THE HIGH COURT

[2023] IEHC 236

2022 No. 60 SP

IN THE MATTER OF THE ESTATE IN BANKRUPTCY

OF MICHAEL BERNARD MCNAMARA

BETWEEN

THOMAS ALEXANDER ROBINSON and MARK WILSON

PLAINTIFFS

AND

NATIONAL ASSET LOAN MANAGEMENT DESIGNATED ACTIVITY COMPANY

DEFENDANT

JUDGMENT of Ms. Justice Eileen Roberts delivered on 5 May 2023

Introduction

1. This matter comes before the court by way of a special summons dated 3 May 2022 seeking declarations pursuant to Order 3 rules 6, 7 or 22 to determine whether the plaintiffs or the defendant are entitled to the proceeds of two separate investments in the estate in bankruptcy of Michael Bernard McNamara.

2. The plaintiffs, as trustees in bankruptcy, have maintained a relatively neutral stance in the proceedings. They have however provided a useful role for the court, as effectively a *legitimus contradictor,* in testing the arguments advanced by the defendant as to its

entitlement to retain the proceeds on the basis of various security arrangements on which it relies.

3. A preliminary issue as to this court's jurisdiction to deal with this matter was raised by the parties. While I will address the arguments in more detail, I am satisfied that this court has jurisdiction to determine the questions raised.

The parties and the background to this dispute

4. The plaintiffs (the "**Trustees**") are the current joint trustees in bankruptcy of Irish property developer Michael Bernard McNamara ("**Mr McNamara**"), who was adjudicated bankrupt by Order of the courts of England and Wales on 11 December 2012.

5. The defendant ("**NALM**") is a limited liability company incorporated in Ireland with its registered office at Treasury Dock North Wall Quay, Dublin 1. NALM, as successor in title to Anglo Irish Bank plc ("**Anglo**"), relies on certain loan and security documents entered into between Mr McNamara and Anglo in relation to a loan facility advanced by Anglo to Mr McNamara in September 2007 in the amount of €1,238,000 and GBP£6,000,020 (the "**Loan**"). The Loan and related security was a part only of significantly more extensive borrowings by Mr McNamara with Anglo. Mr McNamara's rights and obligations to Anglo – including the Loan and the associated security – were transferred to NALM on 3 May 2010. It is agreed that the outstanding debt due in respect of Mr McNamara's entire borrowings with Anglo is in the region of €585 million (comprising both secured and unsecured liabilities).

6. In January 2014, the Trustees received two payments from Signature Capital Limited. relating to investments which had been made by Mr McNamara before his adjudication as a bankrupt. Those payments were both made in sterling. They comprised a payment

of GBP£73,193 (relating to an investment by Mr McNamara in shares issued by First UK Commercial Property plc ("**the First UK Investment**")) and a payment of GBP£770,598 (relating to an investment by Mr McNamara known as the German Geared Commercial Property Investment (the "**GGCP Investment**")).

7. It is those combined sums which comprise the investment proceeds the subject of these proceedings (the "**Investment Proceeds**"). This court is asked to determine whether the Investment Proceeds are to be paid to NALM pursuant to its alleged security entitlements or are to be retained in the estate in bankruptcy of Mr McNamara for the benefit of creditors generally (albeit recognising that the evidence is that NALM is by far the largest creditor in the bankruptcy and that no other creditors have sought to challenge NALM's claimed security).

8. Finally, in relation to outlining the relevant parties, I note that Signature Capital Limited ("**Signature Capital**") is an Irish registered company with its registered office at 76 Merrion Square, Dublin 2. Although not a party to these proceedings, this judgment refers throughout to Signature Capital as it was the entity which managed the First UK Investment and the GGCP Investment (through its subsidiary Sherry Fitzgerald Capital Limited ("**SF Capital**")) on behalf of Mr McNamara. It is described, as will be explained later in this judgment, as the "*controller*" of those investments. SF Capital was dissolved as of 16 July 2017 pursuant to a members' voluntary liquidation.

9. I propose to firstly address this court's jurisdiction to determine the questions posed. I will then consider the evidence as to precisely what the Investment Proceeds received by the Trustees are said to relate to. Finally, I will consider whether some or all of the various forms of security held by NALM entitles NALM to payment of the Investment Proceeds in priority to the Trustees.

The jurisdiction of this court to determine the questions raised

10. A preliminary issue arose in these proceedings in respect of the jurisdiction of this court to determine the questions raised by the Trustees given that Mr McNamara was adjudicated a bankrupt in the United Kingdom. The court orders exhibited by Mr Robinson on behalf of the Trustees in his affidavit sworn 5 May 2022 confirm that on 2 November 2012 a bankruptcy order was made in respect of Mr McNamara by the High Court of Justice, Chancery Division in Bankruptcy, of England and Wales pursuant to a petition presented by Mr McNamara himself.

11. Mr McNamara was discharged from bankruptcy by order of the High Court of England and Wales on 1 March 2014. However, his estate in bankruptcy remains vested in the Trustees.

12. When McNamara's bankruptcy commenced and was adjudicated by the UK courts, the UK was part of the European Union. The relevant EU legislation governing cross-border insolvency was Council Regulation (EC) number 1346/2000 of 29 May 2000 ("**EU Insolvency Regulation**"). English bankruptcy rules therefore take effect subject to the EU Insolvency Regulation in this case.

13. Pursuant to Article 4 of the EU Insolvency Regulation, the general rule is that the law applicable to insolvency proceedings is the law of the Member State in which the proceedings were opened. In this case the relevant Member State in which the proceedings were opened is the United Kingdom, specifically England and Wales. Under Article 4(2)(b), the jurisdiction includes the jurisdiction to determine "*the assets*

which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings".

14. However, Article 5 of the EU Insolvency Regulation creates an exception to that rule in respect of creditor's rights *in rem* – it would appear because of the importance of these rights to the granting of credit. Recital 25 provides in material part that:

> "*The basis, validity and extent of such a right in rem should therefore normally be determined according to the lex situs and not be affected by the opening of insolvency proceedings. The proprietor of the right in rem should therefore be able to continue to assert his right to segregation or separate settlement of the collateral security*".

15. Article 5(1) of the EU Insolvency Regulation provides as follows:

> "*The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, movable or immovable assets – both specific assets and collections of indefinite assets as a whole which change from time to time – belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.*"

16. Accordingly, if NALM's rights in respect of the Investment Proceeds are "*rights in rem*", then the fact that Mr McNamara's bankruptcy proceedings were opened in the UK "*shall not affect*" those rights. Instead, the law relating to the assets in question continues to apply.

17. It is argued strongly by NALM that their rights in respect of the Investment Proceeds are "*rights in rem*". If so, the validity and extent of those rights are to be determined according to the law of the *lex situs* (i.e., the State where the assets are located). While

the concept of a right *in rem* is not defined in the EU Insolvency Regulation, Article 5(2) sets out a non-exhaustive list of rights in rem which include:

> "*(a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;*
>
> *(b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of guarantee;*
>
> *(c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;*
>
> *(d) a right in rem to the beneficial use of assets*."

18. Most relevant for present purposes, a right *in rem* expressly includes "*the right to… obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage*". I am satisfied that if – as a matter of Irish law – there was an assignment or charge in favour of Anglo over the Investment Proceeds, then Anglo (and by extension NALM) had a right *in rem* within the meaning of the EU Insolvency Regulation and this right is not affected by Mr McNamara's bankruptcy having opened in the UK. For the reasons set out later in this judgment I am of the view that the rights claimed by NALM are correctly characterised as rights *in rem*.

19. Furthermore, the Investment Proceeds comprise monies initially held by Signature Capital and SF Capital, i.e., the controllers of the distributions relating to the First UK Investment and the GGCP Investment. Any claim by NALM would relate to rights enforceable against those entities pursuant to some or all of the security documentation. Both of those companies are incorporated in Ireland, and pursuant to Article 3(1) of the EU Insolvency Regulation, their centre of main interests is in Ireland.

20. Finally on a point on jurisdiction I note that the deed of charge of August 2002 on which NALM relies as part of its security for the First UK Investment is expressed to be governed by Irish law and the parties thereto agreed to an exclusive jurisdiction clause in respect of Ireland. The same situation applies to the loan agreement relevant to the GGCP Investment (at clause 13 thereof).

21. Being satisfied, as I am in all the circumstances, that this court has jurisdiction pursuant to Article 5 of the EU Insolvency Regulation to determine the issues raised in these proceedings, I do not need to consider an alternative position were Article 5 not to apply, in which case the matter would fall to be determined under English bankruptcy law.

22. I will now proceed to consider the nature of the Investment Proceeds in more detail and then the basis of NALM's claim to the Investment Proceeds by reference to the security documents and the circumstances on which NALM relies.

The Investment Proceeds

23. Mr Robinson at para 4 of his affidavit confirms that in January 2014 the second named plaintiff and Mr Robinson's own predecessor as trustee in bankruptcy of Mr McNamara received the Investment Proceeds from Signature Capital. It appears, from correspondence exhibited to the affidavit of John Dunne on behalf of NALM that the Investment Proceeds were paid by Signature Capital to the Trustees "*having been instructed to do so by the Joint Trustees*" (Para 24.2). The solicitors for Signature Capital advised NALM to contact the Trustees as "*the correct party to determine the distribution or otherwise of the property of Mr McNamara*" (para 25).

24. By letter dated 22 December 2021, the Trustees wrote to Signature Capital "*in order to clarify certain matters in relation to these payments*" (para 30 of Mr Robinson's affidavit). In particular, this letter requested that Signature Capital

> "*confirm the nature of the monies paid by you to the Joint Trustees and state whether they relate to investments in shares or loan notes and whether they comprise payments of principal, interest, dividends, return of investment or any other basis of payment*".

25. On 3 February 2022 Signature Capital wrote to the Trustees confirming at para (c) that

> *"[m]onies paid to the Joint Trustees to date from the First UK Commercial Property plc were from funds following the sale of the remaining properties held in the fund. In terms of the German Geared Commercial Property Investment, monies paid to the Joint Trustees to date comprised the repayment of a Loan Note*".

26. Signature Capital also confirmed in this letter that there are no further monies outstanding in relation to the First UK Investment and that there is a balance of approximately €22,700 remaining in relation to the GGCP Investment (which it appears is also now held by the Trustees).

27. At para 32 of his affidavit, Mr Robinson notes:

> "*As can be seen from the said correspondence, Signature Capital confirmed that the payments received in respect of the First UK Investment were from funds received by First UK following the sale of the remaining properties held by it. Although the exact legal form thereof is not clear, it would therefore appear that this payment represents a return of the entire investment to the shareholders of First UK*."

28. Mr Robinson further notes at para 34 of his affidavit that

> "*Signature Capital further confirmed that the monies paid in respect of the GGCP investment constituted the repayment of the Loan Note. Accordingly the payment does not appear to relate to the Signature Shares*".

General overview of NALM's security

29. In 2002, Mr McNamara acquired 2 million ordinary shares in First UK Commercial Property plc. In 2007, 796,054 of those shares were sold leaving Mr McNamara with 1,203,946 ordinary shares in First UK Commercial Property plc (which comprise the First UK Investment).

30. Mr McNamara was also the beneficial owner of 716 ordinary shares in Signature German Commercial Property S.a.r.l. ("**SGCP**"), the legal interest in which was held by Signature Capital Nominees Ltd ("**Signature Nominees**"). Mr McNamara is stated to be the holder of a loan note dated 13 October 2008 (the "**Loan Note**") recording a loan of €1,593,597 owed to him by SGCP under a loan agreement dated 28 February 2007 (the "**Loan Agreement**"). Signature Nominees entered into the Loan Agreement on Mr McNamara's behalf. The SGCP shares and the Loan Note together comprise the GGCP Investment.

31. Both investments were managed on behalf of Mr McNamara by an Irish real estate investment business, Signature Capital (or its related entities).

32. There are three different forms of security relied on by NALM in these proceedings as security relevant to its entitlement to the Investment Proceeds in respect of the First UK Investment and the GGCP Investment. While each will be considered in detail, the security in brief comprises the following: –

(1) a deed of charge dated 30 August 2002 entered into between Anglo and Mr McNamara pursuant to which Mr McNamara created a legal charge in favour of Anglo over the First UK shares (the "**Deed of Charge**");

(2) the deposit of the share certificate and the loan note certificate relating to the GGCP Investment with Anglo which, it is alleged, had the effect of creating an equitable charge over these shares and the Loan Note; and

(3) two letters of undertaking which are identified as items (i) and (ii) in the schedule of the "*Security*" to be provided by Mr McNamara pursuant to the facility letter for the Loan dated 5 September 2007 (the "**2007 Facility**"). The first letter of undertaking was from Signature Capital to Anglo in relation to Mr McNamara's First UK Investment. The second letter of undertaking was from Signature Capital's subsidiary, SF Capital, to Anglo in respect of Mr McNamara's GGCP Investment. It is alleged that these letters of undertaking, each dated 11 September 2007 (the "**Undertakings**") had the effect of creating an equitable charge over the Investment Proceeds paid in respect of the First UK Investment and the GGCP Investment.

33. The 2007 Facility expressly provides that the security "*and any other security provided by the Borrower to the Bank from time to time shall secure all sums now or from time to time due or owing by the Borrower to the Bank…*".

34. Although the summons in this case sought to put NALM on strict proof of the entitlement of NALM to rely on the Anglo security documentation, it was accepted by the Trustees at the hearing of this action (and in their legal submissions) that the Trustees now take no issue with the related questions of (i) whether the Loan originally advanced by Anglo to Mr McNamara and the security relating thereto have been properly assigned to NALM and (ii) whether there is an amount due under the Loan to

NALM in excess of the amounts of the Investment Proceeds received. The Trustees now accept that both matters are sufficiently clear and proven in light of the various averments made in and exhibits attached to the affidavit of John Dunne sworn on behalf of NALM on 16 June 2022. These are not therefore issues this court needs to determine and my analysis will therefore focus solely on the interpretation of the security documents on the agreed understanding that NALM is fully entitled to rely on those documents.

(1) The Deed of Charge

35. The Deed of Charge is exhibited at Tab 7 in the bundle of exhibits to the affidavit of Mr Robinson sworn 5 May 2022. The Deed of Charge is dated 30 August 2002 and, pursuant to clause 2 thereof, Mr McNamara as the Borrower charged

> "*as a continuing security for the payment and discharge of the Secured Liabilities*"…"*all shares in the capital of First UK Commercial Property plc… issued from time to time in the name of the Borrower or its nominees and any shares substituted for such shares (the Shares)*".

36. Clause 4 of the Deed of Charge prohibited Mr McNamara from creating any other security over the First UK shares or selling or assigning them without Anglo's consent.

37. Clause 8 of the Deed of Charge provided that

> *"[u]pon the making of a demand by the Bank on the Borrower, the Bank shall have, and be entitled without prior notice to the Borrower to exercise, the power to sell or otherwise dispose of the whole or any part of the Shares and may… treat such part of the Shares as consists of money as if it were the proceeds of such a sale or other disposal. The Bank shall be entitled to apply the proceeds of*

such sale or other disposal in paying the costs of such sale or other disposal and in or towards the discharge of the Secured Liabilities …".

38. The Trustees say that the Deed of Charge appears to relate only to the shares and not to any rights associated with those shares, such as dividends and other distributions (including, in this case, payments relating to the sale of properties held by the fund).

39. The Trustees say that the portion of the Investment Proceeds relating to the First UK Investment is a dividend or distribution relating to the shares in First UK. It is not the proceeds of the sale of the shares themselves. The Trustees query in those circumstances whether the Deed of Charge is broad enough in its terms to include not just the First UK shares but also the dividends and distributions arising therefrom.

40. Counsel for the Trustees pointed to the general rules of contractual interpretation including the *contra proferentem* rule where contracts are ambiguous. Counsel referred to *Goode and Gullifer on Legal Problems in Credit and Security, 7th ed. 2023,* where at para 1-65, they explain that where proceeds of sale of a secured asset are included within the scope of the security (as in the present case):

> *"Proceeds do not include income derived by the debtor from an asset (e.g. rentals, share dividends), or natural produce (e.g. milk from cows)…for these are not given in exchange for the asset, which remains in place. Whether, in the absence of agreement to the contrary, they belong to the debtor or the creditor depends on the circumstances. Where the debtor is lawfully in possession of a tangible asset, such as land or goods, it will normally be assumed that the fruits belong to the debtor in the absence of any agreement to the contrary. However, when the secured creditor has taken possession in the case of intangibles, such as bank deposits and investment securities, the same principle should apply".*

41. Counsel for the Trustees noted that the Deed of Charge did not expressly charge the share dividends or other distributions in favour of Anglo nor did it include any restriction on the retention by Mr McNamara of any dividends or distributions. He said that the Deed of Charge referred only to enforcement by way of sale or disposal of the shares themselves. He suggested that the failure to include a charging provision in respect of the share dividends or distributions could be seen as a deliberate exclusion of such a charge. He also argued that possession of the First UK shares appears to have remained with Mr McNamara (the share certificates not having been deposited with Anglo) and that this was a further relevant factor pointing to the conclusion that the income derived from those shares was not included in the Deed of Charge. He also argued that this conclusion was supported by the very existence of the letter of undertaking from SF Capital relating to the "*distributions*" in respect of the First UK Investment, as such an undertaking would be entirely superfluous if the Deed of Charge already encompassed those distributions.

42. Mr Dunne on behalf of NALM stated at para 9 of his affidavit that

> "*…given that Mr McNamara remains indebted to NALM…NALM's security interest in the Relevant First UK Shares ought reasonably to extend to security over the beneficial interest in such shares including any dividends and /or other distributions arising from Mr McNamara's rights under the Relevant First UK Shares…such that the First UK Proceeds come within the First UK Charge*".

43. Counsel for NALM referred to the provisions of clause 8 of the Deed of Charge, particularly the expression "*such part of the Shares as consists of money*" and submitted that this was wide enough to confer on Anglo a right to receive distributions in respect of the First UK shares, as well as the proceeds of the shares themselves.

44. It is true to say that the Deed of Charge does not refer expressly to any dividends or distributions attaching to the First UK shares. A well drafted deed of charge would be clear on the point so that there could be no doubt about the scope of what was in fact charged in favour of Anglo. The shares themselves were certainly charged. Having considered the terms of the Deed of Charge in some detail I believe, on balance, that it is not so widely drafted as to encompass, within the extent of the charge, those ancillary rights attaching to the shares such as the payment of dividends or other distributions arising from property sales. Clause 8 arises in relation to enforcement. It entitles Anglo to sell some or part of the shares and to apply *such part of the Shares as consists of money* towards the discharge of the debt as if it were the proceeds of such a sale or disposal. I believe that the correct interpretation of this phrase relates to shares which have been sold where the proceeds remain in cash, rather than dividends or distributions payable by reference to unsold shares. The only reference to income in the Deed of Charge is in the second para of clause 8 which refers to the statutory power to appoint a receiver under section 19 of the Conveyancing Act 1881, noting this statutory power is to appoint "*a receiver of the Shares or the income thereof*". The actual wording in paragraph 3 of section 8 however, which is designed to supplement the statutory power of appointing a receiver, makes no reference whatsoever to the income deriving from the charged shares. Neither does clause 10 of the Deed of Charge contain any such reference.

45. I conclude therefore, based on a plain reading of the Deed of Charge, that it is not drafted in terms which are wide enough to charge the income derived from the charged shares such as dividends or other distributions associated with the shareholding. The Deed of Charge does not therefore, in my view, provide security for NALM in respect

of that portion of the Investment Proceeds which relates to the First UK Investment. The Deed of Charge is obviously of no relevance to the GGCP Investment.

(2) The deposit of the GGCP share certificate and Loan Note certificate

46. Mr Dunne confirms at paragraph 15 of his affidavit sworn on 16 June 2022 that

> "*As part of the security provided by Mr McNamara to Anglo in relation to the GGCP Investment, Mr McNamara deposited the original copies of the following documents with Anglo: the share certificate relating to the Signature Shares…; and the Loan Note.*"

47. The Loan Note certificate dated 13 October 2008 specifies Mr McNamara as the registered holder of a loan receivable in the amount of €1,593,597 from SGCP. The Loan Agreement dated 28 February 2007 in respect of which the loan arises is entered into between GGCP Investors (represented by Signature Capital Nominees Ltd) as "Lenders" and SGCP as "Borrower".

48. It is alleged by NALM that the deposit by Mr McNamara of the original share certificate for the SGCP shares and the Loan Note certificate with Anglo demonstrates a clear intention on the part of Mr McNamara to charge his interest in the SGCP shares and the Loan Note in favour of Anglo and that this deposit was sufficient to create an equitable charge or mortgage on which NALM can now rely as an equitable charge over Mr McNamara's interest in the GGCP Investment.

49. In fact, as set out previously, the Investment Proceeds relevant to the GGCP Investment have been confirmed to consist entirely of a repayment of the Loan Note. The Trustees argue therefore, and I agree, that it is only the deposit of the Loan Note certificate that is of relevance as security in these proceedings. NALM believes that the overall context in which Mr McNamara deposited both the share certificate and the Loan Note

certificate demonstrates a clear intention to grant Anglo a security interest in the GGCP loan and says there is no other conceivable reason why Mr McNamara would have deposited these certificates with Anglo.

50. In either event, it is necessary to consider what was the legal effect of the deposit of the Loan Note certificate by Mr McNamara with Anglo. The certificate is exhibited at Tab 11 to Mr Robinson's grounding affidavit.

51. Counsel for the Trustees pointed out that there appear to be three areas of concern in relation to this alleged security interest over the Loan Note.

(i) The loan certificate appears to have no legal status and contains errors on its face

52. Firstly, counsel said that it is not clear that the deposit of the Loan Note certificate could have created an equitable mortgage given what he described as "*the somewhat unusual character of the certificate*" (para 47 of the Trustees' legal submissions). He argues that the certificate issued in relation to the Loan Note does not appear to possess a similar character to a share certificate. He points to the terms of para 8.2 of the Loan Agreement which provides that "*the Lenders* [i.e., Mr McNamara] *may assign all or part of its rights under this Agreement but shall notify the Borrower* [i.e., SGCP] *in writing of any such assignment*". He says that there is no requirement for the names of noteholders to be entered in any sort of register – merely that the company be notified of any transfer. This is to be contrasted with the position which applies when shares are transferred to another party. He says that the Loan Agreement does not authorise the creation of loan note certificates nor does it state that such certificates are evidence that the party named in them is a noteholder. He says the certificate is not required to be presented before the transfer of ownership of the Loan Note is permitted (unlike the situation in relation to shares) and in those circumstances he argues that the Loan Note

certificate does not appear to have any legal effect whatsoever, and in particular could not be properly described as a document of title or even one that properly evidences title.

53. In further support of his argument on this point counsel for the Trustees also says that the Loan Note certificate appears to contain a number of errors which he summarises as follows:

(a) the certificate is headed "German Geared Commercial Property Investment" which, it is suggested, seems to suggest that this is the name of the company issuing the certificate – when it should have been SGCP.

(b) German Geared Commercial Property Investment is described in parenthesis below its name as "a limited liability company, incorporated under the laws of the Republic of Ireland". However, the issuer of the Loan Note should be SGCP, a company incorporated in Luxembourg. I note that this information is contained further down in the text of the certificate.

(c) The wording at the foot of the certificate refers to "*the above shares*". In fact however the Loan Note certificate does not relate to shares at all but rather to the Loan Note.

(d) It is stated that the transfer of the "*shares*" cannot be registered without the production of the certificate, despite no such restriction being contained in the Loan Agreement and the Loan Agreement not relating to shares at all. This wording appears to be a cut and paste from the SGCP share certificate.

(e) As an additional point, I note that the certificate confirms that "*The Loan Note is governed by the terms of the loan agreement dated 28 February 2007, Luxembourg*." Other than SGCP being a Luxembourg registered company, there

is no relevance to "Luxembourg" in the Loan Agreement." Clause 13 deals with governing law and jurisdiction – both of which are exclusively Irish.

(ii) Even if an equitable mortgage could have been created by the deposit of the Loan Note certificate, it is not clear that there was in fact an equitable mortgage actually created in this case.

54. Secondly, counsel for the Trustees submitted that there is no objective evidence that the deposit of the Loan Note certificate was intended to create an equitable mortgage, even if the deposit of the certificate could have created an equitable mortgage.

55. He says that NALM bear the burden of proof as the party asserting the existence of an equitable mortgage. He submits that the 2007 Facility does not refer to the creation of an equitable mortgage over the Loan Note and points out that significant other security was provided for Mr McNamara's borrowings from Anglo.

56. He also notes that there is no memorandum of deposit recording the basis on which the Loan Note certificate was deposited and that this is contrary to normal banking practice of having written evidence of the intention of a debtor to create an equitable mortgage.

(iii) It is not clear whether any equitable mortgage which may have been created secured the loan facility for the Loan Note.

57. Thirdly, counsel for the Trustees says that if the deposit of the Loan Note certificate legally could have and was intended to create an equitable mortgage, the available evidence suggests that the mortgage was not intended to secure the 2007 Facility.

58. In that regard, he points out that the itemised list of security held by Anglo in respect of the Loan does not include a reference to the deposit of the Loan Note certificate. The certificate appears to have been created on 13 October 2008, which is after the date of

the 2007 Facility. He says this suggests that, even if Anglo did indeed hold the Loan Note as security, it was as security for a different loan facility. He acknowledges that the difficulty with making such an assumption is that, without evidence identifying that other loan facility, it is not possible to determine whether that loan facility has been repaid in the interim. While an inference could be drawn from the fact that the original certificate had not been returned to Mr McNamara, counsel for the Trustees says this may not be sufficient to satisfy the evidential requirements.

59. Counsel for NALM argues that the deposit of the Loan Note certificate was effective to create an equitable mortgage over the SGCP loan. He argues that the deposit of evidence of ownership is a well-recognised method for creating an equitable mortgage over documentary intangibles such as shares and life assurance policies. He says there could be no conceivable reason for Mr McNamara to deposit the Loan Note certificate with Anglo unless he intended to grant security to Anglo over receivables under the SGCP loan/Loan Agreement. Given all the context, he says that Mr McNamara's actions in depositing a Loan Note certificate which is stated on its face to be a "*Certificate of Ownership*" demonstrates a clear intention by Mr McNamara to grant Anglo a security interest in the SGCP loan, whether that be an equitable assignment or a charge over the debts payable under the Loan Agreement.

60. Counsel argues that the deposit of a share certificate is a well-recognised mechanism for creating an equitable mortgage over shares. He relied in that regard on the decision of the English High Court in *Harrold v Plenty* [1901] 2Ch 314 in which Cozens-Hardy J stated (at page 316) that:

> "*A share is a chose in action. The certificate is merely evidence of title, and whatever may be the result of the deposit of a bearer bond…I think I cannot treat the plaintiff as a mere pledgee. The deposit of the certificate by way of security*

for the debt, which is admitted, seems to me to amount to an equitable mortgage, or, in other words, to an agreement to execute a transfer of the shares by way of mortgage".

61. Reliance was also placed on the decision of *In re Wallis* [1902] 1 KB 719 where a deposit of a life assurance policy was held to create an equitable mortgage over the proceeds.

62. Counsel for NALM argues that at a minimum, the Loan Note certificate in this case was clearly intended to provide evidence of Mr McNamara's ownership of the debt obligations. He submits that there is no relevant distinction between a share certificate or life assurance policy (which are mere evidence of ownership, and where a deposit generally creates an equitable mortgage) and the Loan Note certificate in this case.

63. He also argues that the obvious inference is that the Loan Note certificate was deposited as security for the 2007 Facility and that there is no reason to assume Mr McNamara separately created a mortgage by equitable deposit over the very same investment as security for entirely different loans. Crucially, the 2007 Facility expressly provides that security for the Loan was not limited to the security documents listed but also included "*…any other security provided by the Borrower to the Bank from time to time…".* Accordingly, he argues that even if the Loan Note certificate was deposited as security for different borrowings, NALM can nevertheless rely on it as security for the 2007 Facility, and indeed as security for the significant outstanding liabilities which it is accepted by the Trustees remain due and owing to NALM.

64. I believe that it may be significant that Mr McNamara lodged the Loan Note certificate along with the share certificate. The deposit of the latter in my view likely created an

equitable mortgage in respect of the SGCP shares (although none of the Investment Proceeds relate to the SGCP shares).

65. While Mr McNamara's intention in depositing both certificates may have been the same, the question is whether the deposit of the Loan Note certificate has the same effect as the deposit of the share certificate insofar as the creation of an equitable security interest is concerned.

66. I believe there are relevant differences between a share certificate and a loan note certificate – particularly where, as in the present case, I cannot confirm there was in fact a loan note in existence. There is a well-established practice of creating equitable mortgages by deposit of share certificates. This system works in circumstances where original share certificates are passed from one owner to another on transfer and registration or where a party must explain a missing original share certificate. The same system does not apply in relation to certificates regarding loan notes. While Mr McNamara and Anglo may have wished to have a "document" which could be used to create security over the SGCP loan proceeds, I am not convinced that the certificate which was produced was sufficient for this purpose.

67. Clause 8.2 of the Loan Agreement (as previously quoted) provides that "[T]*he Lenders may assign all or part of its rights under this Agreement but shall notify the Borrower in writing of any such assignment*". The Loan Agreement does not envisage the creation of a loan note certificate nor does it ascribe any meaning to such a certificate. In fact, the parties in these proceedings have not exhibited an actual loan note at all. The Loan Agreement which is exhibited at tab 12 to Mr Robinson's affidavit refers to a schedule attached with details on individual investors and the respective amount of their individual loans. However this schedule was not attached to the exhibited version. I can only assume (but have no direct evidence) that this schedule would have noted a

loan of €1,593,597 against Mr McNamara's name. This amount is a very small proportion of the total loan provided for in the Loan Agreement of €54,663,325.

68. A borrower can evidence a contract for borrowing and repayment of that money by using a loan agreement or by issuing loan notes pursuant to a loan note instrument. While both are documents which detail the terms and conditions of a loan, they are not the same instrument. Generally, one or other option is selected to document a borrower/lender relationship – but in the present case they both appear to feature and to be used interchangeably. While borrowers generally pay registered holders of loan notes, and the certificate refers to Mr McNamara as being the "*registered holder*" of a loan receivable from SGCP, there is no evidence that Mr McNamara in fact held any registered loan note. All that has been produced is a "certificate of ownership" alleged to prove the existence and ownership of a loan note by reference to the Loan Agreement, which does not reference certificates of loan notes at all .

69. It is not suggested that Mr McNamara ever legally assigned his interest in the Loan Agreement to Anglo, although he would have been entitled to do so pursuant to the provisions of clause 8.2 of the Loan Agreement quoted previously.

70. I have considered the judgment of the Supreme Court in *Promontoria (Oyster) DAC v Hannon* [2019] IESC 49, [2020] 1 IR 364, where the court held that section 73 of the Registration of Deeds and Title Act 2006 did not simply preclude the creation of new liens by deposit of land certificates but, in addition, extinguished any such liens with effect from 31 December 2009. While Dunne J confirmed that "*…this change in the law has no bearing on any other method of creating an equitable mortgage in a manner previously known to the law*" (para 101 of her judgment), there are some parallels with the present case where the legal effect of the certificate of Loan Note in this case is not, in my view, clear.

71. In *Hannon*, Clarke CJ, noting that it has long been the case that an equitable mortgage or charge would be created by the deposit of title documents, said at para 67:

> "*However one characterises the legal basis for the creation of a lien by deposit in respect of registered land, it does require the deposit of something representing evidence of title. Where that which has been deposited has, by statute, been deemed to be no longer of any effect whatsoever, it seems to me that it is difficult to sustain the view that the lien by deposit can survive*".

72. Dunne J held at paras 98 and 99 of her judgment that:

> "*The whole point of effectiveness of the deposit of the land certificate was that without the land certificate no further transactions could be carried out in relation to the land. Thus the creditor of the landowner was in a position to stop the landowner from carrying out any transactions that would affect the creditor's security. The creditor no longer has a means of stopping such transaction. …the 2006 Act abolished the issue of land and charge certificates with the consequence that neither a registered owner not a registered chargee has any longer a document to deposit so as to create such an equitable mortgage…*".

73. I appreciate that *Hannon* must be considered in the context of a specific statutory regime applicable to registered land and the specific abolition of legal force or effect for land certificates which previously related to registered land. I believe however that the Loan Note certificate in this case is in a somewhat analogous position to these land certificates. The Loan Note certificate appears to have been created in the present case primarily to document the entitlement of Mr McNamara under the Loan Agreement. It appears to have been drafted on the basis of a template share certificate but it does not in my view have the same standing as a share certificate in terms of evidencing

ownership of the underlying asset or as part of the transfer process for the underlying asset the subject of the certificate. Possession of the Loan Note certificate (even if deemed to be an original) does not appear to me to create any legal or practical impediment to the transfer or encumbrance of Mr McNamara's entitlement to payment under the Loan Agreement. There are several inconsistencies on the face of that certificate and I am unable to safely determine that it had any legal effect in and of itself. There is no other evidence before the court regarding the quantum of the underlying loan due to Mr McNamara (given the absence of the schedule to the Loan Agreement) and no evidence of the basis on which the Loan Note certificate relates to the Loan Agreement.

74. I have therefore concluded that the deposit of the Loan Note certificate did not have the effect of creating an enforceable equitable mortgage over the proceeds of the SGCP loan which could now be relied on by NALM.

75. I turn now to the third and final security on which NALM seeks to rely in this case, namely the Undertakings which were given to Anglo in respect of both the First UK Investment and the GGCP Investment.

<u>(3) The Undertakings</u>

76. The 2007 Facility sets out a list of agreed security which Mr McNamara was to provide to Anglo for all his borrowings. The first two items specified as "Security" are the Undertakings. These are in the following terms:

(i) a letter (the "**First UK Undertaking**") dated 11 September 2007 on the headed paper of SF Capital signed by Ciaran McNamara on behalf SF Capital and by Mr McNamara, issued to Anglo confirming that

"*On the instruction of Mr Bernard McNamara, who has invested in* ***First UK Commercial Property Fund*** *(the "Investment"), the undersigned as controller of the Investment hereby irrevocably undertakes to Anglo Irish Bank ("the Bank") that in the event of any distributions arising from the Investment being available to be paid to Mr. Bernard McNamara that all such distributions will be remitted directly to the Bank for the account of Mr. Bernard McNamara in or towards his indebtedness to the Bank pursuant to the Bank's facility letter dated TBC. This undertaking shall have no further effect once the final distribution has been made or Mr. Bernard McNamara (sic) indebtedness to the Bank pursuant to the Bank's facility letter of TBC has been discharged in full*".

(ii) A letter (the "**GGCP Undertaking**") dated 11 September 2007 on the headed paper of Signature Capital signed by Ciaran McNamara on behalf of Signature Capital and by Mr Bernard McNamara, addressed to Anglo and in almost identical terms to the First UK Undertaking but specifically providing as follows:

"*On the instruction of Mr. Bernard McNamara, who has invested in Signature Capital German Geared Commercial Property Investment (the "Investment"), the undersigned as controller of the Investment hereby irrevocably undertakes to Anglo Irish Bank ("the Bank") that in the event of any distributions arising from the Investment being available to be paid to Mr. Bernard McNamara that all such distributions will be remitted directly to the Bank for the account of Mr. Bernard McNamara in or towards his indebtedness to the Bank pursuant to the Bank's facility letter dated TBC. This undertaking shall have no further effect once the final distribution has been made or Mr. Bernard McNamara (sic) indebtedness*

to the Bank pursuant to the Bank's facility letter of TBC has been discharged in full."

77. The facility letter dated 14 May 2008 (the "**2008 Facility**"), which amended the 2007 Facility, also listed the Undertakings as "*Security Documents*" and recorded that these were "*Held*".

78. It would appear that between 2007 and Mr McNamara's bankruptcy in 2012, Signature Capital paid distributions arising from either the First UK Investment or the GGCP Investment to Anglo, in line with the Undertakings. This is confirmed by Mr McNamara's solicitors who in the attachment to their letter dated 16 September 2021 (exhibited at tab 13 to Mr Robinson's affidavit) state that

> "*We are advised that Signature Capital have confirmed that all distributions from the German Geared Commercial Property Investment up to the date of the commencement of Mr McNamara's bankruptcy have been remitted to Anglo Irish Bank Corporation plc.*"

79. NALM's position is that the Undertakings constitute an assignment to Anglo of all rights in respect of any distributions regarding the First UK Investment and the GGCP Investment by way of security for Mr McNamara's obligations, which security was perfected insofar as the Undertakings were acknowledged in writing by Mr McNamara.

80. NALM say that this arrangement:

(1) was set out and agreed in the application form signed by Mr McNamara on 5 October 2007 addressed to Signature Capital providing instructions to them in accordance with the GGCP Investment Information Memorandum and irrevocably authorising them to execute all documents necessary on his behalf. This is NALM's response to the Trustees noting that there did not appear to be

any formal power of attorney, contract, deed or other instrument executed by Mr McNamara appointing Signature as "controller" of the investments. It is conceded however that payments arising from those investments were made to Signature entities prior to Mr McNamara's bankruptcy. The Trustees also do not dispute that Signature paid over the distributions it received to Anglo, up until Mr McNamara's bankruptcy;

(2) is recorded and agreed in the Undertakings;

(3) is reflected in the fact that, in respect of the GGCP Investment, Signature Nominees both (a) was the legal owner of the shares as Mr McNamara's nominee and (b) entered into the Loan Agreement on behalf of Mr McNamara.

81. Counsel for NALM confirms their primary argument that the Undertakings, reinforced by the other documents and commercial background, created an assignment of the Investment Proceeds to Anglo as security for Mr McNamara's debts. Alternatively, they created a charge over the Investment Proceeds.

82. Counsel says that no particular form of words needs to be used to create an assignment, provided there is sufficient expression of an intention to assign. He points to the well-established practice for the creation of an equitable assignment by an instruction by a borrower to pay a receivable to a lender which is often (but not necessarily) reinforced by an undertaking by the obligor to pay the receivable to the lender. He argues that the Undertakings effected an assignment of an existing chose in action and the right to the Investment Proceeds vested in Anglo immediately in 2007 from when, in fact, payments started to be made directly to Anglo in respect of any distributions received by Signature Capital on behalf of Mr McNamara.

83. He also says that even if there was an agreement to assign a future chose in action, and the future chose came into existence after the bankruptcy, Anglo (NALM) would nevertheless have priority over the Trustees. He relies on commentary from Guest on the Law of Assignment (4th ed. 2021) at page 138 where the author explains:

> "*Where there is an assignment of debts due and growing due under a contract, the assignment will transfer to the assignee, to the exclusion of the trustee, not only debts which are due and payable at the commencement of the bankruptcy, but also those which are due but not yet payable…It does not matter that the date for payment arises after the commencement of the bankruptcy, provided that the right to payment has been earned by the assignor before the commencement*."

84. Counsel for NALM also notes that where the bankrupt's property is subject to contractual rights or liabilities in favour of third parties, the trustees in bankruptcy take the property subject to those rights or liabilities, even if they do not strictly constitute security interests. He relies on a passage from Halsbury's Laws of England, 4th ed, vol. 3, para 594 (adopted by the Supreme Court per Henchy J in *Dempsey v. Bank of Ireland* (Unreported, Supreme Court, 6 December 1985) that:

> "*The general rule is that the trustee in bankruptcy takes no better title to property than the bankrupt himself had. The bankrupt's property passes to the trustee in the same plight and condition in which it was in the bankrupt hands, and is subject to all the equities and liabilities which affected it in the bankrupt's hands, to all dispositions which have been validly made by the bankrupt, and to all rights which have been validly acquired by third persons at the commencement of the bankruptcy.*"

85. In *Dempsey*, the Supreme Court confirmed that a contractual right to set off liabilities against money in a bank account, which did not create a lien or charge, nevertheless remained enforceable against a liquidator.

86. The concern raised by the Trustees is that they say that while an assignment can assign present debt even if paid in the future, it cannot assign a future debt. They argue that Signature Capital is merely the entity to which funds were paid for investment purposes. There is no legal obligation that the funds be paid to them although this is what happened in practice. The Trustees say that the obligation on Signature Capital only arises at the time when Signature Capital receives monies and by the time the proceeds the subject of this litigation were received, Mr McNamara was already bankrupt.

87. Counsel for the Trustees sought to distinguish those cases in which an undertaking was given by a solicitor acting for a borrower to use the proceeds of sale of a particular asset to reduce or discharge the balance of a loan, noting that such undertakings create an equitable mortgage or charge over those (future) proceeds. In *Anglo Irish Bank v Edward Kavanagh (Maynooth) Ltd* [2003] IEHC 113, it was held by Gilligan J that a security interest in such circumstances covered only the proceeds and not the underlying asset. Counsel for the Trustees argued that it is not clear that an undertaking by a party other than a solicitor has the same effect. He also pointed to the status of Signature Capital as "*controller*" of the respective investments which he said did not appear to be formally documented or clear as to the capacity in which they gave the Undertakings.

88. On that basis, counsel for the Trustees argued that it is not clear from the express terms of the Undertakings whether they create a charge over the Investment Proceeds or, instead, merely create a contractual obligation on the part of the controllers.

89. Counsel for NALM acknowledges that the case law distinguishes between existing and future choses in action. He quotes from *Guest on the Law of Assignment (4th Ed)* at page 6 as follows:

> "*…the law treats as an existing chose of action a present contractual right to receive some performance in the future, for example, the right to future payments of rent under an existing lease or future instalment payable under a hire purchase agreement already made. This is so despite the fact that the right is not presently enforceable, for example, because the right is a right to a payment that will become due only at a future date or upon a future demand and even though the exercise or enjoyment of the right may be subject to a contingency…*".

90. Counsel for NALM says that shares are existing choses in action as are, by analogy, distributions payable to holders of those shares. He says that the chose in action in the present case is the right to receive the distributions and that this right immediately vested in Anglo from the date of the Undertakings and is confirmed by the practical reality as to how payments were made pursuant to the Undertakings since 2007.

91. In my view, several features of the Undertakings are significant. They provide a written "*instruction*" to Signature Capital – the investment manager and the entity which was to pay out any distributions – which is said to be "*irrevocable*". The instruction was not only signed by Mr McNamara as the party issuing it but was also signed on behalf of the Signature Capital entity who was obliged to carry out the instruction in each case. The Undertakings relate to "*any distributions arising from*" the named investments and, on their face, this appears broad enough to extend to the Investment Proceeds at issue in these proceedings. The Undertakings were dated six days after the 2007 Facility. In my view the evidence suggests the Undertakings were procured and provided to Anglo by Mr McNamara to satisfy his prior agreement to grant undertakings to Anglo as

"*security*". The Undertakings are clear that the distributions are to be paid to Anglo to discharge Mr McNamara's "*indebtedness*" and that once this indebtedness "*has been discharged in full*" the Undertakings would "*have no further effect*". This conferred on Mr McNamara (as the borrower) a right of redemption which is a classic characteristic of a security interest.

92. I do not believe it is of material importance in this case that the date of the facility letter was omitted and the Undertaking simply referred to the date as "*TBC*". This is particularly in circumstances where the Undertakings were issued so close in time to the 2007 Facility and are clearly contemplated by the terms of the 2007 Facility as security to be provided. Indeed this is accepted by the Trustees where, at para 16 of Mr Robinson's affidavit he notes that

> "*Despite the incorrect reference to the date of the facility letter in both letters of undertaking, and the difference in the description of the Signature Capital German Geared Commercial Property Investment as between the facility letter and the letter of undertaking, it nonetheless appears that these letters of undertaking are the letters of undertaking referred to in the facility letter*".

93. I am satisfied in the present case that the rights assigned by the Undertakings were existing, not future choses in action. They included (for both investments) existing rights, under shares already held by Mr McNamara, to distributions or dividends in the future as well as (for the GGCP Investment) existing debt obligations under the existing Loan Agreement which would become payable in the future. In those circumstances, I believe that the existing right to future payments immediately vested in the assignee (Anglo) once the Undertakings were given and that from that date any distributions could not properly be dealt with other than in accordance with the Undertakings.

94. I am also satisfied that the Undertakings were effective to create an equitable assignment in favour of Anglo. As *Guest* notes at pages 70-71

> "*The second main way in which an equitable assignment may be effected is for the assignor to direct the debtor or obligor to pay his debt or perform his obligation to the assignee instead of the assignor...The direction need be in no particular form*".

In the present case Mr McNamara (as assignor) directed Signature Capital, (as obligor) to pay out distributions to Anglo (as assignee) instead of to Mr McNamara.

95. A large number of cases were relied on by counsel for NALM as authority for this practice. It is not necessary for all of these cases to be quoted in this judgment but I refer to a selection of what I believe are the most relevant cases. The first is the decision of the House of Lords in *William Brandt's Sons & Co v Dunlop Rubber Company Limited* [1905] AC 454. In that case merchants agreed with the bank by whom they were financed that goods sold by the merchants should be paid for by remittance direct from the purchasers to the bank. Goods having been sold by the merchants, the bank sought the right to receive the purchase money and requested that the purchasers remit the purchase money to the bank. It was held by the House of Lords that there was evidence of an equitable assignment of the debt to the bank with notice to the purchasers and that the bank could recover the debt from the purchasers.

96. A second case relied on is the decision in *Re Kent & Sussex Sawmills* [1947] Ch 177 where the court held that an instruction to a business partner from a party who had obtained a bank overdraft in the following terms effected an equitable assignment:

> "*…we hereby authorize you* [i.e. business partner] *to remit all moneys due thereunder direct to this Company's account at Westminster Bank…whose receipt*

shall be your sufficient discharge. These instructions are to be regarded as irrevocable unless the said bank should consent to their cancellation in writing…" (page 178).

i. Commenting on the fact that this instruction was "*irrevocable*", Wynn-Parry J said at page 180:

"*Effect must be given to those words and in my judgment the proper way of construing this letter, looking at it as a whole, is to bear in mind and never to lose sight of the circumstance that the relationship of the two parties in question, the company and the bank, was that of borrower and lender and that this letter was brought into existence in connection with the proposed transaction of borrowing by the company and lending by the bank*".

97. The Undertakings reflect a very similar method for taking security as relied on by the banks in *William Brandt* and *Kent & Sussex*.

98. Counsel for NALM also referred to Irish caselaw which confirms that where a borrower or obligor undertakes, on the borrower's instruction, to pay a receivable to a bank, the bank obtains a security interest in that receivable. These cases also confirm that such security interests are enforceable against the borrower's liquidator (or, by analogy, bankruptcy trustee) even where the receivable comes into existence after the liquidation. In that regard a number of cases where cited.

99. In *Byrne v AIB* [1978] IR 446 a company had contracted to sell a property and subsequently obtained a bridging loan from a bank. As security for that loan the company instructed its solicitor to undertake to the bank to "*hand over sufficient monies*

out of the proceeds of the sale to redeem this bridging finance as soon as the sale is closed...". The company entered liquidation and the liquidator argued that the bank had no effective security over the sales proceeds. The High Court (McWilliam J), in directing the money to be paid to the bank rather than the liquidator, held that the undertaking created an equitable charge over the sales proceeds noting "*…the clear intention was to charge the proceeds of sale…*".

100. In *Fitzpatrick v DAF Sales Limited* [1988] IR 464 the plaintiff had obtained a settlement in litigation and was awaiting payment. He sought a loan from a bank and as security for the loan instructed his solicitors to write to the bank saying "*I undertake to discharge my client's liability of £7000 plus interest thereon as soon as I receive the balance amounting to £12,000*" (at page 466). The plaintiff contended that the arrangement between him and the bank gave rise to an equitable assignment of the monies referred to in the undertaking, or an equitable charge over same, giving the bank's claim priority over a judgment creditor who was seeking a garnishee order. O'Hanlon J concluded that the arrangement between the plaintiff and the bank was sufficient to give rise to an equitable assignment in favour of the bank in respect of that part of the funds payable to the plaintiff which was referred to in the correspondence. O'Hanlon J said at page 468, "*I think the language used does indicate that the judgment monies were being earmarked as a fund from which the bank would be repaid*".

101. In the *Fitzpatrick* case, the security was effective against the liquidator even though the receivables became payable only after the liquidation.

102. While *Byrne* and *Fitzpatrick*, as well as other cases such as *Anglo v Edward Kavanagh* relate to undertakings given by solicitors, I do not believe that the creation of equitable assignments is confined to undertakings given by solicitors. While a solicitor's undertaking certainly has a distinct quality in many respects, I do not believe that it can

be distinguished, from the perspective of an equitable assignment, from undertakings given by other parties on behalf of debtors provided those parties are properly instructed and authorised to give the undertaking. I do not believe that only solicitors' undertakings to pay receivables can give rise to security interests over those receivables and the UK decisions previously referred to appear to bear this out.

Decision and summary

103. I am satisfied that this court has jurisdiction pursuant to Article 5 of the EU Insolvency Regulation to determine the issues raised in these proceedings.

104. For the reasons set out in detail in this judgment, I find that that portion of the Investment Proceeds (namely, £73,193) which relates to the First UK Investment is not charged in favour of NALM by the terms of the Deed of Charge.

105. For the reasons set out in detail in this judgment, I find that the deposit of the Loan Note certificate did not create an enforceable equitable mortgage over the portion of the Investment Proceeds (namely, £770,798) which relates to the GGCP Investment.

106. For the reasons set out in detail in this judgment, I find that the entire of the Investment Proceeds of £73,193 in respect of the First UK Investment and £770,798 in respect of the GGCP Investment were validly charged to Anglo (and now to NALM as successor in title) by virtue of the Undertakings, the legal effect of which was to create an equitable assignment by Mr McNamara to Anglo over all distributions received in respect of both investments. The same equitable assignment will operate in respect of a further sum of €22,700 relating to the GGCP Investment.

107. I will therefore make an order that:

(1) The defendant is beneficially entitled to the First UK Investment proceeds of £73,193 currently in the hands of the plaintiffs as joint trustees in bankruptcy.

(2) The plaintiffs as joint trustees in bankruptcy of Michael Bernard McNamara shall transfer the said First UK Investment proceeds to the defendant.

(3) The defendant is beneficially entitled to the GGCP Investment proceeds in the amount of £770,798 currently in the hands of the plaintiffs as joint trustees in bankruptcy of Mr McNamara.

(4) The plaintiffs as joint trustees in bankruptcy of Michael Bernard McNamara shall transfer the said GGCP Investment proceeds to the defendant.

(5) The plaintiffs shall transfer the further sum of €22,700 (or such amount as is held by the plaintiffs as joint trustees in bankruptcy of Michael Bernard McNamara in relation to the First UK Investment or the GGCP Investment) to the defendant.

108. I will list this matter for mention on Thursday 18 May at 10.30am to deal with the final form of Order, submissions on legal costs and any further matters arising from this judgment.