

Gough Square Chambers' consumer credit column: October 2025

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Lee Finch, Sabrina Goodchild, Ann-Marie O'Neil and George Spence-Jones are all specialist consumer credit counsel at Gough Square Chambers. On a regular basis, they share their views with Practical Law Financial Services subscribers on topical developments or key issues relating to consumer credit.

In the October 2025 column, George Spence-Jones considers whether the principal sum in a credit agreement of a “secured debt” is a “qualifying debt” in the context of the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (*SI 2020/1311*). This follows the Court of Appeal decision in *Forbes v Interbay Funding Ltd* [2025] EWCA Civ 690.

Meaning of “qualifying debt” in Breathing Space Regulations

This month's column considers whether the principal sum in a credit agreement of a “secured debt” is a “qualifying debt” in the context of the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (*SI 2020/1311*) (Regulations).

It follows the Court of Appeal decision in *Forbes v Interbay Funding Ltd* [2025] EWCA Civ 690 (06 June 2025). The appellant, Mr Forbes, was subject to a mental health crisis moratorium after defaulting on loans from Interbay and Seculink that were both secured on property. The central issue was whether the principal sum due under these loans was a “moratorium debt” under the Regulations. If determined as such, this restricts creditors' enforcement rights and interest accrual during the moratorium.

Background to Regulations

Although the Regulations bear a 2020 year, offer relief to debtors facing difficult times and came into force on 4 May 2021, they were not actually a response to COVID-19. Instead, they were first proposed back in 2017 and finally introduced under section 6 of the Financial Guidance and Claims Act 2018.

In general, the Regulations operate to restrict creditors from taking certain steps to enforce or add sums to certain debts while the debtor is in a moratorium period, unless they obtain permission from the court. The moratorium can be either:

- A breathing space moratorium, where the moratorium period is a fixed 60 days and where only one can be granted per year.
- A mental health crisis moratorium, where the period can last indefinitely and remains active while a debtor is receiving mental health crisis treatment.

The restrictions on creditors apply during a moratorium period to a “qualifying debt”, which is “any debt or liability other than non-eligible debt”. Regulation 5(4) sets out a long list of excluded “non-eligible debt”.

The relevant excluded “non-eligible debt” in *Interbay* is set out in regulation 5(4)(a), which is “secured debt” that does not amount to arrears in respect of secured debt. So, whatever “secured debt” falls outside the scope of these “arrears” is not protected by the restrictions.

“Secured debt” means:

- A secured credit agreement.
- A hire-purchase agreement.
- A conditional sale agreement.

The definition of “arrears” in regulation 2(1) was then “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...”.

“Capitalised mortgage arrears” in this context 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”.

With this background in mind, we turn to the facts of Mr Forbes's loans and the appeal.

Facts

Interbay

In July 2016, Mr Forbes entered into a loan agreement with Interbay under which he borrowed around £1.3 million on an interest-only basis for ten years, with interest payable monthly. This loan was secured on a single property consisting of a block of flats.

Mr Forbes fell into arrears in 2018 and, in 2019, Interbay made a formal demand for repayment of the whole capital sum due, plus arrears of around £60,000. In April 2022, Mr Forbes applied for a mental health crisis moratorium, which was granted on 2 July 2022. Mr Forbes has remained in that mental health crisis moratorium ever since.

Interbay brought possession proceedings in May 2023 on the grounds that, *inter alia*, the capital sum had not been repaid. In July 2023, at first instance, possession was granted, with the money claim being adjourned generally with liberty to restore.

Mr Forbes' first appeal on that decision was dismissed.

Seculink

Separately, in October 2018, Mr Forbes entered into a bridging loan agreement with Seculink under which he borrowed £260,000. This loan was secured over five properties. Mr Forbes defaulted under this agreement, and Seculink later brought possession proceedings.

Those proceedings were compromised in June 2021. However, Mr Forbes defaulted on the obligations of the compromise and, in April 2022, Seculink applied to enforce and for an order for possession. Shortly after in July 2022 (as with Interbay), Mr Forbes entered into the mental health crisis moratorium.

In April 2023, Seculink applied for a determination on whether the principal sum under its loan to Mr Forbes was not covered by the moratorium on the basis that it was a “non-eligible debt”.

The High Court found in Seculink's favour.

Court of Appeal decision

Both the Interbay first appeal and Seculink High Court decisions were appealed and later combined to be heard together by the Court of Appeal.

It was uncontroversial that “arrears” covered any unpaid interest repayments under a mortgage that had accrued before the date of the application for a moratorium by the debtor. The main issue in dispute was whether the capital or principal of the secured debt itself was “arrears” under the Regulations as it had been called in before the moratorium start date. If that capital sum were such “arrears”, then it would be a protected “qualifying debt” under the Regulations.

The Court of Appeal dismissed the appeal. Zacaroli LJ's reasoning, with which the others agreed, is fully set out at [48]–[71]. In summary:

The point was a matter of statutory interpretation. The uncontroversial principles were at [45]–[47]:

- The task of the court was to seek the meaning of the words which Parliament used, read in the light of the legislation as a whole and in the light of their context and purpose (*R (O (A Child)) v Secretary of State for the Home Department* [2023] AC 255).
- This applied equally to secondary legislation, with the additional consideration that since delegated legislation derived its authority from the enabling Act, it must be interpreted in the light of that Act (*Bennion on Statutory Interpretation* (8th edition) at [3.17]).
- There was a presumption in favour of every word used by the legislator having meaning. When faced with two possible constructions, the court was entitled to look at the consequences of adopting each of the alternatives, both to the parties in the case and the law generally.

Mr Forbes' main argument was that the definition of “arrears” included the phrase “any sum ... payable to a creditor by a debtor which has fallen due and which the debtor has not paid”, and so was clearly broad enough to cover the principal sum outstanding if it had been called in. Therefore, as the Interbay and Seculink capitals had been called in, they had fallen due and were “arrears”. There

was an attractive simplicity to Mr Forbes' argument. However, it was not accepted.

With the above principles of interpretation in mind, the Court of Appeal's starting point was the choice of language in regulation 5(4)(a). The ordinary word "arrear" carried a more restricted meaning. It meant periodic instalment payments that have fallen due but remain unpaid. That was particularly so given the context that "secured debt" was 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 involved periodic instalment payments in respect of a principal sum [51].

The "any sum" in the phrase "any sum ... payable to a creditor by a debtor which has fallen due...", was not intended to have the breadth which it might have if taken out of context. It was not setting out to define the meaning of the word "arrear". Instead, it started from the general understanding of referring to missed instalments (whether of capital, interest or fees and charges), but it imposed three requirements before arrears would be excluded from non-eligible secured debt [54]. These are that the arrears:

- Must have been due as at the date of the application for the moratorium.
- Must be of instalments that the debtor failed to pay in breach of the agreement or applicable legislation or rules.
- Could not be those which have already been capitalised.

The Court of Appeal also looked at the definition of "capitalised mortgage arrears" and inserted that into the definition of "arrear", which would then have read as "arrear" means 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...".

The Court of Appeal then found that to add something to the balance, something had to be different from the balance itself. They rejected Mr Forbes' argument that once a principal sum is called in, there can no longer be any capitalised mortgage arrears because there is no longer a "duration of the mortgage" [56].

They also found that Mr Forbes' construction would have led to anomalies. For example, the creditor under an interest-only mortgage being unable to pursue interest if the debt is called in just before

the moratorium, when it was common ground that such interest would be recoverable under regulation 7 if the debt were called in just after the moratorium period began [59]-[60]. Further, the Court of Appeal's interpretation was supported by how it apparently mirrored the position of secured debt in the personal insolvency context under the Insolvency Act 1986 [62]-[64].

Finally, the Court of Appeal held that where a construction would lead to a significant interference with the rights of a secured creditor, the principle that Parliament is not to be taken to have removed proprietary rights unless the wording of the statute clearly required it provided support for resolving the ambiguity in the Regulations in favour of the lenders [65]-[70].

So, the conclusion was that the principal sum of a secured debt, whether or not called in before the start of a moratorium period, was "non-eligible debt" such that it could be enforced during the period of an active moratorium.

Comment

Debtors have been increasingly relying on the Regulations for protection.

Historically, given the significant restrictions on creditors during a moratorium period and the ambiguity in various provisions, lenders have been cautious to pursue enforcement even in relation to what might appear to be exempt or "non-qualifying debt". This guidance from the Court of Appeal will certainly be welcomed by the industry. The unequivocal conclusion in [71] 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" will assuage many concerns.

However, the following observations about the Court of Appeal's reasoning are worth noting:

- The Court of Appeal did not embark on reviewing the decision of Mellor J in *Bluestone Mortgages Ltd v Stoute* [2025] EWHC 755 (Ch). That was handed down on 31 March 2025, after permission to appeal was granted to Mr Forbes in September 2024, but before this hearing date in the Court of Appeal in May 2025. That decision related to enforcement of "mixed debt" under the Regulations (that is, debt of both the principal (assuming that is not a moratorium debt) and arrears (in the conventional sense, which would be moratorium debt)).
- In essence, Mellor J in *Bluestone* held that a lender attempting to enforce a mixed debt

was restricted by the Regulations. Bluestone's argument on interpreting the Regulations had lost sight of the context of the Regulations and their purpose. If its arguments were correct, a lender would have an automatic right to enforce the principal debt during the period in which the debtor was in mental health crisis treatment. That would necessarily entail the debtor being evicted with their home being sold, and there were very few events which could be more detrimental to someone's mental health.

- The purpose of requiring the court's permission to enforce certain debt during a moratorium was for the court to consider the impact of enforcement, particularly in relation to mental health. From this, it seems that Mellor J and Zacaroli LJ focused on different purposes of the Regulations in resolving the arguments before them: one on the protection of the debtor, and the other on the protection of secured creditors.
- Perhaps an answer to bridge the two is that a secured lender should always be able to enforce and recover the principal sum as a carve out. However, if a lender chooses to enforce only the principal during the moratorium period, then the balance achieved by the Regulations is that the lender will forego the recovery of the relevant interest/arrears that would constitute a "qualifying debt". It might seem to circumvent the protections of the Regulations if the lender could initially enforce just the principal to obtain possession and then latterly pursue any arrears that would initially have been part of an unrecoverable "mixed debt" following *Bluestone*. Further guidance from the senior appellate courts would certainly be welcomed.

On a final note, although a parallel was drawn with the Insolvency Act 1986 regime, it would be interesting to explore the comparisons further. For example, in relation to residential tenancies, a moratorium would prevent eviction for unpaid rent under Ground 8 of Schedule 2 of the Housing Act 1988 (*regulation 6(7)(j)*). However, such possession orders are generally unaffected by bankruptcy or debt relief orders, as the possession order is intended to restore the landlord to their full proprietary rights (*Sharples; Godfrey [2011] EWCA Civ 813*).

So, the Regulations are not necessarily a perfect mirror of the insolvency regime. Further, the two other "secured debts" as defined in the Regulations are conditional sale and hire purchase agreements, both of which are regulated under the Consumer Credit Act 1974 and Financial Services and Markets Act 2000 regimes. It would be interesting for the court to have a fuller picture of how arrears, principal sums and demanded debts are treated under those regimes too.

Mr Forbes sought permission to appeal to the Supreme Court. That was refused on 1 October 2025. Therefore, this decision will stand as authority until the Court of Appeal hears any further arguments on the interpretation of the Regulations.

Conclusion

In summary, the following practical points arise from the decision:

- Significant clarity has been provided for parties in similar factual positions. The principal sum of secured debt, whether or not called in before commencement of the moratorium, is non-eligible debt, and thus neither a qualifying debt nor a moratorium debt. Therefore, such a principal sum does not attract the protections of the Regulations.
- This decision seemingly applies to conventional debt secured on land (mortgages) and also to the other consumer-related "secured debts" under the Regulations (that is, hire purchase agreements and conditional sale agreements).
- There are additional arguments that the courts may consider in providing any further guidance. This includes those that were raised in the recent High Court decision of Mellor J in *Bluestone*, which were not reviewed by the Court of Appeal this time round.

Gough Square Chambers' consumer credit columns

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