Legal Mortgage Monthly Update
June 2025

Contents	

Case name Neutral citation	Forbes v Interbay Funding Ltd and Forbes v Seculink Ltd [2025] EWCA Civ 690
Legal points	Mortgage enforcement – debt respite scheme – whether principal sum a moratorium debt
Issue	These were two combined appeals raising a short point of construction of the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Moratorium) (England and Wales) Regulations 2020, namely 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 Reg 5(4) and is thereby excluded from the definition of a 'qualifying debt' and excluded in turn from the definition of a 'moratorium debt'
Facts	In the Interbay case, in 2016 F borrowed £1.36M on a 10-year interest-only loan secured by a mortgage on various properties. F fell into arrears in 2018 and in 2019 Interbay demanded repayment of the capital balance + arrears of £60k. In April 2022 F applied for a mental health crisis moratorium which was registered on 2 July 2022. Interbay subsequently commenced mortgage possession proceedings on 9 May 2023. On 24 July 2023 the court made an order for possession and adjourned the money claim generally. F's appeal to HHJ Evans-Gordon was dismissed. F obtained permission to appeal to the Court of Appeal by Lewison LJ.

	In the Seculink case, in 2018 F borrowed £260k on a 4-month bridging loan secured by a mortgage on a number of other properties. F defaulted and Seculink commenced proceedings for possession which were compromised by a Tomlin Order dated 17 June 2021. Following further default in compliance with the Tomlin Order, Seculink applied for possession. The proceedings were pending when F entered into the mental health crisis moratorium. The issue on enforcement of the Tomlin Order was whether the debt owed to Seculink was a moratorium debt. The judge at first instance dismissed the application to enforce the Tomlin Order on the ground that the court did not have jurisdiction to determine whether the debt due to Seculink was a 'moratorium debt'. On appeal, Sir Anthony Mann held that the court did have jurisdiction [2024] EWHC 3339 (Ch) and went on to determine the appeal [2025] EWHC 524 (Ch) by holding that the principal sum due to Seculink was not a 'moratorium debt'. He gave F permission to appeal on that point.
Held	Zacaroli LJ (with whom Males and Baker LJJ agreed): The court reviewed the Regulations and the respective decisions under appeal. The critical issue was whether the principal amount of a secured debt is 'arrears' which is defined in Reg 2 as "any sum other than capitalised mortgage arrears payable to a creditor which has fallen due and which has not been paid at the date of the application for a moratorium…" F's argument on this was that the definition is wide enough to cover the principal sum outstanding, where it has not been called in. There was an attractive simplicity to this but the court was unable to accept it. Secured debt is (generally) non-eligible debt unless it amounts to 'arrears'. On F's case, the drafter of the Regulations could have achieved the required result simply by excluding from non-eligible debt any part of a secured debt which had fallen due for repayment, but this was not done, and 'arrears' carries only a restricted meaning i.e. such of those periodic instalment payments which have fallen due but remain unpaid. There was also a distinction between 'arrears' and 'capitalised mortgage arrears'. 'Arrears' carries its natural meaning and means something different from the outstanding balance itself – it 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. Reg 2(1) is not setting out to define the meaning of the word 'arrears' but starts from the recognition that 'arrears' is generally understood as referring to missed instalments, but imposes three requirements before arrears are excluded from non-eligible secured debt: (1) the arrears must have been due 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. The court went on to consider a number of other arguments on construction, but concluded that the principal sum of secured debt – whether or not called in prior to the commencement of the moratorium – is non-eligible debt, and this neither a qualifying debt nor a moratorium debt. Appeals on this point in both cases dismissed (two other grounds of appeal in the Interbay case fell away).
Comment	We previously reported on the substantive appeal in the Interbay case in the March 2025 monthly update and commented then that the result – that the principal sum was not a moratorium debt – was not particularly surprising, but the converse would have been.

	The decision confirms that mortgage lenders are entitled to enforce at least to the extent of the principal sum (whether or not called in before the commencement of a moratorium). It also clarifies what may properly be treated as 'arrears' for the purposes of the Regulations. For other cases involving debt respite schemes and mortgage enforcement, see: • MSP Capital Ltd v Hillborough Hall Farms Ltd (unrep) HHJ Walden-Smith, Cambridge County Court, 24 January 2023 (June 2023 monthly update) • Bluestone Mortgages Ltd v Stoute (Unrep, Canterbury County Court, 4 March 2024) (March 2024 monthly update + transcript)

Case name Neutral citation	Kharroubi v Hertford Solutions LLP and others (Unrep, County Court at Central London, 9 June 2025) – see transcript
Legal points	Bridging loan – parties - allegations of unconscionable bargain, undue influence and duress – whether 5% default rate interest a penalty – regulatory compliance – business exemption
Facts	In 2020, C obtained a 6-month bridging loan from D2 (lender) for £112,000 at 2% pcm (default rate 5% pcm) subject to various fees, charged on C's property. Following default in repayment at the expiry of the term, D2 charged interest at the default rate. C subsequently repaid £80,000 leaving a balance outstanding. C issued proceedings in the High Court (transferred to the County Court at Central London) claiming that the loan agreement was unenforceable (a) because the loan agreement was between C and D1, not D2 the lender, and that D2 could not enforce it; (b) certain terms of the agreement were an unconscionable bargain and should be set aside; (c) the loan agreement should be set aside for undue influence/duress; (d) the loan agreement is unenforceable because of s 26(1) Financial Services and Markets Act 2000 (agreements made by unauthorised persons); the default rate of interest is unenforceable as a penalty.
Held	(HHJ Monty KC) The court began by reviewing the witness evidence, noting the fallibility of human recollection and the need to look at contemporary documentation (*Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 per Leggatt J at [15]-[22]) and also noting the difficulties in dealing with evidence from a foreign language speaker (Arabic) when complying with CPR PD57AC, together with the use of interpreters in court. On the evidence, the court regarded C as a very poor witness, and the court gave a long list of examples. Following a detailed review of the evidence, the court made the following findings: (1) Parties: There were discrepancies in the paperwork (offer of loan, loan agreement and charge) as to the correct identity of the lender (it named another company – D1). Applying *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, it was plain who the borrower and lender were, and it was also clear that C and her solicitors knew who the lender was.

	(2) Unconscionable bargain: Following *Libya Investment Authority v Goldman Sachs International* [2016 EWHC 2530 (Ch)](#) C had not been at a serious disadvantage [to the lender]. She received detailed advice from solicitors and a broker was involved on her behalf. The fees being charged were explained and it was not surprise that the bridging loan was completed quickly. (3) Undue influence: The court directed itself on the legal principles in *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773. The allegations were against C's solicitors who were not a party to the proceedings and the court acknowledged it should be slow to make adverse findings against them if they had not had an opportunity to rebut the allegations (following *MRH Solicitors v The County Court sitting at Manchester* [2015] EWHC 1795 (Admin) at [34]). Although there was a relationship of trust and confidence between solicitor and client, the transaction was readily explicable (so that the presumption did not arise), and there was a complete absence of any evidence of undue influence. The solicitors acted for C alone (not also the lender) and the lender had no contact with C – there was nothing to put the lender on notice that the transaction was being entered into otherwise than with C's informed and freely given consent. (4) Duress: This meant illegitimate pressure from or on behalf of the other party to the transaction – in this case the lender, but the solicitors did not act for the lender (and, as noted, the lender had no contact with C). In any event, the court rejected C's allegations about pressure being placed on her. (5) Was the default rate a penalty: The court applied the 3-stage test in *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67 as elucidated by Fancourt J in *Vivienne Westwood v Conduit Street* [2017] EWHC 350 (Ch): > "A liquidated damages clause will not amount to an unenforceable penalty provided (1) it is a secondary obligation triggered by a breach of contract (this is a threshold question); (2) the clause is in furtherance of a legitimate interest which the innocent party has in the performance of the primary obligation; (3) and the clause is not extortionate, exorbitant or unconscionable." The same test applies to default interest clauses (see e.g. *Ahuja Investments Ltd v Victorygame Ltd* [2021] EWHC 2382 and *Houssein v London Credit Ltd* [2024] EWCA Civ 721). In respect of the 3-stage test: (1) Primary or secondary obligation? The provisions of the loan agreement impose the default rate as a secondary obligation in the event of non-payment, which is the primary obligation. (2) Legitimate interest? The provision for default interest is in furtherance of the lender's legitimate interest in the performance of the primary obligations: C's credit rating was poor so that it was self-evident there was a commercial justification in charging a higher rate on default; C received independent advice about the provisions of the loan including the default rate; and it is not appropriate to review this limb simply by looking at how much is now due because that is purely the result of the passage of time. (3) Extortionate, exorbitant or unconscionable? No – the default rate is within the range of default interest being charged at the time in accordance with the advice of the single joint expert. Overall, C had not discharged the onus of proving that the provision was penal.

	(6) The effect of the FSMA: C's contention that this was a regulated loan which the lender was not authorised to make was not made out. C signed an exemption declaration that this was a business loan which it was contended gave rise to a presumption that it was entered into wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by her (her residential lettings business) but this was required by CONC App 1.4.5 to be set out in the 'credit agreement' and in this case it was not – it formed part of the same pdf as the loan agreement but was separate to it, it was not incorporated in the loan agreement or referred to in it. However, applying *Kumar v LSC Finance Ltd* [2024] EWCA Civ 254, on the evidence, C clearly intended that the loan be used for business purposes. On that basis, the loan was unregulated, but if the court was wrong on this (so that it was unenforceable under s 26 FSMA 2000) it was plainly just and equitable to allow it to be enforced (s 28(3) FSMA 2000). Claim dismissed.
Comment	Unusually, this is a 'kitchen sink' type of claim rather than the more common defence. As with any of these claims or defences, best advice is to stick to a reliable cause of action (if you have one) rather than throw everything at it. The costs must have been substantial. The court probably had fun and games with the documentation which appears to have named different lenders (and different trading names) – not uncommon, but easily avoided. The unconscionable bargain, undue influence and duress claims all fell down on the evidence which, according to the transcript, looked pretty one way. It never helps these claims to have had solicitors acting for you! Here, the claimant was quick to blame all her lawyers (including her former lawyers) in an attempt (the judge thought) to deflect attention away from the fact that she signed all the loan documents without reading them! Of note is the court's approach on the 5% default rate and why it was not a penalty. Decisions on whether default rates are primary or secondary obligations (following *Makdessi*), and the permissible default rates themselves, have varied over time, but this case makes it fairly clear that they will be regarded as secondary obligations but, absent any reliable expert evidence (the SJE evidence was not favourable to the claimant) a 5% default rate on short-term commercial bridging is unlikely to be extortionate, exorbitant or unconscionable. On the FSMA point – the lender appears to have dropped a clanger (commonly done) with the form of the exemption declaration but got home on the 'matter of fact' test.

Publication	On 25th June 2025 the Financial Conduct Authority published a discussion paper DP25/2: Mortgage Rule Review: the future of the mortgage market. The FCA say it is intended to launch a public conversation on the future of the UK mortgage market: We consider areas where changes may be needed to support sustainable home ownership and economic growth, and where increased flexibility could allow firms to tailor their product offerings to consumers' evolving needs.

	Possible measures include: • Revising our responsible lending rules to support wider access to sustainable home ownership. • Ensuring the regulatory framework, and the market, are prepared for anticipated increases in demand for later-life lending. • Introducing more flexibility to promote consumer understanding, information needs and innovation. • Rebalancing the collective risk appetite in mortgage lending including trade-offs and risk that this could lead to. Who this is for This paper will primarily interest: • Mortgage lenders and administrators, including later life and equity release firms. • Home purchase providers and administrators. • Mortgage intermediaries. • Trade bodies representing mortgage lenders and intermediaries. • Consumer groups and organisations. • Consumers who own, or want to own, their home with a mortgage, or who want to release equity from their home for later life. Responses to the questions collated in annex 1 are required by 19th September 2025. There is an online response form.