Lexis®Nexis Case Summaries

Re Ipagoo LLP (in administration)
Baker and another (Financial Conduct Authority intervening)

[2022] EWCA Civ 302, [2022] All ER (D) 35 (Mar)

The Court of Appeal, Civil Division, dismissed both the appeal and the cross-appeal against the decision of the Chancery Division. The appeal and cross-appeal were concerned with the proper construction of the Electronic Money Regulations 2011, SI 2011/99 and, in particular, with the status of funds received by an electronic money institution from electronic money holders in the event of its insolvency. The court held, among other things, that (i) the existence of the alternatives and the nature of the alternative in art 10(1)(b) of the Directive (EU) No 2366/2015, together with the natural and ordinary meaning of art 10(1)(a) when read as a whole and interpreted in accordance with EU law, were inimical to the need for the imposition of a trust to satisfy the purposes of the Directive (EC) No 110/2009. Therefore, it was not necessary to impose a statutory trust to fulfil the purposes of the 2019 Directive and art 10(1) of the 2015 Directive; and (ii) the proper interpretation of 'asset pool' in reg 24 included relevant funds which had not been properly safeguarded. It was also necessary, to interpret 'costs of distributing the asset pool' in reg 24(2) to include the costs of making good the asset pool in circumstances where relevant funds, or some of them, had not been safeguarded. Those were administrative costs associated with the asset pool itself.

Catchwords

INSOLVENCY – DIRECTIVES – INTERPRETATION

Background

A company (Ipagoo), regulated by the Financial Conduct Authority (FCA) as an electronic money institution (EMI), became insolvent and was placed into administration. Ipagoo was authorised to issue electronic money (e-money) and also to provide multi-country and cross-currency payment account services, designed to enable clients to open and operate non-resident payment accounts in multiple EU countries. The joint administrators (the administrators) applied for directions about how certain funds held by ipagoo should be distributed and, in particular, whether those funds were held on trust pursuant to the Electronic Money Regulations 2011, SI 2011/99 (EMRs). The EMR was made in order to implement the Electronic Money Directive (EC) 2009/110 (the EMD) and the Second Payment Services Directive (EU) 2015/2366 (the PSD2). The FCA intervened. Under reg 24 of the EMR, where there was an insolvency event, the claims of electronic money holders had to be paid from the asset pool in priority to all other creditors.

The administrators sought answers to two issues from the court. Namely; (i) whether the EMR created a statutory trust over the asset pool as defined in reg 24 of EMR, for the benefit of electronic money holders; and (ii) whether the relevant funds formed part of the asset pool. The High Court held that regs 20-22 and 24 of the EMRs largely provided the level of protection for funds received from electronic money holders required by the PSD2 and the EMD and there was no basis for implying a trust of the funds. Further, in order to comply with art 10 of the EMD, it was necessary to treat the 'asset pool' defined in reg 24 so as to include a sum equal to all the funds received from electronic money holders which ought to have been but had not been safeguarded under the remainder of the relevant regulations.

The FCA appealed. It submitted that the EMD and PSD2 required the EMRs to be construed in a manner which resulted in 'relevant funds' being subject to a statutory trust from the moment they were received by an EMI and that their proceeds were traceable, whether or not the funds were segregated in the first place or subsequently ceased to be so. The administrators' cross-appeal on the issue of the asset pool submitting that, it should be extended to include a sum equal to any relevant funds which should have been, but were not safeguarded and that accordingly, electronic money holders had a statutory right to be paid out of relevant funds in priority to all other credit.

Issues and decisions

(1) Whether the EMD and PSD2 required the EMRs to be construed in a manner which resulted in 'relevant funds' being subject to a traceable statutory trust. It was necessary, therefore, to construe the relevant provisions of the EMD and the PSD2.

Funds which were required to be segregated by art 10(1)(a) of the PSD2 were, in fact, a fluctuating pool. Art 7 required the funds to be safeguarded in either of two, if not three ways and it was for Member States or their competent authorities to determine which method or methods were to be used (see [55], [56] of the judgment).

The existence of the alternatives and the nature of the alternative in art 10(1)(b), together with the natural and ordinary meaning of art 10(1)(a), when read as a whole, and interpreted in accordance with EU law, were inimical to the need for the imposition of a trust in order to satisfy the purposes of the EMD. It was not necessary to impose a statutory trust in order to fulfil the purposes of the EMD and art 10(1) of the PSD2 (see [65], [66], [69] of the judgment).

Lehman Brothers International (Europe) (in admin), Re [2012] UKSC 6, [2012] 3 All ER 1, [2012] 1 BCLC 487, [2012]

Bus LR 667, [2012] All ER (D) 193 (Feb) applied

Lehman Brothers International (Europe) (in admin), Re [2009] EWHC 3228 (Ch), [2010] All ER (D) 143 (Jan) applied

Re Allied Wallet Ltd [2022] EWHC 402 (Ch) considered

Ayerst (Inspector of Taxes) v C & K (Construction) Ltd [1974] 1 All ER 676, [1974] STC 98, 50 TC 651, [1973] TR 303 considered

(2) Whether the judge erred in holding that the 'asset pool' should be extended to include a sum equal to any relevant funds which should have been, but had not been safeguarded giving electronic money holders a statutory right to be paid out of relevant funds in priority to all other credit.

As the EMD and the EMR's had not required the imposition of a statutory trust, it followed, therefore, that in order to fulfil the requirements of the EMD 'asset pool' in reg 24 had to be given a wider meaning. 'Asset pool' had to include a sum equal to such relevant funds which ought to have been but had not been safeguarded in accordance with regs 21 and 22 (see [90] of the judgment).

Thoburn v Sunderland City Council [2002] EWHC 195 (Admin), [2003] QB 151, [2002] 4 All ER 156, [2002] 3 WLR 247, [2002] All ER (D) 223 (Feb) considered

R (on the application of Privacy International) v Investigatory Powers Tribunal and others [2019] UKSC 22, [2020] AC 491, [2019] 4 All ER 1, [2019] All ER (D) 72 (May) considered

Oakley Inc v Animal Ltd (Secretary of State for Trade and Industry intervening) [2005] EWCA Civ 1191, [2006] Ch 337, [2006] 2 WLR 294, [2005] All ER (D) 222 (Oct) considered

United States of America v Nolan [2015] UKSC 63, [2016] AC 463, [2016] 1 All ER 857, [2015] All ER (D) 183 (Oct) considered

Villiers v Villiers [2020] UKSC 30, [2021] AC 838, [2021] 1 All ER 175, [2020] All ER (D) 07 (Jul) considered

The appeal and the cross-appeal would be dismissed (see [107] of the judgment).

Decision of David Halpin QC [2021] All ER (D) 16 (Aug) affirmed.

Judgment date
9 March 2022

Judges
Asplin, Popplewell and William Davis LJJ

Representation
Felicity Toube QC (instructed by The Financial Conduct Authority) and Dr Riz Mokal for the appellant.
Jack Watson (instructed by Faegre Drinker Biddle and Reath LLP) for the respondents.