Neutral Citation Number: [2024] EWHC 369 (Ch)

Case No: CR-2023-005465

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28/02/2024

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

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Between:

SIMON ASHLEY ROWE	**Applicant**
(as Liquidator of ONESTOPMONEYMANAGER LTD (IN LIQUIDATION))	
- and -	
(1) REDBONES LIMITED	**Respondents**
(2) QUAD STRATEGY LIMITED	
(3) NEW CROSS NETWORK LIMITED	
(4) RUNNING 4 LIMITED	

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Miss Jessica Powers (instructed by **Howard Kennedy LLP**) for the **Applicant**

Hearing date: 14 February 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 28 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Chief ICC Judge Briggs:

1. OneStopMoneyManager Limited (the "Company") had been authorised by the Financial Conduct Authority as an electronic money institution for issuance of electronic money. Authorisation was granted on 6 March 2018.

2. In February 2019 Visa withdrew the Company's licence to participate in the visa card scheme.

3. On 4 December 2019, the Financial Conduct imposed requirements on the Company that prevented it from, amongst other things, carry on any regulated activities.

4. On 23 October 2020 the directors of the company signed a declaration of solvency and on 28 October 2020 the Company entered a members' voluntary liquidation. Simon Rowe of Milsted Langdon LLP was appointed liquidator.

The liquidation

5. Mr Rowe recognised that one of the purposes of the liquidation was to return monies held by the Company to merchants who could be identified as having paid money to the Company. At the time of liquidation €8,609,594 was estimated to be held in reserves leaving a surplus of €331,803 after anticipated payments for merchant claimants.

6. Mr Rowe embarked on a due diligence process for the purpose of identifying merchants who would have a claim on the funds held by the Company. The due diligence comprised: i) the receipt of the relevant money laundering identification of the merchant company's director(s); ii) receipt of the merchant's bank account details; and iii) a signed agreement by a relevant director of the sums due from the Company. Once he was in receipt of the relevant documents or information he obtained approval from the Financial Conduct Authority and made the due payment.

7. Four of the identified merchants have failed to comply with the requirements of the due diligence process. These four are the Respondents to the Application made by Mr Rowe. A sum of €21,529.97 is currently held to meet the expected merchant claims.

8. One challenge faced by Mr Rowe is merchant engagement apathy. He explains in his witness statement:

> "On 26 April 2021, I informed the FCA that we were ready to make further payments, including to dissolved companies, which we understood would be Bona Vacantia. We received a response from the FCA on 29 April 2021 which stated that I would need to satisfy myself that the dissolved companies had the beneficial interest in the funds and not another party, using the example of funds that were being held on trust by a dissolved company for someone else…desktop enquiries have been undertaken to ascertain whether further or alternative means of communication with the Outstanding Merchants can be found from public sources. Where these desktop enquiries did uncover additional or previously unused means of contact

> with the Outstanding Merchants, my team has taken steps to attempt contact with the Outstanding Merchants, using these methods."

9. The First Respondent did provide a signed settlement letter. The letter was signed by a person holding a power of attorney for a former director of the company. Despite using various methods of communication including a telephone call, letters sent to the registered address of the First Respondent and e-mails to an address provided in earlier correspondence there has been a failure to provide the necessary due diligence documents including a signed settlement agreement by a director of the company.

10. The Second Respondent has not responded to the attempts made Mr Rowe to communicate with it.

11. The Third Respondent is a company registered in Cyprus. The Third Respondent has corresponded by email, with the latest email being on 15 December 2023, but the Third Respondent has not provided the documents and information sought.

12. The Fourth Respondent is a company registered in Scotland. There is one active director appointed on 22 November 2021 who has significant control of the company. The director has not engaged with the due diligence process.

13. As regards creditors, Mr Rowe has received claims from three employees (ranking as preferential creditors), totalling £4,403.94, and 13 unsecured creditors, totalling £1,313,945.70. All claims have been paid in full, together with statutory interest totalling £112,409.96. All consequential liabilities to HMRC have also been paid in full.

The Application

14. Mr Rowe, in his capacity as liquidator, seeks directions pursuant to section 112 of the Insolvency Act 1986. The provisions permit Mr Rowe to apply to court to determine any question arising in the winding up of the Company. I am satisfied that the determination of the question posed by Mr Rowe will be just and beneficial for the winding up: section 112(2) of the Act.

15. By his Application notice dated 20 September 2023 Mr Rowe asks:

    i) Should the Company be treated as being regulated under the Payment Services Regulations 2017 or the Electronic Money Regulations 2011.

    ii) Are the Residual Monies in the possession of the Company held on a statutory trust for the Respondents.

    iii) What further period of time should be allowed for the Respondents to provide the outstanding information.

    iv) In the event that the Respondents fail to provide the required information to verify their claims, how should he treat the residual monies.

16. Mr Rowe, in his written evidence, draws the Court's attention to three cases where judicial consideration has been given to the applicable regulations. The applicable

regulations are the Electronic Money Regulations 2011 and the Payment Service Regulations 2017. I do not intend to make this judgment unnecessarily long by setting out the totality of the 2011 and 2017 Regulations. These can be found on the internet at legislation.gov.uk:

https://www.legislation.gov.uk/uksi/2011/99/contents/made

https://www.legislation.gov.uk/uksi/2017/752/contents/made

17. The Electronic Money Regulations 2011 (SI 2011/99) govern the issuance of electronic money in the UK. They create an authorisation and registration regime for issuers of e-money where those issuers are not banks or building societies. They also provide rules as to the conduct of business. The regulations are "EU-derived domestic legislation" and continue to have effect by reason of section 2(2) of the European Union (Withdrawal) Act 2018.

18. In a similar way payment services providers are authorised and governed by the Payment Services Regulations 2017 (SI 2017/752). These regulations continue to have effect in domestic law.

19. Given that the purpose of the 2011 Regulations is to authorise and govern the issuance of e-money, it is not illogical to think that if a provider wished to provide payment services it would require a separate authorisation under the 2017 Regulations. Issuance of e-money is not the same as providing a payment service. The short point is dealt with by regulation 32 of the 2011 Regulations headed "Additional activities". It provides that e-money institutions may also provide payment services without separate authorisation under the 2017 Regulations.

20. Regulation 20 of the 2011 Regulations requires steps to safeguard "relevant funds". The relevant funds are those funds paid to the institution by electronic money holders in exchange for e-money. The safeguarding provisions are straight-forward. First the relevant funds are to be segregated from any other funds. Alternatively, relevant funds are to be insured or guarantee should be obtained from an insurer of a credit institution to cover loss: regulations 21 and 22 of the 2011 Regulations. These safeguards are expressed as alternatives: regulation 20(2).

21. In *Re ipagoo LLP* [2021] Bus. L.R. 1469 the court considered if the mechanism provided by the Electronic Money Directive (Council Directive 2009/110/EC) that preceded the 2011 Regulations for safeguarding created a trust. David Halpern QC, sitting as a Deputy High Court Judge, applied the approach to interpretation of EU-derived domestic legislation interpretation set out in *Lehman Brothers International (Europe)* [2012] Bus. L.R. 667.

22. In his reasoning David Halpern QC noted that segregation of funds may be an indicator of a trust as pointed out by Deputy ICC Judge Agnello QC In *re Supercapital Ltd* [2021] 1 B.C.L.C. 355. Only one party was represented in *re Supercapital*.

23. With the benefit of argument from two parties David Halpern QC concluded the 2011 Regulations did not create a statutory trust.

24. The 2017 Regulations were the focus of a directions hearing in *Supercapital*. The Judge explained that whether a trust is created by statute requires consideration of the language at [8]. After citing *Re Lehman Brothers International (Europe) (In Administration)* the Judge reasoned [10]:

> "All the characteristic for such a trust being in existence are present. The segregation of funds received right from the inception as well as ensuring that they are identifiable is equally important. The fact that the company cannot use the funds in its own business and the position is made clear that the funds are only available to those beneficiaries in the event of an insolvency event are also important. In the circumstances, the Administrators are correct in their approach to treat the funds as being held by way of a statutory trust."

25. Returning to the first instance decision in *re ipagoo*, the Financial Conduct Authority obtained permission to appeal the decision. It contended that the safeguard provisions created a statutory trust. Lady Justice Asplin explained In *re ipagoo LLP* [2022] Bus. L.R. 311 [6]:

> "…the FCA appealed the decision, arguing that the Electronic Money Directive (2009/110/EC) (EMD) and Second Payment Services Directive (2015/2366/EU) (PSD2) (the Directives) required the EMRs to be construed so that "relevant funds" were subject to a statutory trust when 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. They say that that is necessary in order to provide the level of protection envisaged and required by the Directives and that the same applies to any insurance policy which is purchased pursuant to the safeguarding provisions in regulation 22 of the EMRs and to the proceeds of such a policy. Otherwise, the relevant funds are unprotected if the EMI fails to take the safeguarding steps it ought to."

26. And decided [79]:

> "It seems to me that the EMRs, properly construed in the light of the EMD and PSD2, do not impose a statutory trust in relation to funds received from electronic money holders."

27. Earlier in her judgment Lady Justice Asplin looked at the primary material, namely the directive from which the Regulations derived. She said:

> "55. First, it is important to bear in mind that the funds which are required to be segregated by article 10(1)(a) are, in fact, a fluctuating pool. The original funds which are received are not set aside. As Ms Toube accepted, the amount which must be safeguarded on any day is not the original amount received from electronic money holders. It is the net amount. In other words, it is the sum equivalent to that which has not already

> been used in transactions by the electronic money holder from time to time.
>
> 56. Secondly, it is important to note that article 7 requires the funds to be safeguarded in either of two, if not three ways and it is for member states or their competent authorities to determine which method or methods shall be used. They are: the segregation of funds in the hands of the EMI upon receipt and thereafter by deposit with a credit institution or the purchase of liquid low-risk assets which must occur by the end of the business day after receipt, and which must be insulated in the event of insolvency in accordance with article 10(1)(a); or the issuance of an insurance policy or guarantee for an amount equivalent to that which would have been segregated, the policy/guarantee being payable in the event that the EMI is unable to meet its financial obligations (article 10(1)(b)). This is important.
>
> 57 The alternative of an insurance policy or guarantee which may be chosen by a member state as the only means of safeguarding to be implemented in national law does not require any funds to be set aside or segregated in any way. To the contrary, instead of keeping funds separate, it is open to an EMI to use them in its business as it thinks fit as long as there is an insurance policy or guarantee in place, for an amount "equivalent" to the amount which would have been segregated. The funds do not even have to be used to meet the premiums on the policy or cost of the guarantee. They are merely "covered by an insurance policy or some other comparable guarantee". The EMI, therefore, is not precluded from making use of the funds for its own purposes in all circumstances. This is contrary to the characteristics of trust property described by Lord Diplock."

28. The reference to Lord Diplock is to his speech in the House of Lords in *Ayerst v C&K (Construction) Ltd* [1976] AC 167 where the question under consideration was how assets held by a company are treated on a winding up. She noted that if interpreted in accordance the principles of EU Law, then it is notable that the holder of electronic money is given no proprietary right to the insurance policy/guarantee or its proceeds.

29. The first question for this Court concerns the interpretation of the 2017 Regulations and a consideration of whether they are sufficiently different to the 2011 Regulations to enable a statutory trust. On this occasion the Financial Conduct Authority do not contend for a statutory trust. Its position is that the relevant language used in the 2017 Regulations is not sufficiently different from the 2011 Regulations to warrant a departure from the reasoning of Lady Justice Asplin in *re ipagoo*.

30. Mr Rowe's view, as stated in his first witness statement, was that a statutory trust does not arise if the Company was regulated by the 2011 Regulations, following re ipagoo, but that a statutory trust would arise, following *re Supercapital*, if the

Company was regulated by the 2017 Regulations. He is, however, neutral as to the outcome.

31. The Respondents (I am satisfied they were served) do not appear.

Should the Company be treated as being regulated under the Payment Services Regulations 2017 or the Electronic Money Regulations 2011.

32. On 7 June 2023 the Financial Conduct Authority wrote to Mr Rowe stating that the Company:

> "…was authorised under the EMRs, but never issued e-money, then safeguarding provisions under the PSRs applied… as a matter of law the PSRs did apply by virtue."

33. Reference was made to Regulation 20(6) of the 2011 Regulations:

> "Regulation 23 of the Payment Services Regulations 2017 applies in relation to funds received by electronic money institutions and credit unions for the execution of payment transactions that are not related to the issuance of electronic money with the following modifications…"

34. The Financial Conduct Authority has intimated that the Company was not regulated by the 2011 Regulations. This, it seems to me, is essentially a question of fact. The Company was authorised and governed by the 2011 Regulations. No one disagrees. No application was made for regulation under the 2017 Regulations. No one disagrees. To find that the Company was regulated under a scheme that the Company had not been authorised by and in circumstances where the Company never made an application for authorisation, would in my judgment be perverse. In my judgment the Company was regulated under the 2011 Regulations.

Statutory Trust

35. I agree with the submission made by Mr Rowe and the Financial Conduct Authority that notwithstanding the Company's authorisation and regulation under the 2011 Regulation, the 2017 Regulation safeguarding provisions apply by virtue of Regulation 20(6) of the 2011 Regulations.

36. In *Re Allied Wallet Ltd* [2022] EWHC 1877 ICC Judge Burton summarised the Court of Appeal decision in *re ipagoo* and concluded that the 2017 Regulations are to be treated the same as the 2011 Regulations [7,8]:

> "The Court of Appeal held that pursuant to regulation 24 of the EMR, electronic money holders have an interest that "might best be analysed as a secured interest" over the asset pool which takes priority over the waterfall of payments prescribed by section 175 of the Insolvency Act 1986 ("IA1986"). The claims of electronic money holders rank ahead of the claims of ipagoo LLP's unsecured creditors and ahead of the costs of the liquidation, other than the costs associated with distributing the asset pool (which are expressly provided for at regulation 24(2)

> of the EMR). In order to achieve the safeguarding requirements of the relevant European Directive, the asset pool must be treated as not being limited to the assets which were properly safeguarded but should extend to include a sum from the company's general estate on liquidation equal to the Relevant Funds which ought to have been, but were not safeguarded.
>
> Whilst the Court of Appeal's judgment concerned only the EMR, I concur with the Joint Liquidators' submission that due to the similarity in the provisions of the EMR and the PSR, it will apply equally to Relevant Funds under both Regulations."

37. The similarities between the safeguarding regulations in the 2011 Regulations and those that provide for safeguarding in the 2017 Regulations are identifiable in the appendix to this judgment.

38. Judge Burton found that the 2017 Regulations do not impose a statutory trust on funds received from merchants.

Disposal

39. The following factors are relevant to the determination:

    i) As found by Judge Burton, the 2011 and 2017 Regulations provide the same safeguarding options. The language is substantially the same, and no material difference has been identified by the Financial Conduct Authority or Mr Rowe;

    ii) In *re ipagoo*, the Court of Appeal found article 10 of the Second Payment Services Directive relevant to the determination of the trust issue. The same applies in this case;

    iii) In *re ipagoo* it was found that where funds had been segregated, such funds constitute a fluctuating pool, so that the amount segregated on any day is not the original amount received. I have been given no reason to find that a fluctuating pool would not operate under the 2017 Regulations;

    iv) If the insurance policy option is chosen by the institution, there is no obligation to segregate funds;

    v) It follows that where an institution elects to obtain an insurance policy the safeguards do not prevent the funds being mixed with all funds;

    vi) Furthermore, the safeguarding provisions in the 2017 Regulations do not preclude the institution from using the funds for its own purpose;

    vii) The language of the 2017 Regulations is not consistent with providing a paying party with a proprietary interest;

    viii) Although not decisive, it is notable that there is no express reference to the creation of a statutory trust in the 2017 Regulations;

ix) Read as a whole, the safeguarding provision in the 2017 Regulations impose no use restriction obligation. The funds received may be used or disposed of for benefit of the institution: *Ayerst v C&K (Construction) Ltd*.

40. I conclude from the factors set out above that the safeguarding provisions in the 2017 Regulations do not impose a statutory trust.

What further period of time should be allowed for the Respondents to provide the outstanding information.

41. The Financial Conduct Authority wrote to Mr Rowe on 7 June 2023 expressing the view that little had been done to communicate with the Respondents since April 2022. Since that date Mr Rowe's office has made further attempts to communicate. It is common ground that the Respondents are identified as merchants who have a claim on the funds held by the Company.

42. In my view two practical steps can be taken to ensure that the Respondents have a fair opportunity to claim their funds. First, a short advertisement can be placed in a daily newspaper in circulation in the relevant jurisdiction and province of each Respondent's registered office. Secondly, a recorded delivery letter may be sent to the registered offices. Where there are known methods of communication (such as e-mail) these methods should be used in addition.

43. If Mr Rowe receives no response following 42 days from the date of deemed service of the letter and any other communication, and publication of the advertisement, whichever is later, he may proceed with the liquidation. The letter, advertisement and other communication should state the time by which the Respondents should contact Milsted Langdon (a "bar date").

In the event that the Respondents fail to provide the required information to verify their claims, how should he treat the residual monies.

44. Mr Rowe knows that funds are identifiable as having been paid to the Company by the Respondent merchants, and so he needs to know how to treat the funds in circumstances where the Respondents do not respond. The options he suggests are either to pay them into the Insolvency Service Account or the unclaimed funds are to form part of the company's assets payable to members in the final account. Mr Rowe argues that the second option would defeat the purpose of safeguarding and provide a windfall to the members. The position of the Financial Conduct Authority is that the funds should be paid into the Insolvency Service Account. The issue is not new, arising, as it does, in liquidations, deceased estates and in cases concerning trusts.

45. In *Re Pritchard Stockbrokers Limited* [2019] EWHC 137, an investment services company, based in Bournemouth, provided a full range of such services. The Financial Conduct Authority served a supervisory notice on the company in February 2012 which effectively meant it could not carry on its regulated activities. On 9 March 2012 an Investment Bank Special Administration order was made under the Investment Bank Special Administration Regulations 2011 and joint special administrators were appointed. The special administrators set about tracing clients so that they could return client money. Their efforts were extensive and included employing tracing agents. Of the £25,753,673 held by the stockbrokers, 97% by value

of claims had been satisfied before a directions application, made under paragraph 63, schedule B1 to the Act, was made to the court about the residue sums.

46. Any solution to unclaimed funds or untraceable claimants to a fund requires a balanced approach permitting fair opportunity for claims to be made on following 42 days from the date of receipt deemed service of the letter and any other communication, and publication of the advertisement, whichever is later, he may proceed the one hand and the need for a winding up to advance and conclude on the other.

47. In my judgment, the following provides a balance:

    i) The Respondent merchants to be given a 42-day period from service of this order to respond to Mr Rowe with the due diligence required;

    ii) Where a Respondent merchant responds within the 42-day period with the necessary due diligence, the claim may be processed;

    iii) If a Respondent merchant fails to respond at all within the 42-day period Mr Rowe may proceed with the liquidation by paying the value of the unresponsive merchant's fund into the Insolvency Service Account;

    iv) If a Respondent merchant responds but fails to provide all the necessary due diligence, Mr Rowe may extend the time for such period as he thinks necessary to complete the process. This should only be done if the due diligence process is underway.

48. The Respondents should be informed (by registered post and other known forms of service) of the outcome in the "no response" scenario, and informed of the extension of time where there has been partial compliance with due diligence.

Conclusion

49. On the questions asked by way of directions:

    i) The Company is authorised and governed by the 2011 Regulations. The safeguarding provisions of the 2017 Regulations apply in respect of any payment services provided by reason of regulation 20(6) of the 2011 Regulations.

    ii) The safeguarding provisions in the 2011 and 2017 Regulations do not create a statutory trust.

    iii) Further time should be afforded to the Respondent merchants to provide due diligence.

    iv) In the event that the Respondent merchants do not respond within the given time frame, Mr Rowe may pay the funds to the Insolvency Service Account.

50. I invite the Applicant to provide an order.

APPENDIX

The similarities between the safeguarding regulations in the 2011 Regulations and those that provide for safeguarding in the 2017 Regulations.

2011 Regulations	**2017 Regulations**
R.20(2): Relevant funds must be safeguarded in accordance with either regulation 21 or 22	R.23(3): an authorised payment institution must safeguard relevant funds in accordance with either paragraphs (5) to (11) or paragraphs (12 and (13)
R.21(1): an electronic money institution must keep relevant funds segregated from any other funds that it holds… (4): no person other than the electronic money institution may have any interest in or right over the relevant funds or the relevant assets placed in an account in accordance with paragraph (2)(a)… (5) the institution must keep a record of any relevant funds segregated in accordance with paragraph (1)…	R.23(5): an authorised payment institution must keep relevant funds segregated from any other funds that it holds… (8): no person other than the authorised payment institution may have any interest in or right over the relevant funds or relevant assets placed in an account… (11): the authorised payment institution must keep a record of any relevant funds segregated in accordance with paragraph (5)…
[alternatively] R.22(1) an electronic money institution must ensure that any relevant funds are covered by an insurance policy with an authorised insurer, a comparable guarantee from an authorised insurer or a comparable guarantee from an authorised credit institution…	[alternatively] R.23 (12): the authorised payment institution must ensure that any relevant funds are covered by one an insurance policy with an authorised insurer 2A compatible guarantee given by an authorised insurer or three a compatible guarantee given by an authorised credit institution…

R22 (2) no person other than the electronic money institution may have any interest or right over the proceeds placed in an account in accordance with paragraph (1)(b) except as provided by this regulation.	R.23 (13): no person other than the authorised payment institution may have any interest in or right over the proceeds placed in an account in accordance with paragraph (12) except as provided by this regulation.