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Case Summary - Re ipagoo LLP (in administration)

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Re ipagoo LLP (in administration); Baker and another (as joint administrators of ipagoo LLP) (Financial Conduct Authority intervening) [2021] EWHC 2163 (Ch)

Background:

- ipagoo LLP is regulated by the FCA as an electronic money institution (EMI). It was authorised to issue electronic money and provide payment account services to enable clients to operate non-resident payment accounts in multiple EU countries.
- Under the Electronic Money Regulations 2011, SI 2011/99 (EMRs), EMIs are not permitted to take deposits and are required under regulation 20(2) of the EMRs to take steps to safeguard 'relevant funds' (defined in regulation 20(1)) as "funds that have been received in exchange for electronic money that has been issued"), i.e. sums paid by electronic money holders (EMHs) in exchange for electronic money in accordance with either regulation 21 or regulation 22.
- By July 2019 ipagoo become insolvent and was placed into administration.
- ipagoo had received from EMHs funds totalling EUR3,810,972, £235,854 and US$265,980, but it had not been possible to establish whether these funds were safeguarded as required by the EMRs.
- Under regulation 24, where there is an insolvency event the claims of EMHs must be paid from the asset pool in priority to all other creditors, and until all the claims of EMHs have been paid, no right of set-off or security right may be exercised in respect of the asset pool (subject to limited exceptions).

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Background (cont'd):

- The administrators made an application asking:
  - whether the EMRs created a statutory trust of the 'asset pool' as defined in regulation 24 of the EMRs, for the benefit of EMHs; and
  - whether relevant funds which should have been, but were not, dealt with in accordance with regulations 20 to 22 of the EMRs, formed part of the asset pool.
- The FCA intervened in these proceedings as *amicus curiae* at the administrators' invitation. It was submitted on the FCA's behalf that a statutory trust had arisen in relation to the relevant funds. The administrators were neutral but presented the case against a statutory trust so that the court could consider both sides of the issue.
- On behalf of the FCA, it was said that the Payment Services Directive (2015/2366/EU) made clear the relevant funds were to be protected at all times. It was submitted that the nature of the intended protection required, in English law, a trust.
- On behalf of unsecured creditors, it was submitted that the word 'trust' did not appear in the legislation and that contractual language had been used instead. It was argued that the draftsman of the EMRs had contemplated a potential failure to comply with EMRs as regulation 72 provided a statutory remedy for non-compliance (which would be unnecessary if electronic money holders had a beneficial interest).

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What did the court decide?

- The EMRs were EU-derived domestic legislation and continued to have effect notwithstanding Brexit. Therefore, the court would have to follow the approach outlined in Lehman Brothers International (Europe) (In Administration) [2012] 3 All ER 1 and the EMRs had to be interpreted in light of the meaning of the relevant Directives (here the Electronic Money Directive (2009/110/EC) and the Payment Services Directive (2015/2366/EU)).
- The judge considered that the Lehman case (cited above) did not assist in determining whether any trust arose in the present case, as it had been concerned with legislation that expressly imposed a trust.
- Further, the FCA relied on Re Supercapital Ltd [2020] EWHC 1685 (Ch), where it was found that the Payment Services Regulations 2017, SI 2017/752 (which were in some ways similar to the EMRs) gave rise to a statutory trust. However, the judge noted that the court in that case had not had the benefit of hearing submissions for the other side.
- The judge noted that the EMRs had some features which were consistent with a statutory trust.
- But, features indicating that there was no trust included:
  - as EMHs spent the e-money they received and the EMI's obligation to safeguard the relevant funds diminished at the same rate, leaving the EMI free to spend the surplus; and
  - EMHs were able to choose to redeem their e-money at any time and there was no requirement that, if and when they did, they would need to be paid out of the relevant funds.

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What did the court decide? (cont'd)

- The court concluded that the EMRs did not give rise to a statutory trust.
- As to the second question, the judge concluded that the asset pool referred to in regulation 24 of the EMRs included sums equal to the relevant funds that should have been, but were not, segregated. Since the EMHs' interest in the electronic funds was not proprietary, the inability to distinguish the relevant funds from money they had been mixed with did not present an obstacle in practice.

Commentary:

- The judgment is useful because it contains a detailed discussion as to when a statutory trust may arise where the relevant legislation does not expressly provide for such a trust.
- The judgment clarifies that electronic money holders, while not beneficiaries under a statutory trust, will enjoy protection under regulation 24 of the EMRs even if the funds they have paid in exchange for electronic money have not been (as they should be) segregated by the electronic money institution from its other funds.

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Commentary (cont'd):

- This decision is at odds with previous guidance issued by the FCA and can be contrasted with the decision In Re Supercapital which found that the Payment Services Regulations 2017 (PSRs) create a statutory trust over safeguarded funds.
- The Ipagoo decision does not overrule Supercapital, and is concerned with different legislation, but given the similarities between the safeguarding and distribution provisions for relevant funds, the decisions are potentially inconsistent. The court in Ipagoo acknowledged the contrary decision in Supercapital but noted that the court in Supercapital had not been presented with arguments to the contrary.
- The FCA's counsel noted in recent written submissions to the court that Judge Halpern's judgment interprets the electronic money rules in a way that overrides principles of insolvency law and creates a conflict for stakeholders in e-money institutions which would have otherwise benefited from insolvency set-off.
- Judge Halpern said during a virtual hearing in September 2021 that he was "satisfied that the Financial Conduct Authority has standing to bring an appeal as an interested party without being joined as a respondent in the application." He said it was an appropriate case to be heard by the Court of Appeal and that it raises difficult questions about the position of the law. The administrators have not opposed this statement and it is possible that this case will go to court again.

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