# Lexis®Nexis Case Summaries

## Re Ipagoo LLP (in administration)
## Baker and another (as joint administrators of ipagoo LLP) (Financial Conduct Authority intervening)

[2021] EWHC 2163 (Ch), [2021] All ER (D) 16 (Aug)

Company – Administration. The administrators of a company in administration sought the answers to two questions. The Chancery Division held that, first, Regs 20-22 and 24 of the Electronic Money Regulations 2011, SI 2011/99 (the EMR) did not create a statutory trust in favour of electronic money holders, but gave a statutory right for them to be paid out of relevant funds in priority to all other creditors on the terms set out in Reg 24 (of the EMR). Second, the definition of 'asset pool' in Reg 24 included a sum equal to any relevant funds which ought to have been, but had not been, safeguarded under Regs 20-22 by means of two safeguarding options.

**Catchwords**

*Company – Administration – Electronic money holders*

**Background**

In July 2019, a company (Ipagoo) became insolvent and was placed into administration. It remained in administration and was prohibited from conducting any business.

The administrators of Ipagoo sought directions as to the distribution of assets. Ipagoo was regulated by the Financial Conduct Authority (FCA) as an electronic money institution (EMI). It 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.

EU law drew a distinction between payment institutions and EMIs on the one hand and credit institutions (including banks) on the other hand. Only the latter were permitted to take deposits of money and pay interest. EU law accorded with English common law (see *Foley v Hill* [1843-60] All ER Rep 16) in relation to the fundamental principle of the banker-customer relationship, namely that money deposited at a bank became the bank's own money and the customer's right to repayment was merely as a creditor (save in the case of a trust account).

By contrast, payment institutions and EMIs were not permitted to take deposits and were required to take steps to safeguard 'relevant funds: namely, sums paid by electronic money holders (EMHs) to the EMI in exchange for e-money (relevant funds). The rules were set out in the Electronic Money Regulations 2011, SI 2011/99 (the EMR). Regulations 21 and 22 of the EMR set out two safeguarding options (options 1 and 2 respectively).

The EMR was made in order to implement the Electronic Money Directive (2009/110/EC) (the EMD). Recital (3) in the Preamble to the EMD referred to the Payment Services Directive (2007/64/EC) (PSD1). PSD1 had been superseded by the Payment Services Directive (2015/2366/EU) (PSD2), and Art 114 of PSD2 stated that any reference to PSD1 should be construed as a reference to PSD2.

In the course of the administration, the administrators sought the answers to two issues from the court.

**Issues and decisions**

(1) Whether the EMR imposed a statutory trust.

Although PSD2 and the EMD contained features which were consistent with a trust or a charge, there was nothing that pointed unequivocally to a trust or charge. PSD2 and the EMD contemplated a relationship which lay somewhere between a bare trust and a personal obligation to repay the equivalent sum. It would be putting the cart before the horse to say that that amounted to a trust and then to ascribe to it all the features which flowed from it being a trust (see [48] of the judgment).

Regs 20-22 and 24 of the EMR achieved the level of protection required by the Directives, subject only to the question of the status of relevant funds where the EMI had failed to comply with Regs 20-22. There was no basis for implying a trust (nor, for that matter, a charge). To the contrary, the imposition of a trust or charge would, at best, duplicate Reg 24 and, at worst, conflict with it (see [49] of the judgment).

If Reg 24 was to be given its full effect, it had to override the priority rules which would otherwise apply to the distribution of assets upon the EMI's insolvency. On the case law, that was permissible, and indeed required, in order to give proper effect to PSD2 and the EMD (see [51] of the judgment).

Regs 20-22 and 24 of the EMR did not create a statutory trust in favour of EMHs, but gave a statutory right for EMHs to be paid out of relevant funds in priority to all other creditors on the terms set out in Reg 24 (see [56] of the judgment).

*Foley v Hill* [1843-60] All ER Rep 16 applied

*Lehman Brothers International (Europe) (in admin), Re* [2012] 3 All ER 1, [2012] UKSC 6, [2012] All ER (D) 193 (Feb) applied

(2) Whether all relevant funds formed part of the asset pool.

Art 10 of PSD2 required the UK to ensure that a high level of protection was given to EMHs in respect of relevant funds. The obligation related to 'all' relevant funds, and the prohibition on commingling relevant funds with other funds of the EMI was 'at any time'. That required the UK to make regulations giving the same level of protection to relevant funds whether or not the EMI had complied with Regs 20-22 (see [52] of the judgment).

Although there could be a potential difficulty in identifying relevant funds where they had been mixed with the EMI's other funds, it ought not to arise in practice, given that the protection given to EMHs was not proprietary in nature. The protection did not extend to the actual relevant funds which had not been safe-guarded, but extended to an equivalent sum. In order to comply with Art 10 of PSD2, it was necessary to treat the asset pool in Reg 24 as including a sum equal to all relevant funds which ought to have been, but have not been, safeguarded under option 1 or option 2 (see [53], [54] of the judgment).

The definition of 'asset pool' in Reg 24 included a sum equal to any relevant funds which ought to have been, but had not been, safeguarded under Regs 20-22 by means of options 1 or 2 (see [56] of the judgment).

*Lehman Brothers International (Europe) (in admin), Re* [2012] 3 All ER 1, [2012] All ER (D) 193 (Feb), [2012] UKSC 6 applied

**Judgment Date**

30 July 2021

**Judge**

David Halpern QC (sitting as a deputy judge of the High Court)

**Representation**

Jack Watson (instructed by Faegre Drinker Biddle & Reath LLP) for the applicants.

Dr Riz Mokal (instructed by the Financial Conduct Authority) for the Financial Conduct Authority, as intervener.