Neutral Citation Number: [2025] EWCA Civ 690

Case No: CA-2024-001329; CA-2025-000647

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON**
**HER HONOUR JUDGE EVANS-GORDON**
**Claim No. K01CR815**

**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**CHANCERY APPEALS (ChD)**
**SIR ANTHONY MANN (sitting in retirement)**
**[2025] EWHC 524 (Ch)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/06/2025

**Before :**

**LORD JUSTICE BAKER**
**LORD JUSTICE MALES**
and
**LORD JUSTICE ZACAROLI**

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**Between :**

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| **DAVID TERENCE FORBES** | **Appellant** |
| **- and -** | |
| **INTERBAY FUNDING LIMITED** | **Respondent** |

**And Between :**

| | |
|---|---|
| **DAVID TERENCE FORBES** | **Appellant** |
| **- and -** | |
| **SECULINK LIMITED** | **Respondent** |

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**Julian Gun Cuninghame** (instructed under Public Access) for the **Appellant (in the Interbay appeal)**
**Joseph England** (instructed by **Brecher LLP**) for **Interbay Funding Limited**
**Martin Westgate KC and Daniel Clarke** (instructed by **TV Edwards LLP**) for the **Appellant (in the Seculink appeal)**
**Tom Morris** (instructed by **JMW Solicitors LLP**) for **Seculink Limited**

Hearing date: 7 May 2025

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 6 June 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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**Judgment Approved by the court for handing down.**

## Lord Justice Zacaroli:

1. The main question raised by these combined appeals is a short but important point of construction of the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Moratorium) (England and Wales) Regulations 2020 (the "**Regulations**"). The question is whether the principal amount owing in respect of a secured debt, where that principal amount has fallen due prior to the commencement of a moratorium, is a non-eligible debt within the meaning of Regulation 5(4), and is thereby excluded from the definition of a "qualifying debt", and excluded in turn from the definition of a "moratorium debt".

2. The practical significance of the question is that if the principal sum due and owing under a secured debt is a moratorium debt then, among other things, the creditor is precluded (without first seeking permission) from taking enforcement action in respect of the debt during the period of the moratorium, and loses all right to interest accruing during that period.

3. The appellant in both appeals ("**Mr Forbes**") was the borrower under two credit agreements, one with Interbay Funding Limited ("**Interbay**"), the respondent to the first appeal, and one with Seculink Limited ("**Seculink**"), the respondent to the second appeal.

4. Mr Forbes is represented by Mr Gun Cuninghame, on a direct access basis, on the Interbay appeal, and by Mr Westgate KC and Mr Clarke on the Seculink appeal. Interbay is represented by Mr England. Seculink is represented by Mr Morris.

Background: the Interbay debt

5. Pursuant to a loan agreement dated 27 July 2016, Mr Forbes borrowed £1,363,189.30 from Interbay on an interest only basis for ten years with interest payable monthly at a rate of 4.55% per annum (for the first five years, after which it was payable at a variable rate). In the event of default, interest was payable at 6.55% per annum. The debt was secured on a property consisting of a block of six flats (rental properties) and three bungalows. Mr Forbes granted Interbay a first legal charge over the property on 31 August 2016.

6. Mr Forbes fell into arrears in February 2018 and, on 21 March 2019, Interbay made a formal demand for repayment of the whole capital sum due, plus arrears of £60,464,10. The total amount of the sum demanded was £1,587,083.53.

7. On 22 April 2022, Mr Forbes applied for a mental health crisis moratorium, having been taken under the care of the Tandridge Community Health Recovery Service. The application (by Regulation 29) is to be made to a debt advice provider (a "**DAP**"). The DAP in this case was Mental Health and Money Advice ("**MHMA**"). It is the DAP's responsibility, among other things, to provide to the Secretary of State information which the debtor has provided as to the debts to which they are subject as at the date of the application, and information identified by the DAP about any other qualifying debts. Upon receipt of information from the DAP, the Secretary of State must cause an entry to be made in the register, and send notice to the debtor and those creditors whose contact details have been provided to the Secretary of State.

8. A mental health crisis moratorium starts on the day following the day on which the Secretary of State causes an entry to be made in the register: Regulation 32(1). In this case, the moratorium commenced on 2 July 2022. Regulations 32 to 34 contain provisions as to its duration and cancellation, and require the debtor periodically to confirm to the DAP that they are still receiving mental health crisis treatment (or if not, when that ended). In this case, the moratorium is still in place.

9. The Interbay proceedings were commenced with the issue of a claim form on 9 May 2023. Interbay claimed an order for possession on the grounds that (a) Mr Forbes had failed to pay, following demand, the full amount of the loan which had fallen due for payment; and (b) Mr Forbes had breached the mortgage terms by letting the secured property in breach of the loan terms.

10. On 24 July 2023, Deputy District Judge Waschkuhn, sitting in the County Court at Croydon, made an order for possession, and adjourned the money claim generally. By an order dated 3 June 2024, HHJ Evans-Gordon granted Mr Forbes permission to appeal but dismissed the appeal. The appeal to this court is brought with the permission of Lewison LJ granted on 23 September 2024.

Background: the Seculink debt

11. Mr Forbes borrowed £260,000 from Seculink by way of a bridging loan entered into on 12 October 2018. Interest was 2.5% per month for four months, with default interest of 12% per month compound in the event of default. The loan was secured over five properties owned by Mr Forbes. Mr Forbes defaulted and Seculink commenced proceedings to recover the debt. These were compromised on the terms of a Tomlin order dated 17 June 2021.

12. Mr Forbes defaulted on the obligations under the Tomlin order and Seculink applied for possession of the secured properties. Those proceedings were pending when the moratorium commenced.

13. It is accepted between the parties that pursuant to the terms of the Tomlin order, failure to pay sums due under it throws the parties back to the original payment obligations. Accordingly, the amounts due comprise £260,000 outstanding as principal, plus non-principal amounts of arrears (whether interest, penalties, or some other amount).

14. The Seculink appeal arose out of an application by Seculink on 21 March 2023 seeking determination of, among other things, the question of whether the debt owed to it constituted a moratorium debt.

15. On 2 January 2024 HHJ Baucher dismissed the application on the grounds that the Court did not have jurisdiction to determine whether the debt due to Seculink was a "moratorium debt". By his order dated 20 December 2024 Sir Anthony Mann allowed an appeal on the jurisdiction point. He also rejected a further contention made on behalf of Mr Forbes that it was an abuse of process to seek the Court's determination of the question whether a debt is a moratorium debt given that the Regulations provide a mechanism for determination of that question. He directed that the question whether the debt was a moratorium debt be determined on an expedited basis.

16. In a judgment dated 11 March 2025, Sir Anthony Mann determined that the principal sum due to Seculink was not a moratorium debt. He gave Mr Forbes permission to appeal that decision.

17. Mr Forbes sought permission from this Court to appeal also Sir Anthony Mann's decision on the jurisdiction and abuse of process points. In an order dated 31 March 2025, Newey LJ directed that the appeal from Sir Anthony Mann's order that the debt was a moratorium debt be listed to be heard with the Interbay appeal. He adjourned the application for permission to appeal the jurisdiction and abuse of process points, with liberty to restore after the hearing of the appeal on the moratorium debt issue.

18. Since the hearing of the appeal, I have refused permission to appeal on the jurisdiction and abuse issues.

The Regulations

19. The Regulations are made under s.6 of the Financial Guidance and Claims Act 2018 (the "**2018 Act**"). Subsection (2) provides that a debt respite scheme is a scheme designed to do one or more of the following:

> "(a) protect individuals in debt from the accrual of further interest or charges on their debts during the period specified by the scheme,
>
> (b) protect individuals in debt from enforcement action from their creditors during that period, and
>
> (c) help individuals in debt and their creditors to devise a realistic plan for the repayment of some or all of the debts."

20. The Regulations create two types of moratorium: a breathing space moratorium (dealt with in Part 2) and a mental health crisis moratorium (dealt with in Part 3). These differ in respect of the procedure for obtaining a moratorium and as to its duration and rights of cancellation. The definition of the debts caught by the moratorium ("moratorium debt") is, however, the same.

21. A moratorium debt is "any qualifying debt" that was incurred by the debtor in relation to whom a moratorium is in place, that was owed by the debtor "at the point at which the application for the moratorium was made" and about which information has been provided to the Secretary of State by a debt advice provider under the Regulations: Reg 6. It is common ground that, if the relevant debts in this case are qualifying debts, they comply with the other requirements of Reg 6 and so would be moratorium debts.

22. A "qualifying debt" is defined by Reg 5(1) as "any debt or liability other than a non-eligible debt".

23. A "non-eligible debt" is defined by Reg 5(4). This sets out a number of categories of debt, the relevant one being that in sub-paragraph (a): "secured debt which does not amount to arrears in respect of secured debt."

24. A "secured debt" is defined, by Reg 2, as "(a) a secured credit agreement, (b) a hire purchase agreement or (c) a conditional sale agreement". A secured credit agreement is

defined by Reg 2 as "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, (b) on assets whose value at least equals the amount of the debt, or (c) on a letter of credit or guarantee."

25. There is no doubt that – apart from the question of whether they amount to arrears – the relevant debts in these appeals satisfy each of the requirements for a non-eligible debt: they are sums due pursuant to a debt secured by a mortgage on land, and are thus "a secured debt" within the meaning of Reg 5(4)(a).

26. The critical question, therefore, is whether the principal amount of a secured debt is "arrears". That term is defined by Reg 2 as follows:

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

27. "Capitalised mortgage arrears" is defined as:

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

28. Regulation 7(6) sets out the steps which a creditor is prevented from taking. These are:

> "(a) require a debtor to pay interest that accrues on a moratorium debt during a moratorium period,
>
> (b) require a debtor to pay fees, penalties or charges in relation to a moratorium debt that accrue during a moratorium period,
>
> (c) take any enforcement action in respect of a moratorium debt (whether the right to take such action arises under a contract, by virtue of an enactment or otherwise), or
>
> (d) instruct an agent to take any of the actions mentioned in sub-paragraphs (a) to (c)."

29. Regulation 7(7) then sets out a number of steps which constitute taking enforcement action, including, (a) taking a step to collect a moratorium debt, (c) enforcing security held in respect of a moratorium debt and (f) starting any action or legal proceedings against a debtor relating to or as a consequence of non-payment of a moratorium debt.

30. Regulation 7(10) provides that, after the end of the moratorium period, the creditor is not entitled to require the 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 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".

31. By Regulation 7(9), however, in the case of a secured debt, Regulation 7(6)(a) (and thus that part of Reg 10 which cross-refers to it) applies only to "interest that accrues on any arrears on the debt during the moratorium period": Reg 7(9).

The judgment of HHJ Evans-Gordon (the Interbay appeal)

32. HHJ Evans-Gordon recognised that, while arrears do not generally include the capital sum secured, the definition in Regulation 2(1) was, on the face of it, wider in that it included "any sum … 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".

33. Read in its context, however, she concluded that it did not include the principal amount of the secured debt, even if that had fallen due by the date of the application for the moratorium.

34. The first contextual point was that Regulation 5(4)(a) referred to "arrears in respect of the secured debt". She considered that the words "in respect of the secured debt" must have some meaning, and that it reflected the usual distinction between the original capital sum and arrears. At §29 she said:

> "If the capital sum becomes "arrears" as a result of being called in, that definition makes no sense at all because there is no longer a non-eligible secured debt, only arrears".

35. The second contextual point was the fact that capitalised mortgage arrears were excluded from the definition of "arrears". This pointed, in her judgment, to the principal sum being excluded. Any other conclusion produced the absurdity that arrears, once capitalised, were excluded but the principal sum, to which the arrears were added once capitalised, was not (see §31).

36. HHJ Evans-Gordon also considered that the policy and objective of the Regulations would be undermined if the principal amount of the secured debt was included as a moratorium debt. At §32, she said:

> "The objective is to allow debtors time to devise a realistic plan for the discharge of their debts. 'Their debts' in this context means their moratorium debts. The debtor is still obliged to make payments of any future mortgage instalments and other day-to-day living expenses falling due after the date of the application for a moratorium. The scheme is not a blanket release from all future debt … It strikes a balance between preserving or freezing the debt level as at the date of the application for a moratorium and suspending its enforcement while ensuring that creditors are paid in relation to post moratorium debt. It does not oblige creditors to continue providing free credit. It is not intended that debtors can live free of cost at their creditors' expense. If Mr Gun Cuninghame's submissions were correct as to the meaning of 'arrears', the Appellant could continue to live in the property indefinitely, receiving most of the rental income without ever having to pay the Respondent anything at all for his occupation."

The judgment of Sir Anthony Mann (the Seculink appeal)

37. Sir Anthony Mann noted that there are anomalies and oddities on either party's interpretation, but the most significant of these (which Mr Westgate's interpretation did not successfully address) was the express exclusion of "capitalised mortgage arrears" from "arrears". That, he considered, was a complete outlier, if the principal amount itself was included within "arrears". He concluded that the only reason for referring to them was it was intended to keep them in the category of non-eligible debt because they were like the capital of the mortgage.

38. Mr Morris, who appeared before the judge, as before us, for Seculink, contended that "in respect of" (in the phrase "arrears in respect of the secured debt" in Regulation 5(4)(a)) meant arrears "on" the debt, not arrears "of" the debt. As to this, Sir Anthony Mann said that, while it appeared a little forced, it is an interpretation which is capable of giving effect to the overall intention that capital of a secured debt would not, generally, be removed from the realms of non-eligible debt.

39. That conclusion was further supported by a particular anomaly that would arise on Mr Forbes' case, namely a distinction between a called and uncalled secured loan. Where the principal remained due at the date of the application for the moratorium, further instalments remained payable as they fell due, and if they were not paid enforcement action could be taken (including calling the whole loan in). If the principal had been called in immediately before the commencement of the moratorium, and it constituted a moratorium debt then as a result of Regulations 7(6) and 7(10), the creditor lost all right to interest accruing during the moratorium period.

The grounds of appeal

40. Mr Forbes appeals the decision of HHJ Evans-Gordon in the Interbay appeal on three grounds. First, that she was wrong to conclude that the principal amount of the Interbay debt was a non-eligible debt. Second, that she was wrong to find that Interbay was not prevented (without permission of the Court) from requiring Mr Forbes to pay interest on the debt or taking enforcement action in respect of the debt, including the possession proceedings in the County Court. Third, that she was wrong to find the possession proceedings in the County Court at Croydon below were not null and void as being brought in breach of the Regulations.

41. By a respondent's notice, Interbay raised three further grounds for upholding the judge's decision. First, since the DAP had determined that the capital sum was not a moratorium debt, and there is no mechanism for a debtor to challenge that determination, the judge was bound to treat the secured debt as not being a moratorium debt. Second, since information in relation to the capital sum was not provided to the Secretary of State via the register required under Regulation 35, it does not satisfy the definition of moratorium debt. Third, the judge's decision was supported by other reasons which, to the extent necessary, I address below.

42. As noted above, the only ground of appeal against Sir Anthony Mann's decision that is currently before us is that the judge was wrong to find that the principal amount of Mr Forbes' debt to Seculink falls outside the definition of "moratorium debt".

43. By a respondent's notice, Seculink seeks to support the judge's conclusion with additional reasons, essentially that the judge should have applied principles of statutory interpretation derived from the "principle of legality", which I address below.

Principles of statutory interpretation

44. There was no real dispute between the parties as to the applicable principles of statutory construction (save in relation to the principle of legality, which I address separately below).

45. The task of the Court is to seek the meaning of the words which Parliament used, read in light of the legislation as a whole and in light of their context and purpose: *R (on the application of O (A Child) v Secretary of State for the Home Department* [2023] AC 255, per Lord Hodge at §29-31.

46. This applies equally to secondary legislation with the additional consideration that since delegated legislation derives its authority from the enabling Act, it must be interpreted in light of that Act: Bennion, Bailey and Norbury on Statutory Interpretation (8th ed.) ("***Bennion***"), at §3.17.

47. There is a presumption in favour of every word used by the legislator having meaning: *Bennion* at §21.2. When faced with two possible constructions, the Court is entitled to look at the consequences of adopting each of the alternatives, both to the parties in the case and the law generally: *Bennion* at §11.6.

Ground 1 (Interbay appeal) and Ground 3 (Seculink appeal): Is the principal amount of secured debt a non-eligible debt?

48. The main argument advanced on behalf of Mr Forbes is straightforward: the phrase "any sum … payable to a creditor by a debtor which has fallen due and which the debtor has not paid" is clearly broad enough to cover the principal sum outstanding, where that has been called in. Mr Westgate expanded on this, noting that this could not be the unintended consequence of a general definition being applied in an atypical context, because the word "arrears" is used in the Regulations only in relation to secured debt (apart from one reference to "arrears of rent" where, given the nature of rent, it could only ever refer to periodic payments). He submitted that this was supported by the use of the phrase "in respect of" in Regulation 5(4)(a), particularly given the fact that secured debt is defined (relevantly for present purposes) as a "secured credit agreement". The principal sum due, he submitted, is clearly an amount "in respect of" the secured credit agreement.

49. There is an attractive simplicity to this argument, but I am unable to accept it for the following reasons.

50. The most important source for determining this question is the wording of the Regulations. Pre-legislative materials can be used as a secondary source, but we were not shown anything in such materials which sheds any helpful light on the specific question raised.

51. The first point to note is the choice of language in Regulation 5(4)(a). Secured debt is (generally) non-eligible debt, unless it amounts to "arrears". On Mr Forbes' case, the

drafter could have achieved the required result simply by excluding from non-eligible debt any part of secured debt which had fallen due for payment. That was not done and, instead, the particular term "arrears" is used, which naturally carries a more restricted meaning – i.e. such of those periodic instalment payments which have fallen due but remain unpaid – particularly when construed in context. That context includes the fact that secured debt is defined to include mortgages on land, hire-purchase agreements and conditional sale-agreements, all of which (particularly in the case of individuals likely to take advantage of the debt respite regime) invariably involve periodic instalment payments in respect of a principal sum.

52. Second, it is clear – from the definitions of "arrears" and "capitalised mortgage arrears" – that this natural meaning was intended at least within those definitions. Incorporating the latter into the former, it reads:

> "…any sum other than any arrears in relation to a mortgage that have been added to the outstanding balance to be paid over the duration of the mortgage payable to a creditor…"

53. There is an element of circularity in this definition, in the use of the word "arrears" within the definition of that very term. What is clear, however, is that, within that definition, the word "arrears" carries its natural meaning. In order for something to be added to the outstanding balance it must be different from the outstanding balance itself. "Arrears" in this context can only refer to unpaid instalments (whether of interest, in an interest only mortgage, or interest and capital, in a repayment mortgage, or outstanding charges) in respect of the outstanding principal sum.

54. This indicates that the phrase "**any sum** … payable to a creditor by a debtor which has fallen due…" is not intended to have the breadth which it might have if taken out of context. The better view, in my judgment, is that Regulation 2(1) is not setting out to define the meaning of the word "arrears", as such, but starts from the recognition that it is generally understood as referring to missed instalments (whether of capital, interest or fees and charges), but imposes three requirements before arrears are excluded from non-eligible secured debt: (1) the arrears must have been due *as at the date of the application for the moratorium*; (2) the arrears must be of instalments that the debtor failed to pay *in breach of the agreement or applicable legislation or rules*; and (3) the arrears cannot be those which have already been capitalised.

55. On this reading of the definition of "arrears", there is less force in the point made by both judges below to the effect that the exclusion of capitalised mortgage arrears would be an anomalous "outlier" if the capital amount which had fallen due was itself a qualifying debt. That is because (on my preferred reading) the definition of arrears does not exclude that part of the capital which has fallen due, where that sum represents capitalised arrears, but excludes the mortgage arrears which have, in the past, fallen due and been capitalised. It says nothing, therefore, about the status of any part of the outstanding principal sum that has fallen due for payment.

56. Mr Westgate's and Mr Gun Cuninghame's answer to this "outlier" point was that once the principal sum was called in there would be no capitalised arrears, because there is no longer any "duration of the mortgage" over which they would be paid. I do not accept that interpretation. The definition of capitalised mortgage arrears is backwards looking, referring to arrears that "have been" added to the outstanding balance. At the point at

which they were so added, the period of the mortgage would necessarily have been continuing. Nothing turns on this, however, as for the reason already given I do not find the "outlier" point to be persuasive either way in seeking to determine whether the principal sum is non-eligible debt.

57. Mr Westgate posited a case where a secured debt was repayable in two lump sum parts. He submitted that it would be anomalous if the first part – if it had fallen due for payment and remained unpaid prior to the commencement of the moratorium – constituted arrears (and so excluded from non-eligible debt), but that if both parts were due and unpaid they did not. This is a highly unlikely scenario in relation to a mortgage, hire purchase or conditional sale agreement or any other secured debt arrangement involving those likely to be subject to a debt respite moratorium. Even if the two parts of the secured debt would be regarded as "arrears" according to its natural meaning (which is questionable, and does not arise on the facts of this case), the interpretation of the Regulations should not be driven by such an extreme case.

58. Third, I consider (in agreement with Mr England and Mr Morris) that there is some support for this conclusion in the distinction drawn in Regulation 5(4)(a) between "arrears" and that which they are to be in respect of, namely the "secured debt". The view that the drafter intended such a distinction is reinforced by Regulation 7(9), which limits the restriction on the recovery of interest (during the moratorium period) – in the case of a secured debt – to "interest that accrues on any arrears **on** the debt".

59. Fourth, I agree with Sir Anthony Mann that Mr Forbes' construction would lead to an anomaly in relation to the provisions as to interest in Regulations 7(9) and 7(10). Take the case of a debt secured by an interest only mortgage. It is common ground that, if the debt has not been called in prior to the commencement of the moratorium, Regulation 7(9) has the effect that the debtor can continue to be required to pay interest on the principal sum during the moratorium period. It is also common ground that the accruing interest is recoverable even if the mortgage debt is called in the day after the moratorium commences. All of this makes sense where the debtor continues to occupy the mortgaged property.

60. On Mr Forbes' construction, however, if the mortgage debt was called in the day before the moratorium commenced, then the creditor would be unable to require the debtor to continue to pay interest accruing during the moratorium period and, by Regulation 7(10), the creditor could never recover that interest even after the moratorium period ended. That would be so, even though the debtor continued to occupy the mortgaged property. In relation to a mental health crisis moratorium, the moratorium period is of indefinite duration and could, as in this case, last years.

61. It is difficult to justify such a significant distinction simply because of the timing of the mortgage debt being called in. Mr Gun Cuninghame contended that the distinction was justified because a debtor does not need protection in relation to a loan that has not been called in, but does so in relation to a loan that has been called in. This does not, however, answer the point that, even on Mr Gun Cuninghame's interpretation, a debtor is not protected under the Regulations in relation to a loan that is called in immediately after the commencement of the moratorium.

62. Fifth, this result would be in stark contrast to the treatment of secured debt in any other personal insolvency context under the Insolvency Act 1986 (the "**1986 Act**"). In

bankruptcy, a secured debt stands outside the process of collective enforcement and distribution, unless and to the extent that the creditor gives up their security. In relation to debt relief orders under Part 7A of the 1986 Act, a debt is not a qualifying debt to the extent that it is secured: s.251A. In the case of an individual voluntary arrangement, no proposal can be approved which affects the right of a secured creditor to enforce their security without their concurrence: s.258(4).

63. Regulation 5(4) is otherwise drafted with the clear purpose of including within the concept of non-eligible debt, any debt that would either not be provable in bankruptcy (Rule 14.2 of the Insolvency Rules 2016), or would not be released upon the discharge of the bankrupt (s.281 of the 1986 Act). The HM Treasury Explanatory Memorandum to the Regulations refers, at §7.8, to the exclusion of some specific public sector debts, "mirroring the position in bankruptcy", but the intention to reflect the bankruptcy position is in any event clear from a comparison of the wording of regulation 5(4) and the above provisions from the 1986 Act and the Insolvency Rules. In no other insolvency regime does the secured creditor lose altogether the right to any part of the accruing interest on its debt.

64. It would be odd if Parliament had intended, without it being foreshadowed in any pre-legislative materials, and without clear language in the Regulations, such a significant interference with the rights of secured creditors, and such a radical departure from the treatment of secured creditors as compared with their treatment in other personal insolvency measures.

65. Mr Morris contended that the principle of legality, as expressed in *Bennion*, at §27.1, provides further support for the secured creditors' case:

> "(1) It is a principle of legal policy any interference with established rights and principles recognised by the common law should be expressed in clear terms. This principle forms part of the context against which legislation is enacted and, when interpreting legislation, a court should take it into account.
>
> (2) This gives rise to a more specific presumption that 'fundamental' common law rights cannot be overridden by general words but only by express words or necessary implication."

66. Mr Westgate did not dispute the existence of this principle, but submitted that Sir Anthony Mann had been right to place little reliance on it (see §21 of his judgment). He cited *Cadogan v McGirk* [1996] 4 All ER 643 (CA), at p.647j to p.648b, where Millett J rejected the submission that the Leasehold Reform, Housing and Urban Development Act 1993, being expropriatory in nature, must be construed strictly. He said:

> "It would, in my opinion, be wrong to disregard the fact that, while the 1993 Act may to some extent be regarded as expropriatory of the landlord's interest, nevertheless, it was passed for the benefit of tenants. It is the duty of the court to construe the 1993 Act fairly and with a view, if possible, to

> making it effective to confer on tenants those advantages which Parliament must have intended them to enjoy."

67. There is no doubt that s.6(2) of the 2018 Act (see §19 above) contemplates some interference with a creditor's right to "further interest" and the right to enforce their debt. The language is clear, and the recognition that creditors can be deprived of these rights during the period of a moratorium does not distinguish between secured and unsecured debts.

68. Mr Morris relied, however, on the closely related principle of statutory interpretation that Parliament is not to be taken to have removed proprietary rights, at least without compensation, unless the wording of the statute clearly requires it: see *Bennion* at §27.6; and *S Franses Ltd v Cavendish Hotel (London) Ltd* [2019] AC 249, at §16, where Lord Sumption JSC (with whom Baroness Hale, Lady Black and Lord Kitchen JJSC agreed), said that where a statute interfered with proprietary rights, the protection conferred by it "should be carried no further than the statutory language and purpose require".

69. The reference to "arrears" in Regulations 5(4)(a) and 7(9), and the associated definitions in Regulation 2(1), are at the very least ambiguous. The primary task of the Court remains (paraphrasing Millett LJ in the passage from *Cadogan v McGirk* set out above) to interpret the language of the Regulations in light of their purpose. That purpose is to provide protection to vulnerable debtors against creditors who are most likely to be commercial entities.

70. I agree with Sir Anthony Mann that, in this context, the legality principle does not carry much weight. It is not necessary to rely on it in order to conclude, as I have, that the principal secured sum is not "arrears". Nevertheless, I consider that, in circumstances where Mr Forbes' construction leads to a significant interference with the rights of a secured creditor, particularly in comparison with other personal insolvency regimes, the principle referred to in *Bennion* at §27.6 and *S Franses Ltd* does provide at least some support for resolving the ambiguity in the Regulations in favour of the respondents.

71. For these reasons, I consider that the principal sum of secured debt – whether or not called in prior to the commencement of the moratorium – is non-eligible debt, and thus neither a qualifying debt nor a moratorium debt. I would accordingly dismiss the appeal on ground 1 of the Interbay appeal and ground 3 of the Seculink appeal. It is accordingly unnecessary to consider the remaining points raised by Interbay's respondent's notice.

Ground 2 of the Interbay appeal

72. Ground 2, as drafted, and as expanded on in Mr Gun Cuninghame's original appeal skeleton, was parasitic on ground 1: if the principal amount of the secured debt is a moratorium debt then it follows that Mr Forbes cannot be required to pay interest that accrues on the debt, and Interbay cannot take enforcement action.

73. In his replacement skeleton argument, however, Mr Gun Cuninghame added a paragraph in which it was contended that if there is a "mixed debt", including both principal (assuming that is not a moratorium debt) and arrears (in the conventional sense, and thus moratorium debt), possession cannot be granted at all, because an order for possession cannot be severed as between different parts of the debt.

74. This was not a point raised before either of the Courts below. Since the filing of that replacement skeleton, Mellor J delivered judgment in *Bluestone Mortgages Limited v Stoute* [2025] EWHC 755 (Ch). In that case, both principal and arrears were owing. At first instance, HHJ Parker had concluded that the principal amount was not a moratorium debt, and there was no appeal from that decision. He went on to decide, however, that in the case of a mixed debt, the wording of Regulation 7(7) compels the conclusion that enforcement of the non-moratorium debt would constitute "enforcement action in respect of the moratorium debt". On appeal, in his judgment dated 19 March 2025, Mellor J agreed.

75. Mr England objected that this new point was not available to Mr Forbes on this appeal as it was not raised below and does not fall within ground 2. More importantly, he submitted that the point was one of wide significance which merited much greater attention and argument than it had been given in this case. Mr Cuninghame's replacement skeleton argument did no more than state the proposition. While he filed a supplemental skeleton following Mellor J's decision in *Bluestone*, this made only a brief reference to the case (while noting a possible point of distinction in that enforcement of the possession order is not sought in this case). Mr Cuninghame did not develop the point to any extent at the hearing, and there would in reality have been insufficient time to do so within the day allocated for the two appeals.

76. In these circumstances, I agree that this is not a point that we should decide on this appeal. In substance, we would be asked to determine an appeal from Mellor J's decision, but without submissions from any of the parties immediately affected by that decision. Indeed, we would be required to decide the point without the benefit of any real or developed argument on it.

77. Accordingly, I would restrict Mr Forbes' second ground of appeal to the limited scope which it was originally intended to cover. On that basis, it falls away given my conclusion on ground 1.

Ground 3 of the Interbay appeal

78. This ground of appeal relates to the fact that the claim for possession was itself based on two separate grounds: default in payment and the unauthorised letting of the premises. The point did not arise for decision before HHJ Evans-Gordon given her conclusion that the principal constituted a moratorium debt: see §35 of her decision. Given my conclusion on the moratorium debt issue, this point similarly does not arise on appeal, and it is unnecessary to deal with it.

**Lord Justice Males**

79. I agree.

**Lord Justice Baker**

80. I also agree.