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DEBT RELIEF MORATORIA: IMPORTANT ISSUES FOR CREDITORS

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Key Points

- While appropriate protection for individuals enmired in debt or suffering serious mental illness is to be welcomed, the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020/1311 (the "**Regulations**") are too easily exploited by unscrupulous debtors and can cause creditors significant difficulties.

- Breathing space moratoria generally cause only short-term disruption to creditors, but mental health crisis moratoria can last indefinitely.

- The grounds on which creditors can seek to overturn moratoria are uncertain, they suffer huge jeopardy on timing the challenge and disputes are costly and protracted.

- It remains unclear how the Regulations apply to secured debt. On the current state of the authorities, they usually prevent any enforcement.

- The Regulations are due to be reviewed on 4 May 2026.

Introduction

It was a manifesto commitment of the 2017 Conservative government to implement a breathing space scheme. After a call for evidence and a consultation period, the Regulations were laid before parliament on 9 September 2020, approved on 6 October 2020 and came into force on 4 May 2021.

The Regulations, which were made under s 7 Financial Guidance and Claims Act 2018, created two types of debt relief moratorium:

- the breathing space moratorium, providing short term relief to debtors to enable them to obtain debt advice; and

- the mental health crisis moratorium, providing relief to debtors undergoing a mental health crisis.

A moratorium affords the debtor far-reaching protection by significantly restricting the rights of affected creditors during the lifetime of the moratorium, most notably the right to take enforcement action.

Perhaps because MPs and parliamentary draftsmen were distracted by the contemporaneous need to consider and pass a plethora of legislation implementing the pandemic response, the Regulations operate in ways which appear unintended and can be deleterious to creditors.

There have now been a number of cases considering the Regulations but, as this article explains, aspects of their operation are ill-defined, and their scope remains uncertain in important ways. This article identifies the contentious and problematic elements of the Regulations and surveys the case law.

The Scheme of the Regulations

The principal difference between a breathing space moratorium and a mental health crisis ("**MHC**") moratorium is that the former is limited in effect for 60 days (reg 26), whereas the latter is only available to debtors undergoing a mental health crisis and lasts for 30 days after the mental health crisis treatment concludes (reg 32). (The Insolvency Service calls MHC moratoria "*mental health breathing space*", including in its communications with creditors, but that confusing terminology is not employed in the Regulations or adopted here).

In 2024, there were 87,732 breathing space moratoria and 1,288 MHC moratoria.

The Moratorium Application

The debtor must apply for a moratorium to a regulated debt advice provider (the "**Provider**"), which checks eligibility. There are numerous Providers, by far the largest being the charity StepChange. Historically, the most prolific MHC moratorium Provider had been the charity Rethink and more recently the charity Toynbee Hall. Providers cannot charge fees to the debtor. In acting as gatekeeper for the moratorium regime, the Provider is undertaking a quasi-judicial role: *Kaye v Lees* [2023] EWHC 758 (KB), David Locke KC sitting as a High Court Judge ("**Kaye IV**").

An application for a breathing space moratorium is made by the debtor under regs 23 to 25, the requirements of which are as follows:

- The "*eligibility criteria*" (reg 24(3)) are that the debtor is:

  (a) an individual;

  (b) owing a qualifying debt;

  (c) domiciled or ordinarily resident in England and Wales;

  (d)-(f) not subject to a debt relief order, IVA or bankruptcy; and

  (g)-(h) not subject to another breathing space within the last 12 months or an MHC moratorium.

- Additionally, there are "*conditions*" (reg 24(4)) that:

  (a) the debtor must be unable, or unlikely to be able, to pay their debts as they fall due; and

  (b) a breathing space must be "*appropriate*", which involves considering a range of factors including benefit to the debtor and the necessity of a moratorium in order to facilitate a "*debt solution*".

An application for an MHC moratorium is made under regs 28 to 30:

- The debtor must be suffering a mental health crisis as defined under reg 28, of which more is said below.

- An application for a moratorium can be made by persons including the debtor, their carer, an "*approved mental health professional*" ("**AMHP**"), a mental health nurse or a social worker (reg 29). An AMHP is someone who is approved under the Mental Health Act 1983 and has wide power to, for example, forcibly detain a patient in hospital.

- The "*eligibility criteria*" for the application are the same as those for a breathing space moratorium application, save that another recent moratorium is no bar.

- The additional "*conditions*" include the provision of evidence that the debtor is receiving mental health crisis treatment, and there is no requirement for the implementation of a "*debt solution*" (see further below).

See below as to the possible effect of the distinction between "*eligibility criteria*" and "*conditions*".

<u>The Effect of the Moratorium</u>

The moratorium bites on "*moratorium debts*", being "*qualifying debts*" owed by the debtor when the application was made. Qualifying debts are defined at reg 5 as being those debts and liabilities which are not "*non-eligible*". Non-eligible debts include "*secured debt which does not amount to arrears in respect of secured debt*", certain business debt, debt incurred by means of fraud, a fine for an offence, an obligation under a confiscation order, an order in family proceedings, student loan debt, damages for death or personal injury, council tax and rates.

The protections afforded to the debtor by the moratorium are set out at reg 7. They include in particular that a creditor may not:

- take enforcement action in respect of a moratorium debt; or

- charge interest, fees, penalties or charges.

Additionally, the creditor must not contact the debtor to enforce a moratorium debt (reg 11).

During the moratorium, the debtor must satisfy certain "*ongoing liabilities*" as they fall due (reg 16(2)(b)). These include payments which fall due in respect of secured credit agreements, leases, insurance contracts, taxes and utility supplies.

A breathing space moratorium is subject to a mid-way review (reg 27). In an MHC moratorium the Provider must obtain from the debtor's nominated point of contact every 20 to 30 days confirmation that the debtor is still receiving crisis treatment.

There is a mechanism under regs 17 to 19 for a creditor to challenge a moratorium on the basis of unfair prejudice or material irregularity. These concepts are dealt with further below.

Once a moratorium has been commenced, it is entered in an electronic register maintained by the Insolvency Service and notice automatically sent to creditors (regs 25 and 31).

Where legal proceedings are already afoot at the start of the moratorium, then the creditor may be allowed to pursue them until judgment (reg 10 and *Seculink Limited v Forbes* [2024] EWHC 3339 (Ch), Sir Anthony Mann ("**Seculink I**") at [108]). Where proceedings cannot continue due to an MHC moratorium, they must be referred to a judge for directions after six months: para 3.5 of Practice Direction 70B.

Contentious Aspects of the Operation of Moratoria

Various aspects of the regulations have been considered by the court in a series of decisions which are considered in the following sections.

<u>Secured Debt and Charging Orders</u>

The provisions applying the Regulations to secured debt are especially dense and convoluted:

- A "*qualifying debt*" means any debt or liability other than non-eligible debt (reg 5(1)).
- Qualifying debt includes "*any amount which a debtor is liable to pay under or in relation to … an order or warrant for possession of the debtor's place of residence or business*" (reg 5(3)(a)(1)).
- Non-eligible debt includes "*secured debt which does not amount to arrears in respect of secured debt*" (reg 5(4)).
- "*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*" (reg 2).
- "*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*" (reg 2).

One issue is this. Where a creditor has obtained a possession order prior to the start of the moratorium, does this make the debt a qualifying debt rather than a non-eligible debt as a result of reg 5(3)(a)(1)? That question was answered in the negative in *Bluestone v Stoute*, HHJ Parker, 4 March 2024 ("**Bluestone I**") at [40]; the designation of secured debt as non-eligible debt in reg 5(4) overrides anything to the contrary in reg 5(3).

More difficult is the meaning of the term "*arrears*". On the face of the definition in reg 2, it would include the full amount of the mortgage debt, except in those untypical cases where arrears have been capitalised. However, the Court of Appeal in *Forbes v Seculink Limited* [2025] EWCA Civ 690 ("**Seculink III**") at [71] held, following an exhaustive exercise in statutory interpretation, that "*arrears*" means only arrears of instalment payments of capital and interest. Accordingly, the balance of the outstanding debt is not "*arrears*" and is not qualifying debt. Permission to appeal *Seculink III* has been refused by the Supreme Court.

That may seem to be a significant victory for secured creditors, but what the Court of Appeal gave with one hand in *Seculink III*, the High Court took away with the other hand in *Bluestone v Stoute* [2025] EWHC 755 (Ch), Mr Justice Mellor ("**Bluestone III**"). That decision focussed on the prohibition in reg 7(6) against taking "*any enforcement action in respect of a moratorium debt*", which under reg 7(7) includes to "*enforce a judgment or order … regarding a moratorium debt" or to "enforce security held in respect of a moratorium debt*". The High Court accepted that non-arrears mortgage debt was not moratorium debt, but nonetheless held, applying a purposive approach to the Regulations, that it would be contrary to the intention behind the Regulations to permit enforcement of the mortgage debt where this would inevitably result in enforcement "*in respect of*" the arrears, a moratorium debt. The court considered that a creditor could instead seek to rely on the court's power to permit enforcement under reg 7(2); as explained below, in most cases such an application will fail.

It is regrettable that *Bluestone III* was not considered by the Court of Appeal along with *Seculink III*. It is unlikely that the legislator intended to remove secured debt from the scope of the Regulations, only to frustrate that outcome in such an obscure manner.

Finally, it has been held that a debt secured by a charging order is not a secured debt for the purpose of the Regulations. A secured debt is only one secured by a secured credit agreement, a hire-purchase agreement or conditional sale agreement: *Lees v Kaye* [2022] EWHC 1151 (QB), HHJ Dight CBE ("**Kaye I**"), at [63].

Joint Debtors

As well as protecting the debtor who has entered the moratorium, the moratorium also protects joint debtors of a moratorium debt: reg 7(7)(n). There is nothing to prevent a joint debtor subsequently seeking their own separate moratorium in respect of the same joint debt, and in particular reg 24(3)(g) would not prevent it: *West One Loan Limited v Salih* 30/3/22, HHJ Monty QC at [58]. As a result, it is relatively common that joint debtors take turns to apply for moratoria seemingly in order to frustrate enforcement.

Enforcement with Permission of the Court

On the face of it, it appears that reg 7(2) provides a means by which creditors might be able to enforce a debt with permission of the court despite the existence of a moratorium.

However, in practical terms, this apparent concession to creditors is a mirage:

- Under reg 7(5), the court may only grant permission if the creditor's proposed step is "*reasonable*" and "*the step will not be detrimental to the debtor*" or "*significantly undermine the protections of the moratorium*".

- Even when the three criteria are satisfied, the court will still have a discretion: *Brake v Guy* [2022] EWHC 2797 (Ch), HHJ Matthews at [58]. In that case, it was held that enforcement against the pension fund of the debtor's husband, her joint co-debtor, would be permitted.

- However, an application under reg 7(2) failed in *Kaye v Lees* [2022] EWHC 3326 (KB), Mr Justice Swift ("**Kaye II**") at [31]. Even in the absence of psychiatric evidence, it was clear that evicting the debtor from her home would be detrimental to her.

- Accordingly, where enforcement steps are intended against the debtor themselves, as opposed to a joint debtor, then it is hard to envisage circumstances where the court would give permission.

Unliquidated, Future and Contingent Debts

What type of debt can be captured by the moratorium? Under reg 5(4)(i), a debt consisting of a liability to pay damages for death or personal injury is non-eligible. However, this provision does not extend to damages for distress, which can be a qualifying debt: *Kaye I* at [56]-[61].

The moratorium offers protection in relation to debts that have already been incurred, not debts that will be incurred in the future: *Axnoller Events Ltd v Brake* [2021] EWHC 2308 (Ch), HHJ Matthews, ("**Axnoller II***"*) at [70] and *Axnoller Events Ltd v Brake* [2021] EWHC 1500 (Ch) at [21]. In the latter, it was held that in order to be a moratorium debt, the debt must be a liquidated debt at the commencement of the moratorium, and so a costs award that had not yet been assessed was not a moratorium debt. This decision sits uneasily with the decision in *Kaye I* that distress damages can be moratorium debts.

Bankruptcy Orders

While most legal proceedings which are pending when the moratorium commences may be permitted to continue to judgment under reg 10, under reg 10(2)(a) the court must stay existing bankruptcy petitions in relation to a moratorium debt.

It has been held that if the court fails to do so, that does not mean that the bankruptcy order is null and void: *Carter v Davies* [2024] EWHC 1536 (Ch). It has also been held that the moratorium does not prevent the court from making a bankruptcy order on an existing petition where that is permissible applying the test at reg 7(5) (see above) and that the test is satisfied where it can be said that a bankruptcy order is not detrimental to the debtor since they have had sufficient time to consider their options: *Yianni v Paliouras* [2024] BPIR 1420,

ICCJ Mullen at [6]. Both of these decisions are questionable, and in particular *Yianni* seems to have been decided without the court's attention having been drawn to *Kaye II*.

Issues Specific to MHC Moratoria

It is often a central question in a dispute concerning an MHC moratorium whether the debtor's symptoms of mental illness amount to a crisis. Creditors will often have in mind that it can be easier for debtors to simulate features of mental illness than symptoms of physical illness. The leading authority concerning the severity of the symptoms which are necessary for the existence of a crisis is *Kaye v Lees* [2023] EWHC 152 (KB), HHJ Dight CBE ("**Kaye III**") at [28]:

"In my judgment the use of the phrase 'mental disorder of a serious nature [my underlining]' is a plain indication that before a [MHC] moratorium is put in place … evidence is required to demonstrate that the debtor is suffering from a disorder of a severity which in other circumstances would justify overriding the free will of the debtor in detaining or removing them in their own best interests or that of the public."

On the face of it, this is a high hurdle to leap. However, in practice Providers do not appear to apply the test stringently, and the Treasury standard evidence form for the AMHP does not require them to give any details of the crisis beyond confirming simply that it exists. It is therefore unclear how the Provider is supposed to reach an evaluative decision on a quasi-judicial basis as to whether the debtor is in crisis. Where the Provider has been supplied with conflicting information, it should ask questions in order to come to a sound conclusion: *Bluestone v Stoute*, HHJ Parker, 14 November 2024 ("**Bluestone II**") at [84-85].

The use of the word "*crisis*" does not indicate that a moratorium should only be in place for a short period of time; a long-term disorder can still be described as a crisis: *Bluestone II* at [90].

Unlike in a breathing space moratorium, in an MHC moratorium there is no requirement that the debtor engage with debt restructuring or intend to put in place any kind of debt solution or payment plan: *Axnoller II* at [19] and [45] and *Bluestone II* at [100], departing from obiter comments in *Kaye IV* at [24]. Statements to the contrary in *Yianni* at [6] seem to be based on a misunderstanding of *Axnoller II*.

Reviewing and Cancelling the Moratorium and the Role of the Provider

The Provider may be asked to review the moratorium, either in relation to an individual debt or generally, on grounds of unfair prejudice or material irregularity under reg 17. The request must be in writing and contain both a statement of grounds and evidence in support and be made within 20 days of the start of the moratorium. The Provider must then conduct the review and inform the creditor of the outcome within 35 days from the start of the moratorium under reg 18.

If the Provider does not cancel the moratorium, the creditor may make an application to the court to discharge the moratorium under reg 19. It must be made within 50 days of the start of the moratorium and may be made either to the High Court or to the county court: *Axnoller II* at [10] and *Kaye III* at [32]. An application to discharge should be made by application notice, rather than a new claim: PD 70B para 2.

Timing Issues

Timing is a matter of crucial importance:

- The timing requirement is a strict one: *Kaye II* at [21] to [27], where the application was refused for this reason. This causes creditors significant difficulty in gathering evidence to support the review request.

- However, in *Kaye III*, the moratorium referred to in *Kaye II* had come to an end. A new moratorium was put in place, and the creditor successfully challenged that within time.

- Where the creditor argues that the debt is not a qualifying debt at all, then such a challenge can be brought outside the structure of reg 17 without first seeking a determination from the Provider: *Seculink I* at [69].

- In *Kaye IV* at [52], the court considered that in some circumstances the quasi-judicial decision of the Provider might in theory be amenable to judicial review, which has its own, marginally more generous, timing rules. This would usually only be appropriate where no other remedy was available, including under the Regulations.

- Under reg 18(3), even where the criteria for cancelling the moratorium have been met, the Provider is not required to do so if the debtor's personal circumstances would make that unfair or unreasonable. The court will also take the same approach: *Bluestone II* at [166].

Unfair Prejudice

As to unfair prejudice:

- Unfair prejudice is not defined by the Regulations. Of course, a creditor will almost always be prejudiced by a moratorium; the question is whether the prejudice is unfair. That must be determined objectively and involves a balancing exercise on a case-by-case basis.

- Unlike with individual voluntary arrangements, determining unfairness is not simply a question of comparing the creditor's position with that of other creditors of the same class or to what it would have been absent the moratorium, and to some extent the determination must take account of the advantage to the debtor. This is difficult, because often the interests of the debtor and the creditor are chalk and cheese: *Axnoller II* at [32-6] and [47].

- The debtor's mental health is a relevant factor: *Axnoller II* at [37] to [39]. Evidence should detail the debtor's diagnosis, treatment, duration and severity. It should explain how removal of the moratorium will hinder recovery.

- Events and conduct after the moratorium start might be significant, for example if the debtor's mental health recovers. Both the length of the moratorium and the extent to which the creditor is secured may also be pertinent: *Bluestone II*, which also held that the financial resources of any co-debtor to satisfy the debt may be a relevant factor.

- Successful unfair prejudice applications include *IV Fund Limited SAC v Mountain* [2021] EWHC 2870 (Ch) and *Kaye III*, where there was insufficient evidence of mental illness. The outcome in *Bluestone II* was also successful for the creditor, taking careful account of the factors going each way.

Material Irregularity

As to material irregularity:

- There is a material irregularity where the debtor did not meet the eligibility criteria when the application was made, where the moratorium debt was not a qualifying debt or where the debtor was not insolvent: reg 17(2).

- The focus is on the position when the application was made and retrospective evidence is not relevant: *Bluestone II* at [95].

- Although there is a material irregularity where the debtor's moratorium application do not meet the "*eligibility criteria*", a literal reading of reg 17 suggests that there is no material irregularity where the application do not meet the "*conditions*". See above as to the distinction between the eligibility criteria and the conditions. In the case of an MHC moratorium, one of those conditions is evidence that the debtor is receiving mental health crisis treatment. For that reason, *Bluestone II* at [57] questioned whether the lack of such evidence would indeed amount to a material irregularity, but followed the conclusions of HHJ Dight in *Kaye III* that it did.

- Where there is an evaluative issue, such as whether the debtor is in crisis, is the court required to form its own view on the evidence, or simply to consider whether the Provider's decision was within the reasonable range of decisions open to it, without the court necessarily reaching the same decision? In *Bluestone II* at [61], the court adopted the second approach.

- Where evidence in support of the application is contradictory or uncertain, the Provider must ask further questions in order to reach a proper understanding of the situation: *Bluestone II* at [84].

In many cases, the creditor will need further evidence in order to support the challenge. The court ordered disclosure of medical records and an examination by the claimant's expert in *Guy v Brake* [2023] EWHC 1560 (Ch). In *Bluestone I* at [126-130], the court granted disclosure of documents in the Provider's hands concerning both the debtor's mental health and also his financial situation.

Where it is clear that a debtor is abusing the Regulations and entering into repeated moratoria on spurious grounds, can a creditor obtain an injunction to prevent a further moratorium being sought? Such an injunction was granted in *West One Loan Limited v Salih* 30/3/22, HHJ Monty QC and in *Kaye III*. However, in *Kaye IV* at [46] the High Court refused to extend the injunction, holding that it would be inappropriate to prevent a debtor from seeking to exercise their legal rights under the Regulations.

Conclusions

As these decisions make clear, there are many aspects of the Regulations which have implications for creditors that are unexpected and complex. Even on fundamental matters, only the higher courts have been able to bring a degree of clarity, and even so there are unresolved tensions between court decisions. In many cases, these difficulties have arisen not because of simple drafting errors, but rather conceptual failures in framing the scheme of the Regulations and working through their application in practice.

Many mental health crises take a long time to resolve, and so creditors are likely to be concerned that an MHC moratorium brings indefinite relief for the debtor. While many creditors who are affected by the Regulations are large, well-funded companies, not all creditors fall into this category; as the reported cases show, creditors who are private individuals have also been required to undertake labyrinthine and costly litigation in order to vindicate their rights against debtors who falsely claim to be suffering from a mental health crisis. The scope for unfairness is considerable.

One central unsatisfactory feature of the Regulations is the continuing uncertainty as to their application to secured debt. This problem is likely to become only more prominent as the total number of debtors in MHC moratorium continues to increase, and those individuals fall into negative equity. The law applying to bankruptcy, individual voluntary arrangements and debt relief orders is unambiguously clear that the rights of secured creditors are not compromised, and it is regrettable that the Regulations do not follow the same path in spelling out their consequences.

Another especially fertile area for injustice concerns the timing requirements for challenging a moratorium. The strict 20-day period afforded to creditors, which cannot be extended by agreement or court order, is unnecessarily short. Even for large organisations, it can take time for the Insolvency Service's commencement notification to reach a decision maker. Individual creditors might, for example, be notified while they are on holiday; similar concerns apply to small business creditors. Once aware of the moratorium, the creditor will then need to find specialist legal advice. Even if advised to mount a challenge, the creditor is unlikely at that stage to have sufficient information to be able to set out their full grounds and provide evidence as required by reg 17(6). There is also an inconsistency between the requirement to state the grounds for challenge within 20 days and the finding in *Bluestone II* that events taking place during the course of the moratorium can contribute to unfair prejudice.

Moreover, the cost of a challenge will be considerable. In many cases, the creditor will need to obtain an order for disclosure against the Provider; sometimes the creditor will also need to obtain expert evidence from a psychologist. Often that cost will be irrecoverable, either because there is no basis for the court to make a costs order or because the debtor lacks resource to pay. And the creditor's jeopardy is high. For example, where the debtor is claiming to suffer a mental health crisis but is in employment and is not being treated in hospital, how is the creditor to assess the prospect of persuading the court to cancel the moratorium?

It is disappointing that such far-reaching and potentially beneficial legislation should have been so poorly conceived. Bodies representing creditors, including landlords and lenders, may wish to lobby for changes to be made when the Regulations are reviewed in May 2026.

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