Neutral Citation Number: [2022] EWHC 34 (Ch)

Case Nos: CH-2020-000100
CH-2020-000101

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
CHANCERY APPEALS

Rolls Building, Royal Courts of Justice
Fetter Lane, London, EC4A 1NL

Date: 11 January 2022

Before:

SIR PAUL MORGAN

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BETWEEN:

(1) Victus Estates (2) Limited
(2) Victus Estates (3) Limited
(3) Deepak Raj Agrawal
(4) Simple To Finance Limited

Claimants/Respondents

And

(1)…
(4) Monica Munroe

Defendant/Respondent

And

Shawbrook Bank Limited

Third Party/Appellant

AND BETWEEN:

Julietta Sonia Benjamin

Claimant/Respondent

And

(1) Victus Estates (1) Limited

Defendant/Respondent

And

(2) OneSavings Bank PLC

Defendant/Appellant

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Ms Josephine Hayes (instructed by **Lightfoots LLP**) for **Shawbrook Bank Ltd**
Ms Josephine Hayes (instructed by **Equivo Ltd**) for **OneSavings Bank plc**
Mr Christopher Royle (instructed by **Lupton Fawcett Solicitors**) for **Ms Munroe**
Ms Amanda Eilledge (instructed on Direct Access) for **Ms Benjamin**
The other Respondents did not appear and were not represented

Following written submissions and counter-submissions
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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MORGAN

This judgment has been handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be 11 January 2022.

SIR PAUL MORGAN:

Introduction

1. This judgment deals with issues as to costs following the judgment which I handed down in these two appeals on 27 August 2021, the neutral citation of which is [2021] EWHC 2411 (Ch). There was an oral hearing in relation to certain consequential

matters on 25 November 2021 and I gave an extempore judgment dealing with those matters. There was not sufficient time on 25 November 2021 to deal with the many issues arising as to costs and I was asked by the parties to deal with those issues on the basis of written submissions. I subsequently received written submissions and counter-submissions from counsel for Shawbrook and OneSavings (Ms Hayes), Ms Munroe (Mr Royle) and Ms Benjamin (Ms Eilledge).

2. I will proceed on the basis that anyone reading this present judgment will have available the earlier judgment of 27 August 2021. I will therefore not restate what I decided in that judgment save insofar as that is necessary to decide the issues which are now before me. I will again use the abbreviations and definitions used in the earlier judgment.

3. The issues as to costs concern the costs of the proceedings in the county court and the costs of the appeals. The parties have made very detailed submissions as to the way matters were dealt with in the county court proceedings and it is submitted that those matters are not only relevant to any decision I might make as to the costs in the county court but may also be relevant to what I ought to decide as to the costs of the appeals. For this reason, I will first set out the procedural history both in the county court and on appeal. I will then deal with the costs in the county court and then with the costs of the appeals.

The procedural history

4. There were three actions in the county court. Ms Benjamin and OneSavings were parties to one of those actions and Ms Munroe and Shawbrook were parties to the other two actions.

5. The first set of proceedings were brought by Ms Benjamin. On 5 September 2014, she brought proceedings against OneSavings as a Second Defendant. I have not been shown the original Particulars of Claim but I have the version of that pleading which was amended in November 2019. Ms Benjamin pleaded at the outset that she had at least a 75% interest in the relevant property. Her case was that the TR1 in her case did not affect the legal estate or her beneficial interest in the property.

6. On 9 July 2015, OneSavings served a Defence and Counterclaim in the Benjamin proceedings. OneSavings claimed to be subrogated to an earlier mortgage of the property which had been redeemed with OneSavings' money. It further pleaded that if certain matters were decided in Ms Benjamin's favour, then nonetheless, the TR1 had the effect of transferring Mr Charles' beneficial interest in the property to the relevant Victus company which had then charged that beneficial interest to OneSavings.

7. On 21 August 2015, Ms Benjamin's Reply and Defence to Counterclaim denied OneSavings' claim to be subrogated to the earlier mortgage. It also pleaded that if (which was denied) Mr Charles had a beneficial interest in the property and if (which was not admitted) Mr Charles had sold that beneficial interest to the Victus company, then it was admitted that OneSavings had an equitable charge over that interest.

8. There were two sets of proceedings to which Ms Munroe and Shawbrook were parties. The first set was issued by the relevant Victus company and Mr Agrawal and Ms Munroe was a Fourth Defendant in those proceedings. Ms Munroe served a Defence and Counterclaim. She claimed that Mr Charles had not had a beneficial interest in the relevant property and that she was the 100% beneficial owner of it. She contended that her signature on the TR1 was a forgery; she did not initially allege that the TR1 was a sham. Ms Munroe joined Shawbrook as a Third Party but I do not have

a copy of the relevant pleading. On 19 August 2015, Shawbrook served a Defence and Counterclaim to Ms Munroe's Third Party Claim. In that pleading, Shawbrook pleaded that if certain matters were decided in Ms Munroe's favour, then nonetheless, the TR1 had the effect of transferring Mr Charles' beneficial interest in the property to the Victus company which had then charged that beneficial interest to Shawbrook. Shawbrook also claimed that it was subrogated to an earlier mortgage which had been redeemed with Shawbrook's money. On 18 September 2015, Ms Munroe served a Defence to Shawbrook's counterclaim and in relation to the allegation as to the effect of the TR1, Ms Munroe pleaded that the allegation were either matters of law or were not admitted. She did not admit Shawbrook's claim to be subrogated to the earlier mortgage.

9. The second set of proceedings which involved Ms Munroe were those brought against her by Shawbrook on 17 August 2018. In those proceedings, Shawbrook claimed to be subrogated to the earlier mortgage on the property. It also pleaded that if certain matters were decided in Ms Munroe's favour, then nonetheless, the TR1 had the effect of transferring Mr Charles' beneficial interest in the property to the relevant Victus company which had then charged that beneficial interest to Shawbrook. I do not have a copy of the original pleading which Ms Munroe served in response to this claim but I do have a copy of her Defence as amended in 2019. In the original pleading, she adopted her pleadings in the first set of proceedings to which she was a party. She claimed to be the sole beneficial owner of the property. She did not admit Shawbrook's claim to be subrogated to the earlier mortgage.

10. All these proceedings were due to be tried in June 2019. At that date, it had not been alleged by Ms Munroe or by Ms Benjamin that the TR1s were shams. However, the trial did not then proceed and the proceedings were adjourned.

11. In August 2019, Ms Munroe applied for permission to amend her Defence and Counterclaim in the first set of proceedings to which she was a party and also to amend her Defence in the second set of proceedings. On 8 October 2019, she obtained the permission to amend which she had sought. The court's order recorded that Ms Munroe agreed to treating Shawbrook's pleadings as not admitting and requiring her to prove the facts newly alleged in her amended pleadings without any formal amendment of the same.

12. Ms Munroe then Re-Re-Amended her Defence and Counterclaim in the first proceedings to which she was a party and Amended her Defence in the second set of proceedings. She did not amend her pleading in response to Shawbrook's Counterclaim in the first set of proceedings. In her Re-Re-Amended Defence and Counterclaim she pleaded that the TR1 in relation to the property was a sham and passed no interest in that property to the relevant Victus company. She pleaded a detailed case to the effect that the arrangement between Mr Charles and Mr Agrawal was a plan to defraud her and prospective mortgagees and that Mr Agrawal was a knowing party to that arrangement.

13. On 28 November 2019, Ms Benjamin was given permission to re-re-amend her claim by serving Re-Re-Amended Particulars of Claim which raised an allegation of sham. OneSavings did not object to the proposed amendment. The court's order of 28 November 2019 recorded that the Defence and Counterclaim of the relevant Victus company was to be read as denying that the purchase of the property was a sham and

requiring Ms Benjamin to prove the facts alleged as to sham without there being a formal amendment of the Victus company's own pleading. The order recorded a similar agreement as regards there being no need to amend OneSavings' Defence and Counterclaim.

14. Ms Benjamin's Re-Re-Amended Particulars of Claim pleaded that the purported sale of the property was a sham and no interest in the property passed to the Victus company. It pleaded that Mr Agrawal knew that Ms Benjamin was the joint registered proprietor of the property. It then pleaded that Ms Benjamin would rely on the matters set out by Ms Munroe in paragraphs 17A to 17E of her Re-Re-Amended Defence and Counterclaim (which raised the allegation of sham and of Mr Agrawal's knowing participation in the fraud). Finally, it was averred that the TR1 was wholly void and of no effect.

15. The result of the above was that Ms Munroe and Ms Benjamin alleged in their pleadings in October and November 2019 that the TR1s were shams and pleaded a detailed case that Mr Agrawal was a party to a fraud on them. They agreed that Shawbrook and OneSavings respectively did not need to plead to this new allegation and the matter would go to trial on the basis that the allegations were not admitted and that Ms Munroe and Ms Benjamin respectively had to prove the relevant facts on which they relied.

16. With the benefit of hindsight, it is perhaps unfortunate that the issues which would arise in relation to the allegation of sham were not pleaded. Furthermore, it is unfortunate that the amendments to the pleadings alleging sham were made at such a late stage before the commencement of the trial on 3 December 2019.

17. In relation to the question of costs, there was considerable dispute between the parties as to what had been argued at the trial in the county court. However, having fully considered the material provided to me, I believe that I am able eventually to come to a reliable conclusion as to what was argued and what was not argued in the county court.

18. The proceedings were tried on 3 to 11 December 2019. The parties who appeared at the trial were Ms Munroe, Ms Benjamin, the Victus companies and Mr Agrawal, Shawbrook and OneSavings.

19. The issues dealt with in the judge's judgment were as follows:

    i) Ms Munroe's and Ms Benjamin's beneficial interests; they contended that they had (before the transactions in these cases) 100% of the equity in the properties; Shawbrook and OneSavings contended that Ms Munroe and Ms Benjamin had only 50% of the equity; on this issue, Ms Munroe and Ms Benjamin lost and Shawbrook and OneSavings succeeded;

    ii) Were Ms Munroe's and Ms Benjamin's signatures forged? on this issue Shawbrook and OneSavings took a neutral stance and Ms Munroe and Ms Benjamin succeeded;

    iii) Were Ms Munroe and Ms Benjamin otherwise bound by the TR1s? the judge recorded that Shawbrook and OneSavings did not so contend;

    iv) Did Mr Agrawal know that Ms Munroe and Ms Benjamin did not consent to the sales? on this issue Shawbrook and OneSavings joined with Mr Agrawal in

contending that he was not a party to the fraud and Ms Munroe and Ms Benjamin succeeded;

v) Rectification of the register; the judge recorded that there was no substantial dispute that the register should be rectified (at least) to show Ms Munroe and Ms Benjamin as joint legal owners;

vi) Equitable title; the judge recorded that the claims of Ms Munroe and Ms Benjamin to the equitable title were subject to the rights of Shawbrook and OneSavings;

vii) Were the TR1s shams? the judge considered three arguments put forward by Shawbrook and OneSavings; in relation to two of the arguments, the judge rejected them and on the appeal, I did not rule on those arguments; the third argument depended on section 63 of the Law of Property Act 1925; the judge held that Shawbrook and OneSavings could not rely on section 63 because of the decision at first instance in *Penn v Bristol & West Building Society* [1995] 2 FLR 938 ("*Penn*"); on the appeal, I have reversed the judge's conclusion and held that Shawbrook and OneSavings can rely on section 63 to produce the result that they have a charge over a half share in the relevant property;

viii) Subrogation; the judge agreed with Shawbrook and OneSavings that they were, in principle, entitled to subrogation in relation to earlier charges which had been discharged but accepted certain limitations on such subrogation; those limitations had been contended for by Ms Munroe and Ms Benjamin.

20. The judge dealt with consequential matters at a hearing on 26 February 2020 and gave a separate judgment dealing with those matters. He gave a further explanation in

relation to subrogation. He dealt with issues as to costs as between Ms Munroe, Ms Benjamin, Mr Agrawal and the Victus companies. He then dealt with the question of costs as between Ms Munroe, Ms Benjamin, Shawbrook and OneSavings. He referred to the degree of success and failure of these parties and held that the right order was no order as to costs. However, following the appeal, the degree of success and failure of the parties is now different.

21. At this point, I will address the issue as to how the case was argued in the county court on the question of sham. Shawbrook and OneSavings undoubtedly submitted that the TR1s were effective to transfer the half share in each property vested in Mr Charles to the relevant Victus company and that the relevant Victus company had validly created an equitable charge of the half interest in favour of Shawbrook and OneSavings respectively. That would indeed be the normal position. Ms Munroe and Ms Benjamin sought to escape from that legal result by contending that the TR1s were shams and of no effect. It is important to see how Ms Munroe and Ms Benjamin put their case. The judge explained the submissions which had been made to him on their behalf. At [152] of his judgment, he recorded the submission as: "[a] situation with a fraudulent intent on both sides of the transaction cannot be a conveyance because it is a sham".

22. Ms Munroe and Ms Benjamin relied heavily on the decision in *Penn* as support for their proposition as recorded above. The judge considered *Penn*. He stated at [153] of his judgment that the judge in *Penn* had decided: "because both husband and purchaser were party to the fraudulent document which was itself a fraud on a third party, namely the building society lending to the purchaser, no rights could pass under that document …". The judge in the present cases then held he was bound by this

proposition in *Penn* and he applied that proposition and held that the TR1s were shams. He added, at [156] of his judgment, alternative reasoning which he plainly preferred to the reasoning in *Penn*. He explained that his alternative reasoning would be appropriate if the proposition he derived from *Penn* was not binding on him. That alternative reasoning essentially involved an analysis based on *Patel v Mirza* [2017] AC 467. I understood from what I was told at the hearing of the appeals, that the judge's alternative reasoning in favour of Ms Munroe and Ms Benjamin was not explored at the trial before him but was put forward in the judgment as alternative reasoning arriving at the same result as that contended for by Ms Munroe and Ms Benjamin based on the proposition they derived from *Penn*.

23. It is understandable that Ms Munroe and Ms Benjamin relied on *Penn* at the trial. That decision appeared to be favourable to them. The judge was bound by it as a decision of the High Court. Shawbrook and OneSavings tried to distinguish it by asserting that there could only be a sham in this case if Shawbrook and OneSavings were also parties to the sham. The judge rejected that attempt to distinguish *Penn*. However, the decision in *Penn* has turned out to be a false friend to Ms Munroe and Ms Benjamin. When that decision was examined on these appeals, I held that the proposition derived from it was not good law and I would not apply that proposition.

24. Because of the decision in *Penn* and the ability of Ms Munroe and Ms Benjamin to rely on it successfully in the county court, there is no indication that they set out to establish that the TR1s were shams if one applied conventional principles as to when a purported transaction had no legal effect whatsoever, because it was a sham. If they had wanted to submit that the TR1s were the types of shams which had no legal effect whatsoever, they would have had to argue and to prove that the parties to the TR1s

intended them to have no legal effect. There is no real sign that Ms Munroe and Ms Benjamin ever tried to do that. I was not shown anything by their counsel to establish that that was their case at trial. There is no indication in the judgment below that the judge was invited to make findings to that effect and there are no such findings. While the judge did indeed hold that the TR1s were shams, this is clearly to be understood on the basis that he was bound to follow *Penn* in that respect. Indeed, the basic facts of these cases make it inherently improbable that the Victus companies would have intended a result where they acquired no rights whatever in relation to the relevant properties.

25. As I understand it, Mr Royle and Ms Eilledge, counsel for Ms Munroe and Ms Benjamin respectively, submit on the question of costs that apart from the issues of fact as to whether Mr Agrawal was a party to the frauds, there was no real dispute as to the intentions of Mr Charles and the Victus companies. Mr Royle and Ms Eilledge showed me extracts from Ms Hayes' written closing submissions at the trial. Mr Royle and Ms Eilledge submitted that the only point made by Ms Hayes in answer to the allegation of sham was that Shawbrook and OneSavings were not parties to the sham. I do not agree with Mr Royle and Ms Eilledge on this point. In fact, reference to Ms Hayes' closing submissions, at [9] and [10], shows that she considered the evidence as to the position between the two parties to the TR1s, Mr Charles and Mr Agrawal (on behalf of the Victus companies). She submitted that there was not an intention on the part of Mr Agrawal that the transactions were shams which had no legal effect.

26. The judge refused permission to appeal to the High Court but such permission was given at an oral hearing by Sir Alastair Norris on 20 November 2020. The grounds of

appeal included an appeal in relation to the judge's order as to costs; the judge had ordered that there be no order as to costs between these parties. Sir Alastair Norris refused permission to appeal on that ground because Shawbrook and OneSavings had invited the judge to make the order for costs which he had made. I consider that a fair reading of Sir Alastair Norris' decision is that he was refusing permission to mount an independent appeal in relation to costs. Thus, if the other grounds of appeal failed, there could not be an appeal in relation to the judge's decision that there should be no order for costs. The trial judge made that order on the basis of the decisions he had made on the issues before him. This does not preclude Shawbrook and OneSavings now pointing out that the result before the trial judge has been altered by the decision on these appeals so that the costs in the county court need to be re-considered. If the Appellant's Notice had not sought to make any appeal in relation to costs, the appeal court would be entitled to reconsider the order for costs made in the county court on the basis of the different result arrived at following the appeals. I note that the ground of appeal as to costs is not well expressed as it might be said to show a confusion between an independent appeal on costs and a review of the costs order in the court below following the appeal being allowed on other grounds. Nonetheless, I consider that the right way to interpret the refusal of permission by Sir Alastair Norris is that he was not preventing the appeal court reconsidering the order for costs made in the county court now that the appeals have been allowed on other grounds.

27. The final matter I will deal with in this review of the procedural history is to comment on the way in which the matter was argued by Shawbrook and OneSavings on these appeals. I have explained that I have allowed their appeals on the basis that I disagree with the proposition, derived from *Penn*, on which the judge held that the TR1s were shams and therefore had no legal effect whatsoever. I have also held that that

submission was open to the Appellants on these appeals. It is fair to say that the Appellants were minded to stress other challenges to the judge's conclusion as to sham and did not give the prominence I would have expected to an analysis of what *Penn* decided and whether I should follow it. However, at the hearing of the appeals, it was unavoidable that I should hear full submissions on those points. Having heard those submissions, I was persuaded not to follow *Penn* and not to apply the proposition contended for by Ms Munroe and Ms Benjamin. The matter was fully argued before me and there was no unfairness to any party in the conduct of the appeals.

The costs in the county court

28. The judge made no order as to costs as between these parties. He did so on the basis of an assessment of the degree of success and failure of the various parties. Sir Alastair Norris stated that Shawbrook and OneSavings had submitted that such an order was the right order to make.

29. Mr Royle has submitted that Shawbrook and OneSavings do not have permission to appeal against the judge's order for costs. I have already given my reasons for not accepting that submission.

30. Mr Royle then submitted that I should remit the question of costs to the county court. His first point in favour of remission was that in the second set of proceedings between Shawbrook and Ms Munroe, Shawbrook has applied for an order for sale pursuant to the relevant provisions of the Trusts of Land and Appointment of Trustees Act 1996. He submitted that the outcome of that application might have a bearing on the costs which have been incurred in the county court proceedings and one should

await that outcome before determining the overall position as to costs. This point does not arise in relation to the proceedings between OneSavings and Ms Benjamin where there is no outstanding application for an order for sale. However, Ms Eilledge submits that if I remit the question of costs in relation to Shawbrook I should do the same in relation to OneSavings.

31. Mr Royle also submitted that Judge Parfitt would be the best person to reconsider the question of costs in the light of the result of the appeals. Judge Parfitt would know the background and how the matter was argued before him. I agree that Judge Parfitt should be able to deal with the matter if that were the best option. However, I also recognise that he may not have a full recollection of the procedural history. Further, if the matter were remitted, it would not necessarily be straightforward to have the case listed before Judge Parfitt. As regards the procedural history, the parties have provided me with all the material which they wish to put before me if I were to take the view that I ought to deal with the question of the costs in the county court.

32. Ms Hayes submits that I do not have jurisdiction to remit the question of costs to the county court. I very much doubt that I lack jurisdiction to remit the question of costs to the county court but I do not intend to remit that question. As regards the application for an order for sale in one of the cases, I will plainly not deal with any costs which might have been incurred in relation to the order for sale. It ought to be possible for those costs to be separated out and it does not seem that there will have been any substantial sum spent on the separate question of an order for sale. Further, I do not consider that the fate of the costs which have been incurred on the many points which have been decided should await the outcome of the application for an order for sale. There is no reason to do that in the case of Ms Benjamin; the order for costs in

her case should turn on all the points which have already been argued and decided and I see no reason to take a different view in the case of Ms Munroe. As regards the suggestion that I should remit the matter to Judge Parfitt, whilst that was at the outset a tempting suggestion which might have saved me a considerable amount of work, I have now considered all of the material which the parties wanted me to consider and I take the view that it is my duty to decide the question as to costs in the county court rather than subject the parties to the delay and further cost of remitting the matter for further argument at a future date.

33. I referred earlier in this judgment to the issues which were litigated in the county court. I will refer first to the issues which had been pleaded before there were significant amendments to the pleadings by Ms Munroe on 8 October 2019 and by Ms Benjamin on 28 November 2019.

34. Ms Munroe and Ms Benjamin won on the important first question as to whether their signatures had been forged on the TR1s. Shawbrook and OneSavings remained neutral on that question as they did not know what the position was. If Ms Munroe and Ms Benjamin had failed on that question, then Shawbrook and OneSavings would have been better off. Nonetheless, they did not contend for that result and it was reasonable for them to wait until that issue was decided between Ms Munroe and Ms Benjamin and the Victus companies and Mr Agrawal and to abide by that outcome.

35. Ms Munroe and Ms Benjamin lost on the issue as to the extent of their beneficial interests in the relevant properties. Each of them contended for 100% of the beneficial interests and Shawbrook and OneSavings succeeded in establishing that the relevant percentage share was only 50%. That was an important issue for Shawbrook and OneSavings because if Ms Munroe and Ms Benjamin established that they owned

100% of the beneficial interests, then the argument based on section 63 of the 1925 Act would fall away and be of no benefit to Shawbrook and OneSavings.

36. Shawbrook and OneSavings succeeded in establishing that they were subrogated to the earlier mortgages which had been redeemed with their monies. Ms Munroe and Ms Benjamin succeeded to some extent in achieving limitations on the extent of that subrogation but Shawbrook and OneSavings were the substantial winners on that issue. Again, the claim to subrogation was important to Shawbrook and OneSavings.

37. Turning to the issues raised by the amended pleadings in October and November 2019, there was a detailed examination at the trial as to Mr Agrawal's involvement in the fraud and as to the allegation that the TR1s were shams. Shawbrook and OneSavings did enter the fray as to whether Mr Agrawal was a party to the fraud and they lost on that point. From my consideration of the judgment, it is obvious that this was a major issue which took some time at the trial.

38. As regards the allegation of sham, as a result of the appeals, it has now been held that the TR1s were not void and of no effect. The costs in the county court must reflect that outcome rather than the different outcome arrived at by the judge. Shawbrook and OneSavings took other points in opposition to a finding of sham. These were the point about the transaction being a three-party transaction and the point about the effect of earlier court orders. Shawbrook and OneSavings lost on those points before the judge and I have not decided them on the appeals. It would be open to me to take the view that because Shawbrook and OneSavings succeeded overall on the issue of sham, I should not disallow costs incurred by them in putting forward these further arguments on which they did not prevail. Conversely, it is open to me to disallow the costs incurred in relation to those points.

39. Finally, I did not accept Shawbrook's and OneSavings' submissions as to the form of rectification of the registered titles. Those submissions took up most of the time at the consequentials hearing on 25 November 2019 but those costs were not costs in the county court.

40. I propose to deal with the period up to the amendment to the pleadings in October and November 2019 separately from the following period.

41. In the case of Ms Munroe, in the period prior to her amendments which were permitted on 8 October 2019, I hold that she should pay 95% of Shawbrook's costs. Shawbrook did not contest the question of forgery on which Ms Munroe succeeded. Ms Munroe lost on her claim to be sole beneficial owner and lost on the main issue as to subrogation. I would disallow 5% of Shawbrook's costs to reflect the extent to which Ms Munroe succeeded in limiting Shawbrook's claim to subrogation. This order for costs will not include the costs of the application for an order for sale in so far as those costs (if any) were specific to the question of whether there should be an order for sale, which question has not yet been decided. In the case of Ms Benjamin, in the period up to her amendments which were permitted on 28 November 2019, I hold that she should pay 95% of OneSavings' costs. Her position was essentially the same as that of Ms Munroe save that there was no application for an order for sale.

42. In the period following 8 October 2019, as to Ms Munroe, the issues were extended to include a detailed allegation as to Mr Agrawal's involvement on which Ms Munroe succeeded. As to the issue of sham, my finding is that she ought to have lost on that issue in the county court but I have not decided a number of sub-issues which were raised by Shawbrook. To reflect this balance of success and failure, I hold that Shawbrook should recover 65% of its costs after 8 October 2019. As before, these

costs will not include the costs of the application for the order for sale (as described above). I reach the same conclusion in relation to Ms Benjamin save that the effective date of her amendment was 28 November 2019.

43. The costs in the county court will be the subject of a detailed assessment on the standard basis.

44. Shawbrook asks for an order that Ms Munroe do make an interim payment on account of costs. Shawbrook has not provided a statement of its costs in the county court although Ms Hayes made submissions based on her instructions as to what those costs were. I do not consider that I should make an order for interim payment without more reliable information as to the relevant costs. If the matter is not agreed, then I would allow Shawbrook to renew its application for an order for an interim payment where the application is supported by reliable information as to the relevant costs. However, if I were to make an order for an interim payment against Ms Munroe, I would grant her a stay of that order pending appeal. Ms Munroe has provided information as to her financial position and I am told that she has applied to the Court of Appeal for permission to appeal against the order I made allowing the appeal. In those circumstances, I would adjourn any application which might be made by Shawbrook for an interim payment until the outcome of that appeal is known and, in those circumstances, Shawbrook need not make such an application until that time.

45. I will extend the time for Shawbrook and OneSavings to commence detailed assessment of their costs in the county court so that time will not run against them until the outcome of the appeal to the Court of Appeal is known.

The costs of the appeal

46. I have described the issues on the appeal and the outcome of the appeals. I will deal with both appeals in the same way. Shawbrook and OneSavings succeeded on the matters dealt with in the judgment handed down on 27 August 2021 but in that judgment I did not deal with a number of points which had been argued by Shawbrook and OneSavings. It would be open to me to take the view that because Shawbrook and OneSavings succeeded overall on the appeals, I should not disallow costs incurred by them in putting forward these further arguments on which I did not rule. Conversely, it is open to me to disallow the costs incurred in relation to those points. I conclude that the fair result is to disallow a part of the costs to reflect the fact that all parties incurred costs on issues raised by Shawbrook and OneSavings which I have not decided. I will order Ms Munroe to pay 85% of Shawbrook's costs of the appeal and I will order Ms Benjamin to pay 85% of OneSavings' costs of the appeal.

47. Mr Royle suggested that I should disallow some of Shawbrook's costs because, he said, it had succeeded on a new point that was not taken in the county court and because it had not sufficiently drawn that fact to the attention of the appeal court. As to that, the county court judge was bound by *Penn* whereas I was not and I was very well aware of what had been argued in the county court and how the case was presented on appeal. These facts do not justify any disallowance of Shawbrook's costs of the appeal.

48. Following the hearing of the appeal and before the release of my draft judgment, Shawbrook and OneSavings applied for permission to amend their Appellant's Notices. I decided that they did not need permission to amend and I did not rule on that application. I direct that Shawbrook and OneSavings shall bear their own costs of that application.

49. As to the consequentials hearing on 25th November 2021, most of the time of that hearing was taken up with considering Shawbrook's and OneSavings' submissions as to rectification of the registered titles, which submissions I did not accept. I hold that Shawbrook and OneSavings should bear their own costs of that hearing but that the costs of drafting orders and the preparation for that hearing (but not the brief fees for that hearing) should be considered to be the costs of the appeal.

50. The parties appear to disagree as to whether the costs payable by Ms Munroe and Ms Benjamin can be added to the sums secured in favour of Shawbrook and OneSavings, respectively. As that is not an issue which arose on the appeals nor as part of my jurisdiction as to who should bear the costs of the appeals, I will not deal with it as part of the matters consequential on the appeals. That issue will have to be dealt with separately if it is not agreed.

51. Mr Royle submitted that instead of the court making such order for costs as would otherwise be appropriate, it should leave Shawbrook to claim an indemnity from the Land Registry. There was no investigation as to what claim Shawbrook might be able to make against the Land Registry but, in any event, the possibility of such a claim if any) does not in my judgment alter how I should approach the question of costs as between the parties.

The summary assessment of costs on appeal

52. All parties have asked me to carry out a summary assessment of the costs incurred by Shawbrook and OneSavings. In the written submissions which I have received a large number of challenges have been made to their statements of costs. I have considered whether to direct that these costs should be the subject of a detailed assessment given

the number of challenges and in view of the fact that the costs of the proceedings in the county court will be the subject of a detailed assessment. With some hesitation but in view of the joint invitation to me to carry out a summary assessment, I will do so. However, it must be recognised that for the purposes of the summary assessment, I am asked to decide between what are essentially assertions, without much if any evidence, on many points. My assessment will necessarily be more robust rather than fully refined.

53. I find that it was reasonable for Shawbrook and OneSavings to have separate solicitors. It is accepted that it was reasonable for those solicitors to instruct the same counsel, Ms Hayes. The fees reasonably chargeable by Ms Hayes must reflect the fact that she will receive two fees, one from each firm of solicitors, for work which is largely duplicated.

54. As to the fees for Ms Hayes, I will consider the following separately: fees before the appeal hearings, fees for the permission application, fees for the appeal hearings, the fee for the application for permission to amend; the fee for hearing on 25 November 2021. My conclusions on these matters are:

    i) The sums claimed for work before the appeal hearings are £8,675 for Shawbrook and £7,025 for OneSavings. I consider that a total reasonable sum would have been £10,000 which I will apportion £5,500 to Shawbrook and £4,500 to OneSavings as the solicitors and counsel seem to have considered that there was some difference between the two Appellants.

ii) The fee for the permission application for Shawbrook was £1,500 and I assume the same fee was charged to OneSavings, although it is not disclosed separately. I hold that a total fee of £3,000 split equally was reasonable.

iii) The fees for the appeal were £17,000 for each Appellant, a total of £34,000. I consider that a reasonable total fee would have been £20,000, again split equally.

iv) I disallow the fee claimed for the amendment application; this seems to have been claimed only in the case of Shawbrook.

v) As to the hearing on 25 November 2021, I disallow the brief fee for the attendance on that day but I will allow £500 for each of Shawbrook and OneSavings for dealing with the draft order and any other consequential matters.

55. As to the solicitors' charges, there is no challenge to the rates charged by the solicitors for Shawbrook.

56. Ms Munroe challenges the sums claimed for attendances on Shawbrook and attendances on others. On the material before me, I hold that these sums are reasonable and I will allow them.

57. Ms Munroe challenges a large number of items in the schedule of work done on documents. With the exception of items 41 to 44, on the material before me, I hold that the sums claimed are reasonable and I will allow them. Items 41 to 44 relate to Shawbrook's application for permission to amend its Appellant's Notice which I will disallow.

58. Shawbrook is entitled to include in its costs the VAT which it incurred in relation to those costs. That is because it is not entitled to recover that VAT from HMRC as input tax as it related to an exempt activity by reason of the provision which states that the making of an advance or the granting of any credit is an exempt activity: see Value Added Tax Act 12994, section 31(1) and Schedule 9, Group 5 - Finance. That is confirmed in the evidence submitted on behalf of Shawbrook.

59. I have now dealt with all of the challenges to the statement of costs prepared by Shawbrook. The sum due to Shawbrook should be calculated in accordance with these findings and the further finding that Ms Munroe should pay to Shawbrook 85% of its costs of the appeal.

60. In relation to the statement of costs provided by OneSavings, I have already dealt with counsel's fees. I need to make further findings as to the solicitors' charges. The statement for OneSavings claims solicitors' charges of £275 (Grade A) and £245 (Grade B). It is said that these rates are unreasonably high. I consider that I ought to use rates of £225 (Grade A) and £200 (Grade B).

61. In relation to OneSavings, Ms Benjamin submits that a number of other charges are unreasonably high. On the material before me, I hold that the hours claimed are reasonable and I will allow them. The charges should be recalculated using the rate of £225 per hour for a Grade A fee earner. OneSavings' position in relation to VAT is slightly different from that of Shawbrook. Because of the nature of OneSavings' business, it is able to recover 3% of the VAT incurred on the relevant charges and credit for this is given in its statement of costs.

62. I have now dealt with all of the challenges to the statements of costs prepared by OneSavings. The sums due to OneSavings should be calculated in accordance with these findings and the further finding that Ms Benjamin should pay to OneSavings 85% of its costs of the appeal.

63. Subject to the question of a possible stay pending appeal (to which I refer below), I consider that it is appropriate for Ms Munroe and Ms Benjamin to have 35 days in which to pay the sums I have assessed as the recoverable costs of the appeal.

64. Ms Munroe and Ms Benjamin have applied for a stay of the order for the costs of the appeal pending a further appeal to the Court of Appeal. I am told that they have applied to the Court of Appeal for permission to appeal. I have been provided with information as to their financial position. I consider that in view of their financial position and the effect that enforcement of the orders for costs would have on them, it is appropriate to grant a stay of those orders pending the outcome of the appeal.