CIVIL WAY

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IN BRIEF

- Beware the moratoria.
- Look, no update!
- Loadsavouchers.
- Family security.
- Credit hire back.

MORATORIUM MESS

The debt respite scheme (see 'Civil way', 171, *NLJ* 7960, p15, 171, *NLJ* 7922, p14) has been put to the test in *Lees v Kaye and another* [2022] EWHC 1151 (QB), [2022] All ER (D) 42 (May). The judgment creditor was after satisfaction of a debt which included damages for distress and anxiety. He obtained a charging order over the judgment debtor's flat which was followed by an order for sale, eviction on the strength of a writ of possession and then completion of the sale. Trouble was that on the dates of eviction and sale the debtor had the benefit of mental health crisis moratoria. This rendered the eviction and sale null and void, thanks to reg 7(12) of the Debt Respite Scheme (Breathing Space etc) Regulations 2020 (SI 2020/1311). The debtor gets back in and the sale—though completed, not registered—presents a headache, not least for the buyer and any advancing mortgagees.

A raft of arguments for the creditor met with failure. The damages included in the judgment did not exclude it from the scheme under reg 5 (4)(i) as being for personal injury because distress and anxiety short of psychiatric illness did not constitute personal injury. Nor did the security of the charging order exclude it. Yes, reg 7(13) does provide that nothing in reg 7 affects a charging order made before the start of a moratorium. But this was held simply to mean that the creditor is prevented from enforcing payment by seeking the remedies that would otherwise be available to an equitable chargee, while the existence and status of the charging order is not diminished.

There is a register of moratoria. They come into effect on the day following the day of entry in the register. A creditor who has received mandatory notification of a moratorium is entitled to a sight. As was pointed out in *Lees*, there is no suggestion in the regulations that the commencement of a moratorium is dependent on its existence being notified to a creditor. We could be in for some *MoratoriaGate* moments.

PORTAL RETREAT

Rip out the bit from last time (see 'Civil way', *NLJ,* 3 June 2022, p19) about CPR update 145 sentencing defendant's legal representatives to the damages claims portal as from 2 June 2022 and use to roll a fag. The update was revoked five minutes before an arsenic break on the day before, outwitting us in print but not online. If portals could change colour, this one would be scarlet. Formal revocation has been achieved by update 148. We may have to send a questionnaire to HMCTS which is simply saying that there has been a delay and a new date for defendant sentencing will be announced in due course. In the meantime, anecdotal evidence points to frequent bounce back of paper proceedings outside the portal's scope on the false premise that they should have been started online.

VOUCHERS FOR HEAD BASHING

An additional £5.4m of government cash is being injected into the Family Mediation Voucher Scheme for child disputes (see 'Civil way', *NLJ,* 4 February 2022, p19). Any successful escapes from a Mediation Information and Assessment Meeting (MIAM) without a loud trumpeting of the scheme's virtues should be reported to the *Guinness World Records*.

AND NOW FOR SOMETHING COMPLETELY DIFFERENT

An order for security for costs has been made in a family case. No joke. It could have been the first such case ever: certainly, the first to be reported. In *MG v AR* [2021] EWHC 3063 (Fam), [2021] All ER (D) 34 (Dec) Mostyn J—expressing surprise along the way that there was no PD explaining the power- ordered the father, who was applying for his eight-year-old child to be returned from Toronto to Dubai, to give security in the form of a £50,000 cash payment to be held by the mother's solicitors to abide a possible costs order on the substantive application. If he defaulted, there would be a determination as to whether the application should be summarily dismissed on the strength of such default.

The power is in FPR 20.7, pinched from CPR 25.12. Spot the differences. At least one of the gateway conditions must be satisfied against the substantive applicant: out of jurisdiction; address change post-issue to evade consequences of litigation; no or incorrect address in application form; or steps taken in relation to assets which would make costs enforcement difficult.

And then to the difficult bit. Exercise of a discretion, according to Mostyn J. If the applicant has a meritorious case and is of limited means, it would not normally be just to order security. When assessing an ability to pay costs and security, robust assumptions should be made where disclosure has been deficient or the applicant maintains a source of support has been cut off. If the court determines that the respondent has a good chance of being awarded costs on the substantive hearing, it must then be satisfied that there is a real risk—not as high as a 50% probability—that they will not be in a position to enforce. Promptness in applying for security or lack of it will be considered and historic costs may not be allowed if security has been applied for unduly late. In the first instance, security should only be provided in a financial remedy case up to FDR (apply with form D11) and in a children's case (apply with form C2) up to PTR or equivalent. In the latter, security must be consistent with the best interests of the children, or at least not contrary to their interests. Who needs a PD?

HELP!!!!HIRE

The credit hire company Helphire, along with Avis, Thrifty and Europcar, incorporated into their contracts a term requiring their hirers to indemnify them for loss of use for the hired vehicle at their specified daily rental rate, if it was not returned in the same condition as it was the hire started. In *Amstead v Royal Sun Alliance Insurance Co Ltd* [2022] EWCA Civ 497, [2022] All ER (D) 09 (May) the hirer had an accident for which she was blameless and which damaged the hired car. Helphire sued the tortfeaser's insurers for repairs and loss of use in her name. The loss of use was in issue. Helphire was after £1,560, calculated at £130 per day for the 12-day period.

The Court of Appeal ruled that the hirer was not entitled to the amount claimed, although she could have recovered on the correct basis. The contractual term was an internal arrangement between bailor and bailee and bailment law treated them as having one set of rights to claim. There was no independent agreement between the hirer and Helphire about the likely losses to be suffered (*Network Rail Infrastructure v Conarken Group* [2011] EWCA Civ 644, [2011] All ER (D) 288 (May) distinguished). The contractual term did not represent a genuine and reasonable attempt to assess likely losses and, in the particular circumstances, was irrecoverable as an economic loss which was remote and not foreseeable. NLJ