Claim No H10CL170

IN THE COUNTY COURT AT CENTRAL LONDON

Thomas More Building
Royal Courts of Justice
Strand
London WC2A 2LL

Date: 30 March 2022

Before :

HIS HONOUR JUDGE MONTY QC

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Between :

WEST ONE LOAN LIMITED

Claimant

- and -
(1) MS ERSEL SALIH
(2) MR ERSOY SALIH
(3) MISS ESEN SALIH
(4) MR EREN SALIH

Defendants

- -

Mr Thomas Rothwell (instructed by **Bevan Britten LLP**) for the **Claimant**
Mr Julian Gun Cuninghame (instructed by **BDB Pitmans LLP**) for the **First Defendant** (on her application) and the **Second to Fourth Defendants** (on their application)

Hearing date: 23 March 2022

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Approved Judgment

HHJ Monty QC:

1. This is my judgment on two applications.

2. The first in time is the Claimant's application to cancel a breathing space moratorium obtained by the Fourth Defendant and effective from 19 January 2022. The relevant regulations are the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 ("the 2020 Regulations").

3. The second in time is the Second to Fourth Defendants' application to set aside the orders of HHJ Raeside QC of 10 March 2021 and DDJ Hussain of 15 February 2019.

4. DDJ Hussain had granted the Claimant a possession order in respect of 10 Moncorvo Close, London SW7 1NQ on or before 29 March 2019, and ordered that the Defendants pay the Claimant the sum of £513,417.32 (later corrected in an order by DDJ Mohabir on 14 March 2019 to £5,134,172.32) in respect of sums owing to the Claimant pursuant to its charge over the property.

5. HHJ Raeside QC (on appeal from the order of DDJ Hussain) varied that earlier order, making a possession order of the property on or before 10 July 2021, and ordered that on or before 10 July 2021 the Defendants shall pay the Claimant £4,412,396.95 being sums which it was not disputed were payable, and directed that there should be a trial as to whether anything further was payable. That trial is listed to commence on 25 April 2022 for 4 days, with a pre-trial review listed for 1 April 2022.

6. The Claimant's application was first listed before me on 16 March 2022 for a one-hour hearing. The set-aside application had by that time been issued but no hearing date had been set. I therefore ordered that both applications should be listed before me for a 1-day hearing on 23 March 2022. I also made an injunctive order preventing any further applications under the 2020 Regulations until that hearing or further order. At the end of the hearing on 23 March 2022, I informed the parties that I would dismiss the set-aside application and would continue the injunction until January 2023. Because of lack of time, I said that I would set out my reasons in a reserved judgment, which I now do.

7. Before I deal with the two applications, I need to set out the factual and procedural background (I have omitted some of the procedural events).

8. On 3 August 2015, the Defendants (who are the registered owners of the property) granted a second charge over the property in favour of Aura Finance Limited to secure a 12-month interest-only loan of £2,964,000. Interest was payable at 2% per month, but Aura agreed to a reduced rate of 1% per month if there were no interest arrears and no event of default as defined in the terms and conditions. Aura then assigned all its rights under the charge to the Claimant.

9. There was no repayment by the repayment date, but it was agreed to extend the date for repayment until 2 February 2017. The loan was still not repaid. The parties then entered into a new loan agreement on 27 March 2017, under which the sums due under

the initial and the further loan were to be repaid on or before 2 August 2017, and this was secured by a further charge. At this point, the amount due was £3,775,000.

10. No repayment was made by 2 August 2017. A further loan was agreed on 12 October 2017, to be repaid by 2 April 2018, and by this time the amount outstanding was £4,155,000.

11. Nothing was repaid by 2 April 2018.

12. On 14 May 2018, the Claimant commenced possession proceedings and sought a money judgment.

13. The first order made in these proceedings was that of DDJ Hussain on 4 July 2018, who gave directions for amended pleadings. That order recites that it was made "UPON hearing counsel for the Claimant Mr James Tipler and Counsel for the First Defendant Mr Stuart Armstrong and the remaining Defendants not attending." On 15 February 2019, DDJ Hussain made a possession order and gave a money judgment, as I have set out above. The order recites that it was made "Upon hearing counsel for the Claimant and counsel for the 1st Defendant". The order was made in respect of the "defendant" (singular), but on 14 March 2019 DDJ Mohabir amended that order under the slip rule by replacing "defendant" with "defendants" and by correcting the amount of the money judgment.

14. In the order made following the appeal hearing before HHJ Raeside QC, it is recorded that it was made "…UPON hearing Stuart Armstrong for the Appellant…". Mr Armstrong's skeleton argument for that appeal indicates that "the Appellant" was the First Defendant.

15. The Defendants did not deliver up possession in accordance with the order of HHJ Raeside QC. A warrant of possession was issued, which was to be enforced on 28 September 2021, but an application was made to suspend the warrant (it was in fact the third such application), and in support thereof reliance was placed on an offer of finance, to be secured over the property, from North Bridge Funding. The application was dismissed by DJ Jarzabkowski on 28 September 2021 and permission to appeal was refused. The Defendants then said they had COVID, the bailiff refused to enforce the warrant, and the September 28 eviction date was lost. A new eviction date was scheduled for 27 October 2021 and again there was an application for a stay, this time to enable an appeal against DJ Jarzabkowski's order. Although that application did not get a listing before 27 October, the Defendants again said that they had COVID, and so that date was also lost. A third eviction date was scheduled for 24 November 2021. Again, there was an application for a stay.

16. The First Defendant then obtained a breathing space moratorium under the 2020 Regulations via the debt advice charity Step Change. The 60-day moratorium period started on 23 November 2021, but the Claimant was not aware of the existence of the moratorium when it arranged a further eviction appointment on 9 December 2021. As soon as it became aware of the moratorium, that appointment was cancelled. The Defendants had made a further stay application. On 28 January 2022, HHJ Gerald made an order by consent under which there was no order on the various outstanding applications by the Defendants.

17. The Claimant wanted to challenge the First Defendant's moratorium, but Step Change did not respond to the request for a review in time to allow that to happen before it expired on 22 January 2022 (the response was received with only 1 working day to go before the end of the 50-day period for challenging the moratorium).

18. On 18 January 2022, meanwhile, the Claimant received notice that the Fourth Defendant had entered a breathing space moratorium commencing on 19 January 2022. The Claimant sought a review. Following the response from Step Change, on 1 March 2022 the Claimant made its application to cancel the Fourth Defendant's breathing space.

19. The following day, 2 March 2022, the Second to Fourth Defendants made their set-aside application.

20. I will deal with the Second to Fourth Defendants' application first, and in doing so I shall refer to them as "the applicants".

21. The basis of the application is that the applicants were not present and were not represented at either the hearing on 15 February 2019 or the appeal on 10 March 2021. As I have noted, the recitals to both orders make it clear that it was only the First Defendant who was represented at the hearing, and the appeal was brought by the First Defendant alone.

22. I will now set out the principles to be applied here.

23. An application to set aside a possession order by a party who was not present or represented is governed by the court's general case management powers to "take any other step or make any other order for the purpose of managing the case and furthering the overriding objective" under CPR 3.1(2)(m), and the requirements in CPR 39.3(5): see *Forcelux v Binnie* [2010] HLR 20 [51-52, 58], *Hackney LBC v Findlay* [2011] HLR 15 [23-24], and *Bank of Scotland v Pereira* [2011] 1 WLR 2391. The test is whether it is in the interests of justice to set aside the possession order.

24. CPR 39.3(5) deals with applications to set aside judgments or orders made when a party did not attend a trial, and provides that such an application will only be granted if the applicant (a) acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him; (b) had a good reason for not attending the trial; and (c) has a reasonable prospect of success at the trial.

25. CPR 3.9, which is applicable because an application to set aside a possession order is an application for relief from the sanction of the possession order, requires the court to consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders. In applying that rule, the court will apply the three-stage test in *Denton v T H White* [2014] EWCA Civ 906, and ask (i) is the breach serious or significant, (ii) is there a good reason for the breach, and (iii) what are all the circumstances of the case, including in particular the two factors at (a) and (b) above.

26. In *Pereira*, Lord Neuberger MR said at [24-26]

> "24. … As was made clear by Simon Brown LJ in *Regency Rolls Ltd v Carnall* [2000] EWCA Civ 379, the court no longer has a broad discretion whether to grant such an application: all three of the conditions listed in CPR 39.3(5) must be satisfied before it can be invoked to enable the court to set aside an order. So, if the application is not made promptly, or if the applicant had no good reason for being absent from the original hearing, or if the applicant would have no substantive case at a retrial, the application to set aside must be refused.
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> 25. On the other hand, if each of those three hurdles is crossed, it seems to me that it would be a very exceptional case where the court did not set aside the order. It is a fundamental principle of any civilised legal system, enshrined in the common law and in article 6 of the Convention, that all parties in a case are entitled to the opportunity to have their case dealt with at a hearing at which they or their representatives are present and are heard. If the case is disposed of in the absence of a party, and the party (i) has not attended for good reasons, (ii) has an arguable case on the merits, and (iii) has applied to set aside promptly, it would require very unusual circumstances indeed before the court would not set aside the order.
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> 26. The strictness of this trio of hurdles is plain, but the rigour of the rule is modified by three factors. First, what constitutes promptness and what constitutes a good reason for not attending is, in each case, very fact-sensitive, and the court should, at least in many cases, not be very rigorous when considering the applicant's conduct; similarly, the court should not pre-judge the applicant's case, particularly where there is an issue of fact, when considering the third hurdle. Secondly, like all other rules, CPR 39.3 is subject to the overriding objective, and must be applied in that light. Thirdly, the fact that an application under CPR 39.3 to set aside an order fails does not prevent the applicant seeking permission to appeal the order. It is not very convenient, but an applicant may be well advised to issue both a CPR 39.3 application and an application for permission to appeal at the same time, or to get agreement from the other party for an extension of time for the application for permission to appeal.

27. On behalf of the applicants, Mr Gun Cuninghame submits that where a court is asked to set aside a possession order made at a hearing in the absence of the applicants, the court should apply the requirements of CPR 39.3(5) without too much rigour and the court should be even less rigorous when considering the applicants' conduct.

28. He submits as follows:

    (1) The applicants accept that they were served with the possession proceedings.

    (2) However, they left the First Defendant (who is their sister) to deal with it.

    (3) It was the First Defendant who instructed Mr Armstrong of counsel on a direct access basis.

    (4) The Defence and Counterclaim was drafted by Mr Armstrong as "Defence and Counterclaim of the First Defendant."

(5) The applicants were not present at any hearings nor were they represented.

(6) It was not until 25 January 2022, when BDB Pitmans were instructed, that it was discovered that there was no Defence filed for the applicants.

(7) The applicants thus had a good reason for not attending the possession hearing because they understood that Mr Armstrong was representing their interests, or the appeal hearing when again they believed they were appellants and that Mr Armstrong was representing them.

(8) The applicants have a good defence. Not only do they seek to adopt the Defence and Counterclaim of the First Defendant (which raises questions of whether the interest rate was in fact a penalty, and whether there was an unfair relationship between the Claimant and the Defendants), but they also seek to assert that the First Defendant exerted (presumed) undue influence over them, and they did not receive appropriate or any legal advice.

29. As to the *Denton* test, Mr Gun Cuninghame accepts that the non-attendance was both serious and significant, but submits that in the circumstances – the applicants thought Mr Armstrong was representing them – there was a good reason. In any event, the application was made promptly, having been made 5 weeks after BDB Pitmans were instructed. He also asks the court to take into account the importance of the issues and the property to the applicants (the property is their home), as well as the disabilities of the Second and Fourth Defendants, and the Third Defendant's lack of sophistication.

30. It seems to me that the following points are of particular importance.

31. The applicants were aware of these proceedings. Even though they did not attend the possession hearing, they had been served with a copy of the Claimant's Reply and Defence to Counterclaim, which was also served on Shergill & Co Solicitors. Shergill emailed the Claimant's solicitors, referring to "our clients" (plural) and it is clear that they were acting (although not on the record) for all of the Defendants. When Hoffman-Bokaei solicitors came on to the scene, it was suggested that all four would be applying for an adjournment. Even if the applicants thought that Mr Armstrong was representing them, once the orders of 4 July 2018 and 15 February 2019 were made, which orders were served on the applicants, the true position must have become clear to them, particularly as they all had solicitors advising them (although not on the record). After Hoffman-Bokaei in July 2019, Palmers, then De Cruz, were acting for all of the Defendants. Correspondence from the First Defendant set out a joint position for all four Defendants, and all four served a jointly signed disclosure statement before the costs and case management conference, as well as a further joint disclosure statement.

32. In fact, the First Defendant's Defence and Counterclaim protected the position of all the Defendants up until it was rejected at the hearing on 15 February 2019; the applicants' present position is that whilst they assert they had left dealing with the litigation to the First Defendant, and they were content with that, in fact she had exercised undue influence over them in respect of the loan itself and not only did they not understand the documentation, they had not been given any advice about it.

33. I also bear in mind that the various applications to adjourn and to suspend were made by all of the Defendants, and that they all were proposed parties to the advance from North Bridge Funding which was being used as part of one of the applications.

34. Further, the contention that the applicants acted promptly is simply not made out.

35. The possession order was made on 15 February 2019, and the appeal order on 10 March 2021. Applying CPR 39.3(5) by analogy, the relevant factor is promptness after having become aware that the order had been made. Mr Gun Cuninghame focussed on the period after BDB Pitmans were instructed. The evidence about that latter period is somewhat unsatisfactory. There was no evidence as to why it had taken from mid-January 2022, when BDB Pitmans were instructed, until 2 March 2022 before this application was made. It was suggested in the evidence that the solicitor had to get to grips with quite a lot of material, but that does not seem to me to be a good reason for any delay in the circumstances, and there was no explanation proffered by the solicitor himself. Furthermore, it is to be noted that BDB Pitmans actively consented to an expedited set of directions to ensure that the trial date in April was not lost. In any event, that is, as I have noted, the wrong period on which to focus. The real delay here is from 15 February 2019 and 10 March 2021. I reject the suggestion that there was anything prompt about this application.

36. I am also less than convinced that there is a good defence here. I recognise that this is fact-sensitive (see for example *RBS v Etridge* [2001] 3 WLR 1021) and I accept that whilst Mr Hoffman of Hoffman-Bokaei asserts that he did give advice (and that is denied by the applicants), there must be a degree of "well, he would say that" here. However, it seems to me that if the applicants were of the view that they had been duped by the First Defendant and had not been given proper advice, that was such an obvious point to raise that they could and should have raised it when they discovered that the possession order had been made.

37. On these points, I agree with Mr Rothwell's submissions. As he put it in argument, the applicants could have put forward this defence at the first possession hearing on 4 July 2018, but they simply chose not to attend; then when it became clear (or ought to have become clear) that Mr Armstrong was not in fact representing them, they could have done so at the adjourned possession hearing on 15 February 2019; they could also have made an application after they had been served with a copy of the possession order.

38. It seems to me that there is a clear analogy here with applications for late amendments, and the principles summarised by Carr J as she then was in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm) [38] are of considerable importance:

> "a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
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> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and

> why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
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> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
>
> d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
>
> e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
>
> f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
>
> g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

39. The applicants' application is indeed a very late one. The inevitable result of allowing it will be that the trial date will be lost. That will be prejudicial to the Claimant, and would be inconsistent with the overriding objective. I recognise that a refusal would prevent the applicants from defending the claim on the grounds of undue influence, but it seems to me that they can take what they can from any findings on the defences raised by the First Defendant if those succeed at trial.

40. I have therefore concluded that the application should be refused. The application could have been made earlier. It has been made now, late, in my view as part and parcel of a continuing attempt to frustrate the Claimant and prevent or delay enforcement of the charge and of the money order. The Fourth Defendant's breathing space moratorium is – for reasons I shall deal with shortly – is of a piece with this attempt. As Mr Rothwell says, there must come a time when late applications of this sort – against this particular factual and procedural background – should be rejected. I agree. The set-aside application is therefore dismissed.

41. I now turn to the Claimant's application to cancel the Fourth Defendant's breathing space moratorium.

42. The 2020 Regulations provide for the imposition of a breathing space moratorium under Part 2 and a mental health crisis moratorium under Part 3. The relevant moratorium is of the first kind.

43. The Claimant's challenge is under two heads. First, it is said that the Fourth Defendant was ineligible. Secondly, if that is wrong, the moratorium unfairly prejudices the interests of the Claimant as creditor. These two heads emerge from Regulation 17(1) and which allows the court to cancel the moratorium where (a) the moratorium unfairly prejudices the interests of the creditor, or (b) there has been some material irregularity in relation to any of the matters specified in paragraph (2), which include whether the debtor met the eligibility criteria.

44. The Claimant heavily criticises the decision to grant a moratorium to the First Defendant, but as I have already noted, it was in the event too late to challenge that.

45. The effect of granting a breathing space moratorium is set out in Regulation 7 and the relevant period is at Regulation 26(2).

46. For a period of 60 days, creditors are prevented from taking 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 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)."

47. A moratorium debt is defined in Regulation 6 as a qualifying debt, subject to certain matters, and a qualifying debt is defined in Regulation 5.

48. Those definitions at first appear to exclude the Claimant's debt.

49. A "qualifying debt" includes any debt or liability which is does not amount to "non-eligible debt" and a "qualifying debt" specifically includes any amount which a debtor is required to pay under an order for possession of the debtor's place of residence or business. That would appear to include the monies payable under the Appeal Order. A "non-eligible debt" includes "secured debt which does not amount to arrears in respect of secured debt". However, the definition of "arrears" in Reg. 2(1) is "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".

50. I am therefore satisfied that Mr Rothwell is right when he says that the Claimant's debt is a qualifying debt.

51. In order to enter into a breathing space moratorium, a debtor must meet the eligibility criteria in Regulation 24.

52. One of those is that

> "the debtor …(g) is not subject to another breathing space moratorium and, if they have previously been subject to a breathing space moratorium, that moratorium ended more than 12 months before the date of the application".

53. Mr Rothwell's first submission was that because the First Defendant had her own breathing space moratorium, in respect of which the debt owed to the Claimant was a qualifying debt and thus a moratorium debt, the Fourth Defendant (as a joint debtor) was subject to the First Defendant's breathing space moratorium and thus was not eligible for his own.

54. I disagree.

55. Mr Rothwell asks me to read "subject to" in Regulation 24 in its broadest sense, and says that clearly the entry of the debt into the First Defendant's moratorium meant that the Fourth Defendant was also "subject to" that same moratorium.

56. With respect, this seems to me to misread the Regulations.

57. Under the 2020 Regulations, it is the successful applicant who is subject to their own breathing space moratorium in which the joint debt becomes a moratorium debt. This means that the creditor cannot enforce against the joint debtors, and the joint debtors can take advantage of the 60-day moratorium, but it does not mean – on any reading of the 2020 Regulations – that another joint debtor is "subject to" a breathing space moratorium.

58. I cannot read "subject to" in any way other than to mean that under Regulation 24 only a debtor who has obtained their own breathing space moratorium has been subject to such a moratorium. Had the draftsperson of the 2020 Regulations wanted to prevent joint debtors from making successive applications, that would have been made clear.

59. I also question the utility of an application to cancel the Fourth Defendant's breathing space, and indeed whether I had jurisdiction to cancel something which had expired. Not only had the moratorium come to an end before the hearing, I disagree with Mr Rothwell's reading of the effect of the 2020 Regulations. All that is prevented during the moratorium period is the steps under Regulation 7, which I have set out above. The moratorium does not cancel any interest, fees, penalties or charges in relation to a moratorium debt which have accrued during a moratorium period.

60. In *Axnoller Events Ltd v Brake* [2021] EWHC 2308 (Ch), [2021] 1 WLR 6218, at [14]-[19], HHJ Paul Matthews set out the purpose of the 2020 Regulations, which is in summary to provide sufficient protections for individuals to allow them to enter into a sustainable debt solution, and to encourage more individuals to seek debt advice.

61. Mr Rothwell also asks me to note what was said in *Axnoller*, and particularly at [32-36], which I can briefly summarise as follows:

(1) Unfairness is to be assessed objectively, and this requires the court to undertake a balancing exercise.

(2) That is a difficult exercise, which is particularly fact sensitive.

(3) "Unfair prejudice" under Regulation 17 are ordinary English words, undefined in the 2020 Regulations themselves, and are not obviously terms of art.

(4) Whilst laying down no firm guidelines, there may be cases where post-moratorium conduct can turn a moratorium which did not unfairly prejudice a creditor into one which does.

62. I am completely satisfied that whilst there was nothing in terms of eligibility which prevented the Fourth Defendant from making his own application, that application was not done in order to further the purpose of the 2020 Regulations, but to continue to frustrate the Claimant's enforcement of the debt. It seems to me that the jurisdiction to cancel a moratorium for unfair prejudice to the creditor, and the discretion I have to exercise, is wide enough to enable it to be cancelled where joint creditors apply for successive moratoria in order to avoid paying their debts rather than to explore a debt solution, and there is no evidence at all as to what the Fourth (or even the First) Defendant(s) have done to that end. I have concluded, against the factual and procedural background, that this is yet a further step to delay enforcement, and I have no doubt that applications by the other joint debtors, one after the other, will follow. I therefore accede to Mr Rothwell's application that I should continue the injunction preventing the Defendants from applying for a moratorium of either sort under the 2020 Regulations until January 2023. I agree with Mr Rothwell that to allow further applications would be to have the court sit by whilst the 2020 Regulations are being openly abused. I do not agree with Mr Gun Cuninghame that the court should not grant an injunction because the remedy for an inappropriate moratorium is a cancellation application under the 2020 Regulations. I do not see why this Claimant should have to go down that route in relation to these Defendants in the light of the history of this matter.

63. I refuse permission to appeal in respect of my dismissal of the set-aside application and the grant of the injunction. The former it seems to me is a clear application of a case management decision. The latter again is based upon the exercise of a discretion. In reaching both conclusions, I have taken into account all relevant matters (and no irrelevant matters) in the exercise of my discretion. There is no real prospect of successfully appealing either decision.

(End of judgment)