement. The debt arising from the award of damages in the Substantive Claim is none of those three things and does not therefore fall into the category of non-eligible debts.

Issue (iv). Was the sale to the Second Respondent of an interest caught by the Moratorium?

64. However one analyses this part of the First Respondent's case it seems to me that it is a red herring. The fundamental question is whether in obtaining possession of the Flat and in selling the Lease the First Respondent was taking enforcement action in respect of a moratorium debt in breach of regulation 7. In my judgment there is no doubt that each of those steps was prohibited by regulation 7.

65. While the charging orders may be said to have been granted as security for the underlying judgment debt, without doubt itself a moratorium debt, the Order for Sale Claim and the order made by District Judge Kanwar resulted from steps taken by the Applicant to enforce that judgment debt, steps which he was perfectly within his rights to take until the Moratorium was granted. The fact that the operative parts of the order of District Kanwar only came into effect if the Applicant failed to pay the judgment debt makes it plain that the orders for possession and sale were part of the enforcement of the judgment debt. They had no independent purpose. Further, as Mr Clarke pointed out, the only legitimate purpose for which the Applicant was entitled to exercise his rights as chargee was to obtain payment of the sum secured by the charges: see *Co-*

Operative Bank Plc v Phillips [2014] EWHC 2862 (Ch) per Morgan J at [38] and following where he cites well known passages from earlier decisions of the Court of Appeal and the Privy Council, including the seminal expression of the limits on a mortgagee identified by Templeman LJ in *Quennell v Maltby* [1979] 1 WLR 318 at 324 in the following passage:

> "The estate, rights and powers of a mortgagee, however, are only vested in a mortgagee to protect his position as a mortgagee and to enable him to obtain repayment. Subject to this, the property belongs in equity to the mortgagor. "

66. The fact that by the order of District Judge Kanwar a term of years certain was vested in the Applicant did not alter the position. True it is that this gave the First Respondent a proprietary interest in the Lease, which he then sold to the Second Respondent, but as paragraph 4 of the order specifically stated this was "To enable the Claimant to carry out the sale" of the Flat, or more specifically the Applicant's interest in the Lease. It was a well established method of providing the mechanics to an equitable chargee to enable the chargee to sell a property with a view to seeking repayment of the monies secured by the charge. It is not in dispute that the effect of such a sale in such a way is, once registered at HM Land Registry, to transfer to the purchaser the title originally held by the debtor, not some new title created in favour of the creditor/chargee. I do not set out the well-known statutory provisions which give effect to such a transaction in that way.

67. In my judgment therefore the eviction was enforcement of the judgment debt in breach of the Moratorium and the sale was enforcement in breach of the subsequent moratorium on a proper construction of regulation 7.

Issue (v). Was the sale "null and void"?

68. Regulation 7(12) is unequivocal. The effect of any action taken contrary to regulation 7 "shall be null and void". Thus, in my judgment, since both the eviction and the sale were actions taken contrary to regulation 7 they are both null and void. Notwithstanding the fact that the sale of the Lease has not been completed by registration I find that the transactional steps taken in the course of the sale, by which I mean the contract for sale and the transfer, being actions taken to enforce a moratorium debt, are null and void. As between the Applicant and the Respondents it is as if those actions had never been taken. Those actions do not bind the Applicant. The relief to be granted to the Applicant needs to reflect that conclusion.

69. I say nothing about the effect of this conclusion as between the other parties involved, being not only the Respondents but the Applicant's mortgagee and any lender who might have advanced money to the Second Respondent in reliance on a new charge over the Lease. Nor do those third parties need to be joined to this Application to determine whether the eviction and sale were valid or void. There will no doubt be complicated arguments about restitutionary rights and remedies which are not matters for me to determine on the Application.

Issue (vi). Discretion.

70. It is said that I ought not to entertain an argument about the exercise of the court's discretion because it was not an issue which was specifically identified by the First Respondent for determination in accordance with Bourne J's order, but that seems to me an unrealistic stance. The court would have invited submissions on the question of discretion even if not raised as a discrete issue because the exercise of the court's discretion in the circumstances is not, in fact, a separate issue but very much part of the determination of the Application as a whole. My only concern would be if one party sought to rely on evidence which took the other by surprise, but in the event that does not arise here.

71. Mr Peacock seeks to persuade me that if the Applicant otherwise succeeds on her application I should refuse to grant her the relief which she seeks for the reasons which I set out earlier. However, it seems to me that my primary task here is to construe the Regulations in light of the dispute between the parties. I have done so and have set out my conclusions above. While there may, in the circumstances, be a limited discretion as to whether to make declarations as to the construction of the Regulations and the consequences of that construction there would be little point in declining to do so.

72. Moreover, given that I have reached the conclusion that the First Respondent has taken actions in evicting the Applicant and in selling the Lease which, because they are breaches of regulation 7, are null and void the First Respondent would, in my judgment, have to identify and prove very exceptional circumstances to persuade me to subvert the policy of the Regulations and deprive the Applicant of the protection which the Regulations are designed to confer on her and was conferred on her by grant of the Moratorium as a consequence of her receiving mental health crisis treatment. The factors relied on by the First Respondent do not begin to satisfy that heavy burden.

Conclusion

73. I will discuss with counsel the precise terms of the order to be made but for the reasons which I have given the Applicant is entitled to an order which restores the position to what it was before the eviction and sale took place