Neutral Citation Number: [2021] EWHC 2411 (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: 27/08/2021

**Before** :

**MR JUSTICE 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 **Lightfoot 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

Hearing dates: 28 and 29 July 2021
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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 27 August 2021.**

## MR JUSTICE MORGAN:

*Introduction*

1. This judgment deals with two separate appeals which raise essentially the same issues. The first issue which arises is: where a property is owned legally and beneficially by A and B, and B forges A's signature on a transfer of the property and the transferee (C) knows of the forgery, is the transfer a sham and of no effect or is it effective to transfer B's equitable interest in the property to C? The second issue which arises is: if the transfer would not be a sham and where C charges the property to a lender, should the court as a matter of public policy, and applying the law as to illegality in relation to transactions, hold that B's equitable interest remains with B so that C does not acquire any interest and is incapable of charging any interest in favour of the lender?

2. The first appeal relates to a property known as 67 Cuckoo Avenue, London, W7 1BW ("Cuckoo Avenue") where the dispute is between Ms Munroe and Shawbrook Bank Ltd ("Shawbrook"). The second appeal relates to a property known as 46 Rydal Gardens, Middlesex, HA9 8RZ ("Rydal Gardens") where the dispute is between Ms Benjamin and OneSavings Bank plc ("OneSavings"). Adopting the initials used above, Ms Munroe and Ms Benjamin are in the position of A and Shawbrook and OneSavings are in the position of lenders with charges granted to them by C.

3. The cases concerning Cuckoo Avenue and Rydal Gardens were tried together in the county court. Ms Hayes appeared on behalf of Shawbrook and OneSavings at the trial and again on these appeals. Mr Royle appeared on behalf of Ms Munroe at the trial and again on appeal. Similarly, Ms Eilledge appeared on behalf of Ms Benjamin at the trial and again on appeal.

*Cuckoo Avenue*

4. Cuckoo Avenue is registered at HM Land Registry under Title Number NGL431328. The property was acquired by Ms Munroe and Mr Charles in September 1997. The transfer of the registered title was taken in their joint names and recorded that they were to hold the property as beneficial joint tenants. At the trial, Ms Munroe contended that the property was, from the outset, held on trust for her alone so that Mr Charles did not have any equitable interest in the property. The judge did not accept that contention and held that at all times until Mr Charles's bankruptcy on 2 August 2011 (to which I refer below), the property was held on trust for Ms Munroe and Mr Charles as beneficial joint tenants.

5. On acquiring Cuckoo Avenue in September 1997, Mr Charles and Ms Munroe mortgaged it to the Abbey National Building Society, which later became Santander UK plc.

6. On 2 August 2011, a bankruptcy order ("the first bankruptcy order") was made in relation to Mr Charles. On 15 September 2011, a Mr Hicken was appointed as his trustee in bankruptcy. The order and/or the appointment of the trustee had the effect of severing the joint tenancy: see the discussion in Megarry & Wade, The Law of Real Property, 9th ed. at para. 12-046. The result was therefore that the property was

then held by Ms Munroe and Mr Charles on trust for Ms Munroe and for the trustee in bankruptcy, as tenants in common in equal shares.

7. Between August 2012 and May 2013, Mr Charles engaged in discussions with a Mr Agrawal who controlled various companies with the word "Victus" in their names. The judge described these discussions in some detail but it is not necessary on this appeal to refer to all of that detail. Essentially, what was proposed was that Mr Agrawal (whether by himself or through his companies) would provide funds (mostly if not entirely borrowed from others) which would be used to obtain the annulment of Mr Charles' bankruptcy and to discharge the existing charges on Cuckoo Avenue and Rydal Gardens in return for which some of Mr Agrawal's companies would acquire title to, or an interest in, Cuckoo Avenue and Rydal Gardens.

8. By an order made in the Kingston-upon-Thames County Court on 16 May 2013, the first bankruptcy order in relation to Mr Charles was annulled. The funds needed to secure the payment of Mr Charles' creditors and the fees and charges of the trustee in bankruptcy were provided by Mr Agrawal or one or more of his companies. The effect of the annulment was that the property was held by Ms Munroe and Mr Charles on behalf of themselves, as tenants in common in equal shares.

9. There is a contract of sale, or a purported contract of sale in relation to Cuckoo Avenue. The contract was dated 17 May 2013 and provided for the sale of the property by Ms Munroe and Mr Charles to Victus Estates (2) Ltd ("V2") for £350,000 on 17 May 2013. The contract was signed by Mr Charles, and by Mr Agrawal on behalf of V2. The contract purported to be signed by Ms Munroe but it is now clear that she did not sign it and she did not authorise her signature to be placed on the contract; her signature was simply a forgery.

10. There is a form of TR1 in relation to Cuckoo Avenue. The TR1 was dated 17 May 2013. It named the transferor of the property as Ms Munroe and Mr Charles. It named the transferee of the property as V2. It stated that the consideration for the transfer was £350,000. The transfer was executed by Mr Charles. It may be open to argument whether the transfer was executed by V2 or by Victus Estates (3) Ltd ("V3") but I will proceed on the basis that the intended transferee was V2. The transfer stated that it was with full title guarantee. The transfer purported to be signed by Ms Munroe but it is now clear that she did not sign it and she did not authorise her signature to be placed on the transfer; her signature was simply a forgery.

11. In connection with the transfer of Cuckoo Avenue to V2, Shawbrook lent £234,964.02 to V2. Part of these monies, some £55,168.14, was used to redeem the earlier charge in favour of Santander.

12. On 17 May 2013, V2 executed an all monies charge over Cuckoo Avenue in favour of Shawbrook. Clause 2 of the charge provided that to the extent that the charge did not otherwise charge the property by way of legal mortgage then V2 charged by way of fixed charge any and all of its present and future rights, title and interest in the property.

13. I understand that Mr Agrawal entered into a guarantee with Shawbrook in relation to the loan to V2, although a copy of the guarantee was not in the appeal bundle.

14. Following the transfer of 17 May 2013, V2 applied to the Land Registry to be registered as proprietor of Cuckoo Avenue and on 1 November 2013, it was charge duly registered as such. Following the charge of 17 May 2013, Shawbrook applied to the Land Registry to be registered as a charge in relation to Cuckoo Avenue and on 1 November 2013 it was duly registered as such.

15. On 2 December 2014, a second bankruptcy order was made in relation to Mr Charles. On 18 December 2014, a Mr Edwards was appointed as his trustee in bankruptcy.

16. On 26 June 2018, the county court in the present proceedings made an order recording various terms of settlement between some of the parties. So far as is now relevant, Mr Edwards as trustee in bankruptcy of Mr Charles came to an agreement with Ms Munroe under which it was agreed that Mr Edwards should transfer, and did transfer, to Ms Munroe all his beneficial interest, if any, in Cuckoo Avenue.

*Rydal Gardens*

17. Rydal Gardens is registered at HM Land Registry under Title Number MX159824. Rydal Gardens was acquired by Ms Benjamin and Mr Charles in March 2000. The transfer of the registered title was taken in their joint names and recorded that they were to hold the property on trust for themselves as joint tenants. At the trial, Ms Benjamin contended that the property was, from the outset, held on trust for her alone so that Mr Charles did not have any equitable interest in the property. The judge did not accept this contention and held that at all times until Mr Charles's bankruptcy the property was held on trust for Ms Benjamin and Mr Charles as beneficial joint tenants.

18. On acquiring Rydal Gardens in March 2000, Ms Benjamin and Mr Charles mortgaged the property to the Halifax Building Society, which later became the Bank of Scotland plc.

19. The bankruptcy order made in relation to Mr Charles on 2 August 2011 and/or the appointment of a trustee in bankruptcy had the effect of severing the joint tenancy so that the property was then held by Ms Benjamin and Mr Charles on trust for Ms Benjamin and for the trustee in bankruptcy, as tenants in common in equal shares.

20. As stated above, the bankruptcy order in relation to Mr Charles was annulled on 16 May 2013. The effect of the annulment was that the property was held by Ms Benjamin and Mr Charles on behalf of themselves, as tenants in common in equal shares.

21. There is a contract of sale, or a purported contract of sale, in relation to Rydal Gardens. The contract was dated 17 May 2013 and provided for the sale of the property by Ms Benjamin and Mr Charles to Victus Estates (1) Ltd ("V1") for £435,000 on 17 May 2013. The contract was signed by Mr Charles, and by Mr Agrawal on behalf of V1. The contract purported to be signed by Ms Benjamin but it is now clear that she did not sign it and she did not authorise her signature to be placed on the contract; her signature was simply a forgery.

22. There is a form of TR1 in relation to Rydal Gardens. The TR1 was dated 17 May 2013. It named the transferor of the property as Ms Benjamin and Mr Charles. It

named the transferee of the property as V1. It stated that the consideration for the transfer was £435,000. The transfer was executed by Mr Charles. It may be open to argument whether the transfer was executed by V1 or by V3 but I will proceed on the basis that the intended transferee was V1. The transfer stated that it was with full title guarantee. The transfer purported to be signed by Ms Benjamin but it is now clear that she did not sign it and she did not authorise her signature to be placed on the transfer; her signature was simply a forgery.

23. In connection with the transfer of Rydal Gardens to V1, OneSavings lent £332,520 to V1. Of these monies, some £162,495.78 was used to redeem the earlier charge in favour of Bank of Scotland.

24. On 17 May 2013, V1 executed an all monies charge over Rydal Gardens in favour of OneSavings. Mr Agrawal was a party to the charge and gave a "guarantee" under which he was a principal debtor with V1 for the sums due from V1 under the charge.

25. Following the transfer of 17 May 2013, V1 applied to the Land Registry to be registered as proprietor of Rydal Gardens and, on 26 June 2013, it was duly registered as such. Following the charge of 17 May 2013, OneSavings applied to the Land Registry to be registered as a chargee in relation to Rydal Gardens and, on 26 June 2013, it was duly registered as such.

26. As stated above, on 2 December 2014, a second bankruptcy order was made in relation to Mr Charles and, on 18 December 2014, a Mr Edwards was appointed as his trustee in bankruptcy.

27. On 27 July 2018, the county court in the present proceedings made an order recording various terms of settlement between some of the parties. So far as is now relevant, Mr Edwards as trustee in bankruptcy of Mr Charles came to an agreement with Ms Benjamin, V1 and OneSavings pursuant to which Mr Edwards withdrew his claim that he had any beneficial interest in Rydal Gardens.

*The judgment and order under appeal*

28. In his judgment, the judge set out the issues to be decided. His judgment continued with a lengthy narrative in which he made a large number of findings of fact. Those findings included findings that Ms Munroe's and Ms Benjamin's signatures were forged on the contracts and the TR1s to which I have referred. The findings also dealt with the financial arrangements between Mr Charles and Mr Agrawal. Mr Agrawal (whether by himself or through one or more of his companies) entered into short term borrowing arrangements to enable him to put up the money to secure the annulment of Mr Charles' first bankruptcy order. V2 and V1 borrowed from Shawbrook and OneSavings to pay off the short term borrowings and to redeem the pre-existing charges on Cuckoo Avenue and Rydal Gardens. The arrangements also involved two other properties known as Southcroft and Thornley but it is not necessary for the purposes of the appeal to refer to the findings in relation to those properties. The judge then addressed the issues.

29. The judge held that prior to the first bankruptcy order, Cuckoo Avenue was held by Ms Munroe and Mr Charles on trust for themselves as beneficial joint tenants. The judge said that the joint tenancy was severed on the making of the first bankruptcy

order, although it may be that the severance occurred on the appointment of the first trustee in bankruptcy. On severance, a one-half share in the equity of the property vested in the trustee. The judge made a similar finding in relation to the position of Ms Benjamin and Mr Charles in respect of Rydal Gardens.

30. The judge then considered whether Mr Agrawal had known, at the time of the transactions in May 2013, that Ms Munro and Ms Benjamin did not consent to the sales of Cuckoo Avenue and Rydal Gardens, respectively. After a careful assessment of the evidence, the judge held that Mr Agrawal did know that Ms Munroe and Ms Benjamin did not give their consent to the sales and that their signatures were forged on the relevant conveyancing documents. The judge agreed with the case put forward on behalf of Ms Munroe and Ms Benjamin that the arrangements between Mr Agrawal and Mr Charles were "a mortgage fraud" and that it was a necessary part of the scheme that their equity in their respective properties would be taken from them. The judge described the forged contracts and transfers as "fraudulent". Shawbrook and OneSavings sought permission to appeal against these findings of fact in relation to Mr Agrawal but permission was refused.

31. The judge then recorded that if the court found that the transfers to V1 and V2 were fraudulent, then it was not disputed that the transfers did not transfer the legal title to the properties and that the registered titles to the properties ought to be rectified either to restore the former legal position or to reflect the judge's further findings as to the beneficial ownership of the property.

32. The judge then referred to the settlement agreements which Ms Munroe and Ms Benjamin separately reached with Mr Edwards, the trustee in bankruptcy of Mr Charles. In relation to Rydal Gardens, the judge said that the trustee had disclaimed any interest in that property. This was not a reference to a form of disclaimer which can be made by an insolvency practitioner but was simply a shorthand description of what the trustee did in the settlement recorded in the order of 27 July 2018, to which I have referred. The judge then said that subject to the rights of Shawbrook and OneSavings, Ms Munroe and Ms Benjamin were the legal and beneficial owners of their respective properties. I do not think that that was necessarily a correct analysis of the effect of the two different settlements but, as the judge himself said that his comment was subject to the rights of Shawbrook and OneSavings and they are the only appellants, it is perhaps not necessary to explore that matter further.

33. The next section of the judgment dealt with certain issues arising under the heading "sham". The judge referred to three arguments put forward on behalf of Shawbrook and OneSavings as to why the transfers, although fraudulent, were nonetheless effective. The first argument was given the heading "a composite transaction". The second argument was said to involve election based on certain orders made in these proceedings; I have not referred to all of the orders which were said to be relevant to this point. The third argument was based on section 63 of the Law of Property Act 1925 ("the 1925 Act").

34. The judge dismissed the first of these arguments. He distinguished the position in the present case from earlier cases which discussed arguments based on a possible *scintilla temporis* between a transfer of a title and the grant of a charge by the transferee, where the monies advanced by the chargee to the transferee were to enable the transferee to acquire the property from a transferor.

35. As to the second of these arguments, the judge said that the argument was imaginative but hopeless.

36. That left the third argument, based on section 63 of the 1925 Act. The judge explained the normal operation of section 63 of the 1925 Act. He referred to the argument of counsel for Shawbrook and OneSavings to the effect that section 63 had the effect that Mr Charles transferred to V2 (or V1, as the case may be) his beneficial interest in each property and that V2 (or V1, as the case may be) then charged that beneficial interest to Shawbrook (or OneSavings, as the case may be).

37. The judge then referred to the argument of counsel for Ms Munroe and Ms Benjamin. They submitted that section 63 of the 1925 Act did not apply in this case. That was because, they said, where there was a fraudulent intent on the part of the transferor and the transferee, the transaction did not involve a conveyance because it was a sham. They said that that was the conclusion reached in a case "on all fours with the present one", namely the decision of the High Court in *Penn v Bristol and West Building Society* [1995] 2 FLR 938 ("*Penn*").

38. The judge then considered the decision at first instance in *Penn* [1995] 2 FLR 938. The part of the first instance decision which is relevant in the present case was not considered when that case went to the Court of Appeal on a different point: see [1997] 1 WLR 1356. The judge in the present case analysed *Penn*, consistently with the submissions made by counsel for Ms Munroe and Ms Benjamin, as involving the following proposition:

> " … because both husband and the 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 … "

39. He noted that Megarry & Wade, 9th ed. at para. 12-039 doubted this analysis of the decision in *Penn* because "the parties plainly did intend it to have legal consequences".

40. The judge then gave his own reasons for his conclusion, as follows:

> "156. In my view the *Penn* conclusion is the correct one in this case. I also think it is binding on me and so I'm obliged to follow it. However, if it was not binding on me my reasoning would be different but with the same outcome. It is as follows:
>
> a. The starting point of the analysis should not be the broad brush of is it at (*sic*) a sham or not but the particular question which it is necessary for the court to answer.
>
> b. In the present circumstances it is the Banks which wish to rely on the relevant TR1s as the source of their mortgage rights. The core of the Banks' position is that V1 and V2 got equitable rights under the TR1s which could then be charged as security.

> c. So the key question is did V1 and V2 get equitable rights under the TR1?
>
> d. In *Ahmed* the answer to the equivalent question involved the position of an innocent purchaser.
>
> e. In *Penn* the answer to that question involved a purchaser who was a participant in a fraud.
>
> f. The very purpose of the sham transaction here, to the knowledge of and with the participation of Mr Agrawal on behalf of V1 and V2, was to put V1 and V2 in the position where it could make dishonest representations with an intent to mislead to the Banks and the Land Registry (and through the Land Registry the public generally).
>
> g. In addition it was an obvious consequence of this fraud that a third party would threaten the stability of the home ownership of Ms Benjamin and Ms Munroe. Both Ms Benjamin and Ms Munroe trusted Mr Charles to act consistently with their home rights and the home rights of their children (or more generally the family interest which was the intent of the joint purchase). Mr Agrawal's conduct in the Summer of 2014 illustrates and reinforces this point – it was his fraud that enabled him to threaten their home with the title documents in favour of V1 and V2.
>
> h. Holding all those considerations in mind, the answer to the question posed at c. above must be no, whether because the shared sham intent extended to the rights to be acquired by V1 / V2[1] or because equity will not assist a fraudster by recognising the rights obtained by the fraud or because this is the solution required by a *Patel v Mirza* analysis (which would include that any finding otherwise might encourage fraudulent shams in a domestic context).
>
> 157. I conclude that the Banks can have no interest arising from the charges granted by V1 and V2 in their favour because V1 and V2 acquired nothing as a result of the sham TR1s. The Land Register should be rectified accordingly (I mention that here since it could be said to be relevant to whether there has been unjust enrichment)."

41. I draw attention to the judge's phrase "the *Penn* conclusion" which was different from the phrase he had used in the immediately preceding paragraph, namely, "the *Penn* analysis". As I read the judgment, by referring to "the *Penn* analysis", the judge was

[1] I agree with what Ms Eilledge said to me in oral argument on this point: the TR1 should not be recognised as a "conveyance" where the parties involved knew that its purported transfer of title was a fraud. I have also considered the Banks' right to waive the fraud on them and enforce their charge as against V1/V2 but that still requires an answer to the question posed and I cannot see in principle how the Banks' choice should alter the answer. [This is the judge's footnote.]

referring to the proposition which I have quoted at paragraph 38 above. By referring to "the *Penn* conclusion", the judge was referring to the result arrived at in *Penn*, which was that the conveyance in that case was of no effect and that section 63 did not apply to it. In paragraph [156] of his judgment, the judge appeared to be deliberately distinguishing between the result in *Penn* and the reasoning in *Penn*. The judge thought that the result in *Penn* was correct. However, he explained that he did not adopt the reasoning in *Penn*, save to the extent that he was bound to do so. He gave his own, different, reasoning in support of the result in *Penn* as set out in paragraph [156] of his judgment.

42. The judge then considered whether Shawbrook and OneSavings could claim to be subrogated to the rights of the earlier chargees (Santander in relation to Cuckoo Avenue and Bank of Scotland in relation to Rydal Gardens) when part of the sums advanced by Shawbrook and OneSavings respectively had been used to redeem the earlier charges. The judge held that Shawbrook and OneSavings were entitled to claim to be subrogated and he then dealt with a number of points which arose in that context.

43. The judge then held that the registered titles needed to be rectified and he considered that that was not controversial in the light of his findings as to fraud.

44. On 26 February 2020, there was a further hearing to deal with matters consequential on the earlier judgment. The judge prepared orders to give effect to his conclusions. He also gave a short judgment dealing with some of the matters dealt with in the orders. In particular, the judgment dealt with issues arising as to subrogation and also dealt with issues as to costs. It is not necessary at this stage to refer to those matters.

45. The order made in relation to Ms Munroe and Cuckoo Avenue first declared that her signature had been forged on the contract and the transfer in that case so that those documents were void in relation to her. The order then declared that the conveyancing documents were known to Mr Charles and to V2 and to Mr Agrawal "to have been entered into without the knowledge or consent of [Ms Munroe] and to have been a fraud upon her and **consequently** [V2] acquired no right or interest in the Property as a result of the TR1 or otherwise." [My emphasis].

46. The judge's order then dealt with Shawbrook's rights to be subrogated to the earlier charge over the property. Then the order dealt with the beneficial interests in the property, on the basis that V2 had acquired no interest in the property. The result was Mr Charles retained a half share in the property following the annulment of the first bankruptcy order until he became bankrupt for a second time whereupon his half share vested in this second trustee in bankruptcy. It was also declared that the second trustee in bankruptcy assigned that half share to Ms Munroe with the result that she was entitled to all of the equity in the property subject only to Shawbrook's rights of subrogation in relation to the earlier charge.

47. The order continued with further orders consequential on these declarations. In particular, the order provided that the registered title should be rectified so that Ms Munroe was substituted for V2 as the registered proprietor and so that the charge dated 17 May 2013 in favour of Shawbrook be removed. It was also ordered that Shawbrook's claim to an equitable charge over any beneficial interest in the property

acquired by V2 be dismissed and provision was made for the recording of Shawbrook's subrogated rights.

48. The order made in relation to Ms Benjamin and Rydal Gardens took essentially the same form as the order in relation to Ms Munroe and Cuckoo Avenue. Specifically in relation to the beneficial interests in Rydal Gardens, the order declared that as a result of the second trustee in bankruptcy withdrawing his claim to any beneficial interest in the property, Ms Benjamin was entitled to all of the equity in the property.

*The issues on the appeal*

49. On 20 November 2020, Sir Alastair Norris granted permission to appeal on some of the grounds of appeal but, in particular, he refused permission to appeal against the judge's finding that Mr Agrawal knew that the signatures of Ms Munroe and Ms Benjamin had been forged. When describing the reasoning in the judgment under appeal and the judge's references to "sham", Sir Alastair Norris commented:

> "I am not sure that the reference to "sham" was really helpful, but that is the way that it is put in the judgment."

50. I consider that it is helpful to analyse the situation in these two cases by examining the following issues:

i) before considering the arguments based on sham, fraud and equitable principles, what was the effect of the TR1s in this case?

ii) before considering the arguments based on sham, fraud and equitable principles, what was the effect of the charges to Shawbrook and OneSavings?

iii) before considering the arguments based on sham, fraud and equitable principles, what was the effect of the registration of V2 and Shawbrook at the Land Registry (in the case of Cuckoo Avenue) and of V1 and OneSavings (in the case of Rydal Gardens)?

iv) what was decided in *Penn*?

v) was *Penn* rightly decided?

vi) what did the judge decide about sham in the present cases?

vii) were the transactions of no effect because they were a sham?

viii) what was the effect of the transactions, subject to arguments as to fraud and equitable principles?

ix) what are the principles to apply in relation to the fraud in the present cases?

x) What is the result of applying those principles?

*Discussion and conclusions*

51. The first issue I will address is: before considering the arguments based on sham, fraud and equitable principles, what was the effect of the TR1s in this case? In the case of Cuckoo Avenue, the registered title was vested in Ms Munroe and Mr Charles. In order for there to be a valid TR1 of that property, it was necessary for both Ms Munroe and Mr Charles to execute it. The TR1 in that case did purport to be executed by Ms Munroe but her signature was forged and the document has effect, if any effect, on the basis that it was not executed by Ms Munroe. Accordingly, the TR1 was not a valid TR1 in relation to the registered title to Cuckoo Avenue. The TR1 did not entitle V2 to be registered as proprietor of that property. The registered title ought to have remained vested in Ms Munroe and Mr Charles. The same reasoning applies in the case of Rydal Gardens to the position of Ms Benjamin and Mr Charles. I understand that this reasoning is not in dispute.

52. The real issue as to the effect of the TR1s in this case concerns the application of section 63 of the 1925 Act to the TR1s. Section 63(1) provides that every conveyance is effectual to pass all the estate, right, title, interest, claim and demand which the conveying parties respectively have, in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same. Section 63(2) provides that section 63 applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and the provisions therein contained. "Conveyance" is defined in section 205(1)(ii) of the 1925 (unless the context otherwise requires) so as to include a number of specified instruments and every other assurance of property or of an interest therein by any instrument.

53. A TR1 will normally qualify as an assurance of property or of an interest therein, by an instrument, within section 63 of the 1925 Act. In the case of Cuckoo Avenue, because Ms Munroe did not execute the TR1, section 63 is not relevant to her interest in that property. However, Mr Charles also had an interest in Cuckoo Avenue and he did execute the TR1. Prima facie, the effect of section 63 in relation to Mr Charles' interest in Cuckoo Avenue would be that the TR1 would be to pass Mr Charles' equitable interest in Cuckoo Avenue to the transferee with Ms Munroe retaining her equitable interest in the property. That this is indeed the position is confirmed by the decision in *Ahmed v Kendrick* (1987) 56 P&CR 120. In that case, the registered title to a property was vested in a husband and wife as joint tenants at law and in equity. The husband executed a land registry transfer of the registered title and forged his wife's signature on the transfer. It was held that the transfer did not transfer the wife's interest in the property to the transferee but, applying section 63 of the 1925 Act, the transfer was effective to sever the joint tenancy in equity and to transfer to the transferee the husband's equitable interest in the property. The same reasoning applies in the case of Rydal Gardens to the position of Ms Benjamin and Mr Charles.

54. As I have indicated, I will later consider the arguments based on sham, fraud and equitable principles. However, before leaving section 63 of the 1925 Act, it is convenient to deal with the point made by the judge in his footnote to paragraph 156 of his judgment. On one reading of that footnote, his point related to the meaning of "conveyance" for the purpose of section 63. The judge said that the TR1s should not be considered to be "conveyances" because the purported transfers of title were frauds. If the judge intended to hold that a fraudulent transfer did not come within the statutory definition of a "conveyance", then I would not agree. The TR1s were in a

form which satisfied the definition of conveyance in section 205 of the 1925 Act. Section 63 applies in the case of such a conveyance if and insofar as a contrary intention is not expressed in the conveyance. The TR1s did not contain any wording which expressed an intention contrary to the application of section 63. The subjective intentions of Mr Charles and V2 or V1, as the case may be, do not amount to the expression of a contrary intention contained in the conveyance. This is, of course, subject to any principle which governs how the court should respond to documents which are prepared for the purpose of fraud, a subject I will consider later in this judgment.

55. Before considering the arguments based on sham, fraud and equitable principles, the next issue is as to the effect of the charges in favour of Shawbrook and OneSavings. In the case of Cuckoo Avenue, the effect of the TR1 would be to vest in V2, a half share in the equity of the property. The charge granted by V2 in favour of Shawbrook could not be an effective charge over the registered title to the property because, on the above reasoning, V2 was not entitled to be registered as the proprietor of the property. However, by virtue of section 63 of the 1925 Act, that charge would be effective as a charge over V2's equitable interest in the property. The same reasoning applies to Rydal Gardens and to the position of V1 and OneSavings.

56. Before considering the arguments based on sham, fraud and equitable principles, what was the effect of the registration of V2 and Shawbrook at the Land Registry (in the case of Cuckoo Avenue) and of V1 and OneSavings (in the case of Rydal Gardens)? Although the TR1s in these cases were not validly executed, V2 and V1 did apply to be registered as proprietors and were so registered. Similarly, Shawbrook and OneSavings did apply to be registered in relation to their charges over the respective properties and were so registered. Registration vested the title to the respective properties in V2 and V1 and conferred on Shawbrook and OneSavings charges over their respective properties.

57. It was agreed that the registration of V2 and V1 as proprietors and Shawbrook and OneSavings as chargees did not affect the equitable interests of Ms Munroe and Ms Benjamin in their respective properties. Even on the assumption that the dispositions were for valuable consideration within section 29 of the 2002 Act, the interests of Ms Munroe and Ms Benjamin were overriding interests pursuant to section 29(2)(a)(ii) and schedule 3, paragraph 2 as the interests of persons in actual occupation of the relevant land.

58. The registration of V2 and V1 and of Shawbrook and OneSavings is subject to the possibility that the register can be rectified by an order of the court under schedule 4 to the Land Registration Act 2002 ("the 2002 Act"). Paragraph 2 of schedule 4 gives the court power to rectify the register in certain circumstances. This power is subject to paragraph 3(2) of schedule 4 where any rectification would affect the title of a proprietor of a registered estate in land. Further, paragraph 3(3) of schedule 4 provides for the approach to be adopted by a court when asked to exercise the power to rectify the register.

59. In general terms, the operation of schedule 4 to the 2002 Act was not in dispute in this case. It was accepted that Ms Munroe and Ms Benjamin were entitled to apply for rectification of the register in relation to their respective properties. In the case of Cuckoo Avenue, it was accepted that Ms Munroe was entitled to rectification of the

register to remove V2 as registered proprietor. There was a dispute, to which I will later refer, as to who should be registered in its place as registered proprietor. It was further agreed that Shawbrook should cease to be registered as chargee in respect of that property. It was also agreed that the same reasoning applied in the case of Rydal Gardens, Ms Benjamin and OneSavings.

60. I will next consider the decision in *Penn*. In *Penn*, a property which was not registered at the Land Registry was owned by a husband and wife as beneficial joint tenants. The husband executed a conveyance of the property to a Mr Wilson. The husband forged the wife's signature on the conveyance. Mr Wilson then executed a charge of the property in favour of a building society. It was held that the legal title to the property remained with the husband and the wife and that Mr Wilson was not entitled to be registered at the Land Registry as proprietor on first registration. It was also held that the wife's interest in the property was not affected by the conveyance. It was argued, in reliance on section 63 of the 1925 Act, that the conveyance was effective to sever the joint tenancy in equity and to transfer to Mr Wilson the husband's equitable interest in the property; *Ahmed v Kendrick* was relied on in support of this argument. However, the judge held that the conveyance was a sham principally because Mr Wilson knew that the wife's signature had been forged and that the conveyance was to be used as a device to deceive the building society. The result of holding that the conveyance was a sham was that it was of no effect for any purpose and it did not transfer the husband's equitable interest in the property to Mr Wilson. The result was that Mr Wilson did not acquire any interest in the property and he had nothing which could be charged by him to the building society so that the purported charge to the building society did not give it a charge over any interest in the property.

61. There was argument before me as to whether *Penn* was rightly decided. As to that, if the judge in *Penn* had been right to hold that the transaction in that case was a sham, then it would indeed follow that the transaction was void. A purported conveyance which is void does not have any legal effect. A purported conveyance which is void is not a "conveyance" for the purposes of section 63 of the 1925 Act and so section 63 would not take effect in relation to it.

62. So was the judge in *Penn* right to hold that the transaction in that case was a sham? *Penn* did not purport to lay down any new principle as to whether a purported transaction was a sham but simply sought to apply the established principles as to whether something is a sham, as stated in *Snook v London & West Riding Investments Ltd* [1967] 2 QB 786 ("*Snook*"), which defined a sham as meaning "acts or documents which are intended by [the parties] to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create".

63. Thus, in *Penn*, if the judge had found that the husband and Mr Wilson did not intend the conveyance to have any legal effect but simply intended to use it as a device or pretence to deceive the building society, then the purported conveyance would have been a sham and would have been void accordingly. It may be that the judge in *Penn* did intend to make such a finding and such a finding may well have been open to him on the evidence in that case; the judge pointed out at page 944 that Mr Wilson never actually paid the 10% deposit which it was alleged had been paid.

64. In the county court, counsel for Ms Munroe and Ms Benjamin contended that *Penn* was authority for a different proposition. Their submission appears to have been accepted by the judge who held that, because both husband and the 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 described that as "the *Penn* analysis". Although that analysis had been criticised in Megarry & Wade, the judge held that he was bound by it. The judge's reference to being bound by something decided in *Penn* can only be a reference to some proposition of law laid down in *Penn*. It cannot have been a reference to being bound by some finding of fact in *Penn* because the judge would know that he was not so bound. It is also clear that if the judge had not held that he was bound by a legal proposition to be derived from *Penn*, he would not have adopted the reasoning in *Penn*.

65. In these appeals, counsel for Ms Munroe and Ms Benjamin repeated their submissions that *Penn* was authority for the proposition accepted by the judge. They submitted that the decision in *Penn* was of venerable authority and that I should follow it. However, they did not submit that I was bound to analyse *Penn* in accordance with their submission or that I was bound to accept any legal proposition laid down in *Penn*.

66. If *Penn* did purport to lay down the legal proposition contended for by counsel for Ms Munroe and Ms Benjamin, then I would not accept it. The proposition as summarised by the judge in the present case confuses a transaction which is fraudulent with a transaction which is a sham. It is possible for a purported transaction to be both fraudulent and a sham but it is also possible for a fraudulent transaction not to be a sham but to have some legal effect. If authority be needed for that statement, it is to be found in *Grondona v Stoffel & Co* [2021] 540 ("*Grondona*") to which I refer in more detail later in this judgment. In *Grondona*, the transaction was fraudulent but it was held by the Court of Appeal and the Supreme Court, reversing the trial judge, that the transaction was not a sham. I recognise that the fraud in that case related to the circumstances of the transaction rather than to the contents of the transfer but the case does make it clear that a fraudulent transaction will not necessarily be a sham.

67. In some cases where there is a sham, the court holds that the document takes effect in a way which is different from its purported effect; there have been cases where the document dressed up a tenancy as a licence or an employment contract as a contract for services. In other cases of sham, the court holds that the document has no legal effect because the parties to it intended that it would have no legal effect. In the present case, the outcome produced by the judge was that the TR1s fell into the later category as he held that they had no legal effect whatsoever.

68. I consider that in order to determine whether the TR1s had no legal effect on the basis that they were shams, it is important to identify who were the parties to the TR1s and also to identify what legal rights and obligations those parties intended to create. Ms Munroe and Ms Benjamin were not parties to the TR1s. It is not relevant to ask whether they genuinely intended to be a party to transfers of the properties. Their position is not to be analysed by reference to the principles relating to shams but is instead to be analysed by reference to the principles relating to forgeries. Because they had not executed the TR1s, they cannot be bound by them; they were not bound by forgeries of their signatures.

69. The parties to the TR1s were Mr Charles and V2 or V1, as the case may be. The actual legal effect of the TR1s, unless they were shams, was in accordance with section 63 of the 1925 Act, i.e. they transferred to V2 or V1, as the case may be, Mr Charles' equitable interest in the relevant property. Even where Mr Charles and V2 or V1, as the case may be, intended to pass the TR1s off as have a wider effect than that so as to be effective in relation to the legal estate and the entire beneficial interest in the property that would not, in my judgment, produce the result that the actual legal effect of the TR1s, in accordance with section 63, was not intended. Passing off the TR1s as having a wider effect than their actual effect would not produce the result that the TR1s were to be regarded as shams in their entirety and as being entirely void and so as not even having the effect provided by section 63.

70. I consider that before the TR1s could be held to be shams, having no legal effect, it would be necessary to hold that the parties to them, Mr Charles and V2 or V1, as the case may be, intended that the TR1s would have no legal effect. The TR1s are not shams just because their actual legal effect, in accordance with section 63, is different from their purported legal effect as transfers of the entire legal and beneficial interests in the properties.

71. I turn then to consider the reasoning of the judge in the present cases. I have already set out the relevant parts of his judgment and explained how they are to be read. I consider that the judge held that he was bound by his analysis of *Penn* to hold that the TR1s were shams. He made that finding based on a legal proposition derived from *Penn*. I consider that the legal proposition applied by the judge was wrong in law. I also consider that if the judge had not applied that proposition, he would not have held that the TR1s were shams; as he explained, if he had not been bound by that proposition, he would have put forward different reasoning, albeit producing the same overall result.

72. Nonetheless, counsel for Ms Munroe and Ms Benjamin contended that the judge had held, on the facts, that the TR1s were shams, applying the principles in *Snook*. It was further contended that an appeal court ought not to interfere with the judge's findings of fact. I consider that that is not an accurate description of what the judge found.

73. Mr Royle, on behalf of Ms Munroe contended that I should proceed on the basis that the judge had made the necessary finding of fact. Mr Royle referred to *Piglowska v Piglowski* [1999] 1 WLR 1360, without showing me a report of that case, and he submitted that I should conclude that the judge had made whatever finding of fact was needed, in accordance with the principles in *Snook*, to support the conclusion that the transactions were shams. I expect that Mr Royle had in mind what was said in that case by Lord Hoffmann at page 1372 where he explained that the reasons given in an unreserved judgment might be capable of being better expressed and an appeal court should assume that the judge knew how to perform his functions and which matters he should take into account.

74. I do not accept that the judge at any point made a finding of fact that Mr Charles and V2 or V1, as the case may be, intended that the TR1s had no legal effect as between them. The reason why the judge did not expressly say so was not, as Mr Royle suggested, that he intended to make that finding but then failed to express it adequately. The reason why the judge did not make that finding was that he considered he was bound to apply a legal proposition derived from *Penn*.

75. I have already explained that I do not accept "the *Penn* analysis" relied upon by counsel for Ms Munroe and Ms Benjamin and that in the absence of a finding that Mr Charles and V2, or V1 as the case may be, intended that the TR1s should have no legal effect as regards their legal rights and obligations, it was not open to the judge to reach the legal conclusion that the TR1s were shams.

76. At the hearing of the appeals, counsel for Ms Munroe and Ms Benjamin submitted that it was not open to counsel for Shawbrook and OneSavings to invite the court to analyse the case in accordance with the above reasoning. It was said that the above reasoning, in so far as it did not agree with the judge's reasons, in particular, his conclusion that the TR1s were shams, was not properly raised by the Grounds of Appeal which Shawbrook and OneSavings had been permitted to advance by Sir Alastair Norris when he granted permission to appeal.

77. Shawbrook and OneSavings were given permission to appeal on grounds 2, 3, 4 and 5. Ground 2 contained the principal challenge to the judge's reasoning as to why the TR1s were not effective to transfer Mr Charles' equitable interests to V1 and V2 but there is a further challenge to that reasoning in ground 4. Ground 2 begins with a general challenge to the result arrived at by the judge and then states what the appellants say the judge ought to have held. When the ground states what the judge ought to have held, the ground goes on to explain in 6 sub-paragraphs the reasons for that contention. If ground 2 had not contained the 6 sub-paragraphs, I would take the view that such a ground of appeal would allow the appellants to advance the case which I have accepted earlier in this judgment. That is because the opening words of ground 2 asserted that the judge was wrong to declare that V2, or V1 as the case may be, had acquired no interest in the relevant property pursuant to the TR1s. That wording would have allowed the appellants to develop their case based on section 63 of the 1925 Act and why the judge's findings did not in law produce the result that the TR1s were shams and wholly ineffective. The next part of ground 2 then gives 6 reasons why the judge ought to have held that the TR1s have been effective to transfer Mr Charles' equitable interests to V2 or V1 as the case may be. The reasons include reliance on section 63 of the 1925 Act and the fact that the forgery of the signatures of Ms Munroe and Ms Benjamin were immaterial to the effect of the transfers pursuant to section 63. The high point of the submission of Ms Munroe and Ms Benjamin as to the limited nature of ground 2 is based on sub-paragraph (4) which refers to *Penn*. That sub-paragraph contended that *Penn* was wrongly decided but went on to give the reason for that contention. The reason given was set out in detail but, in summary, it was that the relevant transactions in this case were composite transactions involving the lenders and the lenders were not parties to any sham.

78. Ground 4 also dealt with the effect of the TR1s. This ground also contended that the TR1s were effective to transfer Mr Charles' equitable interests to V2, or V1 as the case may be. Ground 4 was a general challenge to the judge's conclusion that the TR1s were of no effect.

79. I consider that the grounds of appeal are expressed in sufficiently general terms to allow the appellants to put forward the arguments which I have accepted above. I have held that the effect of the TR1s pursuant to section 63 of the 1925 was that Mr Charles' equitable interests were transferred to V2, or V1 as the case may be. That is a case which was advanced in the grounds of appeal. I have further held that the judge was wrong to hold that the transactions were shams in their entirety. I consider that

the grounds of appeal, when they contend that the judge was wrong to hold that the TR1s were of no effect allows the appellants to contend that the TR1s were not shams in their entirety. On a fair reading of the grounds of appeal, the appellants are not limited to a single argument as to why the TR1s were not shams, namely the argument that the transactions were composite transactions involving the lenders and the lenders were not parties to a sham. The appellants' case which I have accepted in this judgment is based on the judge's judgment, on a consideration of section 63 of the 1925 Act, on an analysis of the decision in *Penn* and on legal argument. Counsel for Ms Munroe and Ms Benjamin were in a position to meet all of the points made on behalf of the appellants and there was no unfairness to them involved in the way that the case was presented by the appellants or in the way I have set out my reasoning in this judgment.

80. In view of the submissions made by counsel for Ms Munroe and Ms Benjamin at the hearing as to the scope of the grounds of appeal, counsel for the appellants applied in the course of her reply for permission to amend her grounds of appeal. Counsel for Ms Munroe and Ms Benjamin stated that they had not had adequate notice of the application and were not in a position to deal with it. In the event, I considered that it was not appropriate to grant the permission sought. That was because the new addition to the grounds of appeal, somewhat curiously to my mind, was directed to a criticism of the findings of the judge in *Penn* rather than to a criticism of the findings of the judge in the present cases.

81. At the end of the hearing of the appeals on 29 July 2021, I reserved my judgment. By 9 August 2021, I had prepared a first draft of this judgment in which I concluded that the appeals should be allowed pursuant to the original grounds of appal. On 9 August 2021, the solicitors for the appellants wrote to the court stating that they intended to apply for permission to amend the grounds of appeal. On 11 August 2021, the solicitors for the appellants did so apply. The proposed amended grounds put forward detailed submissions as to section 63 of the 1925 Act, as to *Penn* and as to the 2002 Act.

82. The solicitors for Ms Munroe and Ms Benjamin indicated that they would oppose the appellants' application for permission to amend the grounds of appeal. They referred to a possible need for an oral hearing at some time when counsel were again available. I concluded that since I proposed to allow the appeal on the basis of the original grounds of appeal, it was not necessary for me to deal with the application for permission to amend the grounds of appeal. I also considered that I should tell the parties that this was the position to avoid unnecessary cost and delay. On 17 August 2021, my clerk notified the parties accordingly and, shortly thereafter, I released a draft of this judgment to the parties.

83. As I have explained, in the original Grounds of Appeal, Shawbrook and OneSavings raised further arguments as to why the TR1s should be held to be effective to transfer Mr Charles' equitable interests to V2 and V1 as the case may be. It was contended that Mr Charles would be estopped from denying that he had transferred his equitable interests to V2 and V1. It was also contended that insofar as Ms Munroe and Ms Benjamin were successors in title to Mr Charles, they would be bound by any estoppel which bound him. So far as I can see, an estoppel of this kind was not pleaded and there is no reference to it in the judge's judgment. Mr Charles was not a party to the charges in favour of Shawbrook and OneSavings so Mr Charles did not

make a representation to them by that means. I can see that it might be said that Mr Charles must have appreciated that his execution of the TR1s would have resulted in him making a representation to the lenders indirectly but there are no findings as to that possibility. In view of the fact that I have held that the TR1s were not shams in their entirety, it is not necessary to discuss these difficulties any further.

84. It was further contended by the appellants that it was wrong to consider the TR1s in isolation but, instead, the court should consider whether, in relation to each property, the transaction as a whole was a sham; as to that, because a lender was a party to the transaction as a whole and as such lender did not intend to enter into a sham transaction, the transaction as a whole could not be held to be a sham. As I have already concluded that the appeal ought to be allowed on the basis of my earlier reasoning, it is not necessary for me to discuss these further contentions.

85. Finally, on the question of sham, I will comment on certain submissions which were made to me by counsel for Ms Munroe and Ms Benjamin following the release of a draft of this judgment. In the ordinary way, I had invited counsel for all parties to point out any typing corrections or other obvious errors of fact in the draft judgment. Counsel for Ms Munroe and Ms Benjamin took the opportunity at that stage to make further submissions in support of their earlier argument that the judge had made a finding of fact that the TR1s were shams. These further submissions were not appropriate because they were not directed to pointing out obvious errors but instead tried to re-argue a point which I had decided in the draft judgment giving detailed reasons for my conclusions.

86. Nonetheless, I have reviewed the parts of the draft judgment which dealt with the submission that the judge had made a finding of fact that the TR1s were shams. Having done so I do not wish to change any of my earlier reasoning. However, I will now add some further comments. In his judgment, the judge discussed the dealings between Mr Charles and Mr Agrawal at some length. There is no suggestion in that discussion that they intended that the TR1s would have no legal effect as between them. Indeed, the judge's description of those dealings make it difficult to suggest that that would have been their intention. I have left open the argument for Shawbrook and OneSavings that, as a matter of law, the relevant transactions here were composite transactions involving the banks with the legal result that they could not be shams because the banks did not intend them to be shams. However, if there were to be a finding of fact that Mr Charles and Mr Agrawal intended the TR1s to be of no effect, then that finding of fact would have to be made in the light of all the relevant facts. The relevant facts include the annulment of Mr Charles' bankruptcy, the TR1s and the fact that Mr Agrawal took on personal liability for repayment of the loans from the banks. Before one could make a finding that Mr Charles and Mr Agrawal intended that the TR1s were shams, one would have to explain how that could be the case where they also intended that the annulment would be effective and that Mr Agrawal would be personally liable for the loans.

87. There was a separate argument to the effect that certain consent orders had the result that it was not open to Ms Munroe or Ms Benjamin to argue that the TR1s were not effective. This argument was rejected by the judge. As explained to me on the hearing of the appeal, it appeared to be a very weak argument. Further, counsel for Ms Munroe and Ms Benjamin objected to the argument being considered on the ground

that it had not been pleaded. In view of my earlier reasoning, it is not necessary to consider these further points and I will not do so.

88. I can now express my conclusions as to the effect of the transactions in this case subject to arguments as to fraud and equitable principles. The effect of the transaction in relation to Cuckoo Avenue was that the TR1 was not effective to entitle V2 to be registered as the proprietor of that property. Although it was in fact registered, it is not disputed that it should be removed as registered proprietor by an order for rectification under schedule 4 to the 2002 Act. However, the effect of the TR1, pursuant to section 63 of the 1925 Act, was that Mr Charles did transfer to V2 his half share in the equity of the property. Then, when V2 purported to charge the property to Shawbrook, that had the effect of charging the interest to which V2 was entitled, namely, its half share in the property. The same reasoning applies in relation to Rydal Gardens as to the position of Mr Charles, V1 and OneSavings.

89. I will next consider what the judge decided about fraud and equitable principles.

90. In his judgment, at paragraph 159(c), the judge said that the key question was whether V1 and V2 acquired equitable rights under the TR1s. He answered that question at paragraph 159(h), which for convenience I will set out again. He said:

> "Holding all those considerations in mind, the answer to the question posed at c. above must be no, whether because the shared sham intent extended to the rights to be acquired by V1 / V2 or because equity will not assist a fraudster by recognising the rights obtained by the fraud or because this is the solution required by a *Patel v Mirza* analysis (which would include that any finding otherwise might encourage fraudulent shams in a domestic context)."

91. I understood from what I was told at the hearing of the appeals that the judge had not been addressed in any detail on the relevant legal principles nor as to the possible application of *Patel v Mirza* [2017] AC 467.

92. The judge was influenced by the fact that V1 and V2 were claiming to have acquired from Mr Charles his equitable interests in the properties at a time when V1 and V2 were guilty of fraud. However, the result the judge arrived at could be said to be a very odd one. In summary, the judge produced the result that one of the fraudsters, Mr Charles, was substantially better off by reason of his fraud as he obtained the annulment of his first bankruptcy and became again the owner of a one-half share in each property. The judge also produced the result that the victims of the fraud, the innocent lenders, acquired no rights under the charges purportedly granted to them for which they had given consideration.

93. I consider that the legal principles to be applied to determine what should be the outcome of the transactions in this case are the principles laid down in *Patel v Mirza* and *Grondona*. Before considering those cases, it is useful to remind oneself of some of the matters dealt with in the earlier case of *Tinsley v Milligan* [1994] 1 AC 340.

94. Much of the reasoning in *Tinsley v Milligan* is no longer good law after *Patel v Mirza*. However, *Tinsley v Milligan* contains a useful discussion of the earlier cases which

held that property could pass under an illegal transaction and that discussion remains useful at the present time. In that case, Lord Goff, who was in the minority as regards the actual decision, referred to the cases which established the proposition that the mere fact that a transaction was illegal did not have the effect of preventing property, whether general or special, from passing under it: see at page 355C-H. Lord Browne-Wilkinson was in the majority in that case. He referred to the cases which held that, at law, title could pass under an illegal contract: see at page 369 C-E. He then considered in detail whether the position was different in relation to equitable proprietary interests. After a detailed consideration of the authorities, he held, at page 376E, that the time had come to decide clearly that the rule was the same whether a claimant founded himself on a legal or an equitable title.

95. *Patel v Mirza* did not consider in any detail the cases where it had been held that property could pass under an illegal contract. However, at para. [110], Lord Toulson, with whom four other JSCs agreed, stated that the general rule was that property could pass under a transaction which was illegal as a contract. Further, at para. [112], Lord Toulson, referring to *Tinsley v Milligan*, said that it would have been disproportionate to have prevented Miss Milligan from enforcing her equitable interest in the property and leaving Miss Tinsley unjustly enriched. Lord Neuberger, at paragraph [152], agreed with Lord Browne-Wilkinson in *Tinsley v Milligan* that if the law was that a party was entitled to enforce a property right under an illegal transaction, the same rule ought to apply to any property right so acquired, whether such right is legal or equitable.

96. The legal principles to be applied in accordance with *Patel v Mirza* were stated by Lord Toulson at paragraph [120], as follows:

> "120. The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."

97. At the hearing of these appeals, I referred the parties to *Grondona* and invited submissions on that case. *Grondona* was decided after the judge gave judgment in

these two cases and so the judge did not have the benefit of that decision. In *Grondona*, Lord Lloyd-Jones, with whom the other members of the Supreme Court agreed, commented that where property was transferred for an illegal purpose, the transferee obtained a good title both in law and in equity, notwithstanding that the contract being illegal would not have been specifically enforced: see at para. [33] and also at [34] where that principle was applied to the facts of that case.

98. *Grondona* was a conveyancing case which involved a mortgage fraud. The purchaser sued her solicitors for failing to obtain for her a registered title to the property and failing to achieve registration of a charge she had granted to a lender. The solicitors admitted negligence but contended that since the purpose of the transaction was to further a mortgage fraud, the claim should be dismissed under the common law doctrine of illegality.

99. In *Grondona*, the Supreme Court applied the approach laid down in *Patel v Mirza*. It was held that, where a defendant sought to rely on the common law defence of illegality, the essential question for the court was whether allowing the claim to proceed would be inconsistent with policies to which the legal system gave effect and thereby damage the integrity of the legal system; that in conducting that exercise by reference to the trio of considerations formulated for that purpose, the court would identify the relevant public policy considerations at a level of relative generality and without any evaluation of the underlying policies themselves before considering their application to the situation before the court; that if, after identifying the relevant policy considerations and carrying out any necessary balancing exercise where they conflicted, the clear conclusion emerged that the defence should not be allowed, there would be no need to go on to consider proportionality; and that, where a proportionality assessment was necessary, it would involve giving close scrutiny to the detail of the case in hand, including the seriousness of the impugned conduct and its centrality to the claimed breach of contract or duty.

100. The Supreme Court then applied these principles to the circumstances in *Grondona* and held that solicitors' reliance on a defence of illegality failed. The court held that since an equitable interest in the property had passed to the claimant notwithstanding that the agreement for sale was tainted with illegality, it would be incoherent for the law to then refuse, on the basis of the same illegality, to permit proceedings against a third party in respect of its failure to protect that equitable interest by registering the requisite form at the Land Registry. The court also held that, although the question of whether a claimant had to rely upon the fact of the illegality was no longer determinative of the application of an illegality defence, any such reliance remained of relevance to the question of centrality when considering whether denial of the claim would be a proportionate response to the illegality. The court further commented that the claimant's intention in pursuing her claim had not been to profit from the fraud but rather to acquire the means of meeting a substantial judgment against her. Finally, the court held that the assessment of proportionality, albeit not strictly necessary given the conclusion on policy, resulted in the conclusion that denial of the claim was not a proportionate response to the claimant's illegality.

101. I will now seek to apply these principles to the facts of the present case. The illegality in the present case was that Mr Charles, to the knowledge of V1 and V2, committed the criminal offence of forgery of the signatures of Ms Munroe and Ms Benjamin. The judge held that the intended victims of this illegality were the lenders and Ms

Munroe and Ms Benjamin. The claim being made at the trial included a claim by V1 and V2 to have acquired a half share in the equity of the properties subject to the charges in favour of the lenders. In addition, there was the claim by the lenders to the benefit of charges over a half share in the equity of the properties. Only the lenders have appealed the judgment below. It was explained to me at the hearing of these appeals that if the claim by the lenders succeeded, then the debt charged on the half shares in the equity of the properties would exceed the value of those half shares. Thus, if the claim by the lenders succeeded, they would achieve something of value but less than they thought they were acquiring, which was a charge on the full legal and beneficial title to the properties. On that basis, to allow Mr Charles (and those claiming under him) to succeed in relying on a defence of illegality, would benefit the fraudster (Mr Charles) and harm the victims (the lenders). If the claims by the lenders succeeded, that would be of some advantage to V1 and V2 also; it would be established that they were entitled to half shares in the equity of the properties although those interests would be charged for sums which exceeded their current value.

102. As regards Ms Munroe and Ms Benjamin, before the fraud they had half shares in the equity of their respective properties. The judge held that they also were intended victims of the fraud. If and insofar as the fraud was intended to deprive them of their interests in the properties, the fraud did not succeed because of the legal principles which apply to forgery and not because of any application of the principles in *Patel v Mirza*. Ms Munroe and Ms Benjamin have retained their half shares in the respective properties. It was suggested that their positions before and after the fraud were not identical. Before the fraud the other half share in the properties was held by Mr Charles' first trustee in bankruptcy. Immediately after the fraud, the ownership of the half shares will depend on the result which the court produces in relation to the issue of illegality. The possible owners of the other half share, immediately after the fraud, would be Mr Charles (on the basis that he did obtain an annulment of his first bankruptcy but did not transfer his half shares to V1 or V2 as the case may be) or V1 and V2 (on the basis that the half shares were transferred pursuant to the TR1s as a result of section 63 of the 1925 Act). If it were held that Mr Charles, notwithstanding his fraud, retained his half share in the properties there have been subsequent dealings with those half shares. For example, the judge held that Ms Munroe had taken a transfer of the half share in Cuckoo Avenue from Mr Charles' second trustee in bankruptcy. But this involved Ms Munroe claiming through a fraudster, Mr Charles, and she can be in no better position than Mr Charles himself was, immediately after the fraud. Counsel referred in somewhat general terms to possible differences between a claim for an order for sale of a property by a trustee in bankruptcy, in whom a half share in the property is vested, as compared with a claim for an order for sale by V1 or V2, in whom a half share is vested, or by a chargee (such as Shawbrook or OneSavings) over such a half share, but there was no real attempt to persuade me that these possible differences should be given any real weight in the present context.

103. Applying the policy considerations as to the integrity of the legal system, public morality and the purpose of the prohibition on fraud, I consider that these considerations point overwhelmingly in favour of a result which allows the victims, the lenders, to take the benefits for which they gave consideration and to prevent a fraudster, Mr Charles, enjoying a benefit which he was not intended to have. The fact that in order to protect the lenders from the consequences of the fraud, one

incidentally confers a benefit on V1 and V2, who were also fraudsters, does not cause me to change that assessment. There are the further considerations: (1) that the effect of the TR1s was to vest an equitable interest in V1 and V2 so that title in equity has already passed to them. Further, the charges granted by V1 and V2 have already created effective charges over those equitable interests and (2) V1 and V2 and the lenders do not have to rely on illegality to put forward their claims. These further considerations provide further support to the conclusion that I would have reached in any event.

104. The result of the above reasoning is:

i) The TR1s did not give the transferee the right to be registered in relation to the legal title to the respective properties;

ii) Ms Munroe and Ms Benjamin are entitled to rectification of the registered titles to the respective properties to remove V2 and V1, as the case may be, as registered proprietors;

iii) Ms Munroe and Ms Benjamin are entitled to rectification of the registered titles to the respective properties to remove the charges in favour of Shawbrook and OneSavings in relation to the registered titles to those properties;

iv) Ms Munroe's and Ms Benjamin's equitable interests in the respective properties were not affected by the TR1s;

v) The TR1s were effective to transfer Mr Charles' equitable interests in the respective properties to V2, and V1 as the case may be;

vi) The equitable interests transferred to V2, and V1 as the case may be, were charged to Shawbrook, and OneSavings as the case may be.

105. There is an issue between the parties as to who should replace V2 and V1 as registered proprietors. Prima facie, it should be Ms Munroe and Mr Charles in relation to Cuckoo Avenue and Ms Benjamin and Mr Charles in relation to Rydal Gardens as that would restore the register to the position before the mistaken registration of the TR1s. That is not what the judge ordered. He ordered that Ms Munroe be the sole registered proprietor in relation to Cuckoo Avenue and Ms Benjamin be the sole registered proprietor in relation to Rydal Gardens. That was on the basis of the judge's conclusion that such a registered proprietor was the sole beneficial owner of the relevant property. However, the result following these appeals will be different. At the hearing, it was agreed that if this matter was not agreed between the parties following the release of a draft of this judgment, I would deal with any issue arising as a matter consequential on the hand down of this judgment.