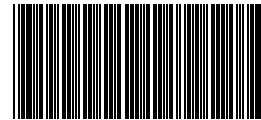




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Written Submissions

COURT DETAILS

Court	Supreme Court of NSW
Division	Equity
List	Corporations List
Registry	Supreme Court Sydney
Case number	2015/00237028

TITLE OF PROCEEDINGS

First Plaintiff	Stephen Ernest Vaughan and Ian Richard Hall in their capacity as Liquidators of BBY Limited (Receivers and Managers Appointed)(In Liquidation) ACN 006 707 777
Second Plaintiff	BBY Limited (Receivers and Managers Appointed)(In Liquidation) ACN 006 707 777
First Defendant	J Mazzetti Pty Ltd ATF J Mazetti Pty Limited Staff Superannuation Fund & ORS ACN 006705602
Second Defendant	Peter Brian Haywood and Bronwen Menai Haywood as trustees for the Haywood Superannuation Fund
Number of Defendants	5

FILING DETAILS

Filed for	Stephen Ernest Vaughan and Ian Richard Hall in their capacity as Liquidators of BBY Limited (Receivers and Managers Appointed)(In Liquidation) ACN 006 707 777, Plaintiff 1 BBY Limited (Receivers and Managers Appointed)(In Liquidation) ACN 006 707 777, Corporation subject of the proceedings 1 BBY Limited (Receivers and Managers Appointed)(In Liquidation) ACN 006 707 777, Plaintiff 2
Legal representative	EMANUEL JOHN POULOS
Legal representative reference	
Telephone	02 9258 6000

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (BBY - Plaintiffs' summary of contentions in reply.pdf)

[attach.]

IN THE SUPREME COURT OF NEW SOUTH WALES
DIVISION: EQUITY DIVISION
REGISTRY: SYDNEY
CORPORATIONS LIST

No. 237028 of 2015

IN THE MATTER OF BBY LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)

PLAINTIFFS' SUMMARY OF CONTENTIONS

IN REPLY

A Recoveries

1. In response to paragraph 9 of the third defendant's summary of contentions, the plaintiffs note that:
 - (a) the Halifax Recovery was paid to, and remains in the control of, the Receivers; and
 - (b) the ABN AMRO Recovery is still held by ABN AMRO pending the Receivers' consent to the transfer of those funds.

B Set-off

2. Set-off may, subject to the Receivers' position, be available pursuant to a contractual right of set-off, as occurred in *In Re MF Global Australia Ltd (in liq)* [2012] NSWSC 994.
3. In response to paragraph 15 of the third defendant's summary of contentions and paragraph 2(c) of the fifth defendant's summary of contentions, the plaintiffs note that:
 - (a) under the Futures Terms:¹
 - (i) it is a Default Event if monies owing are not punctually paid as and when they become due (cl 19.1(a));
 - (ii) the liability to pay margin accrues at the time the margin "*comes into existence*" regardless of when a Call is made (cl 12(g)); and
 - (iii) if no other time is stipulated by BBYL prior to calling margin, the client is required to comply within 24 hours (cl 12(e));
 - (b) under the FX Terms:²
 - (i) the client is obliged to maintain in its account at all times "*sufficient funds to meet all Margin requirements*" (cl 4.3); and

¹ Appendix 12 to the affidavit of Stephen Vaughan affirmed on 23 December 2015 (**December Affidavit**).
² Appendix 14 to the December Affidavit.

- (ii) it is a Default Event if monies owing are not punctually paid as and when they become due (cl 8(a)) or any obligation under the Terms is not punctually performed (cl 8(e)); and
- (c) under the Online Account Terms:³
 - (i) the client is responsible for maintaining margin cover and making all margin payments as required, whether or not BBY gives any notice to the client (cl 7.1(a)) and it is the strict responsibility of the client to monitor and meet all margin requirements (cl 7.2(c)); and
 - (ii) it is a Default Event if monies owing are not punctually paid as and when they become due (cl 10.1(a)) or any obligation under the Terms is not punctually performed (cl 10.1(g)).

C Calculation of client entitlements

- 4. In response to paragraph 13 of the third defendant's summary of contentions, the plaintiffs note that if debtor balances are not set-off it is likely that the Receivers would claim any amounts received in respect of those debtor balances pursuant to the security of their appointor.
- 5. Depending upon:
 - (a) the proper construction of section 981A(2) of the *Corporations Act 2001* (Cth) (**Corporations Act**);
 - (b) the basis upon which the monies are paid;⁴ and
 - (c) the outcome of the Receivers' application,the recovery of client debts may be incapable of expanding the pool of funds available for distribution by reason of that security interest.
- 6. For those reasons, the liquidators excluded debtor balances from their calculation of the aggregate amount of client entitlements and their estimate of the shortfall for each product line.

D Status of Saxo client monies prior to 17 May 2015

- 7. The fourth defendant has contended that prior to 17 May 2015 clients in the Saxo product line were unsecured creditors of BBYL.
- 8. According to page 41 of the Online Trader PDS, BBY would use a "*client monies trust account (the Protection Trust) dedicated only for Clients using an BBY Online Trader Account*" and use client payments "*only for hedging or managing the hedging of its hedge contracts for Clients' BBY Contracts or for paying fees and charges on the BBY Contracts*".

³ Appendix 16 to the December Affidavit.

⁴ *In Re MF Global Australia Ltd (in liq)* [2012] NSWSC 994 at [202].

9. The Online Trader PDS contains, on pages 49–50, a description of the operation of BBY's Protection Trust arrangements.⁵ The Declaration of Limited Trust executed by BBY Limited on 30 June 2012 (**Declaration**) provides that:⁶

(a) BBYL irrevocably declares that the Trust Property including its interest in the Trust Account (cl 1.1):

... will be held by [BBYL] upon a separate trust (Trust) on the terms of this deed upon a nomination by it in writing of the nominated Trust Property being subject to this deed.

(b) subject to cl 1.4(b), no client has any right to, beneficial interest in or other entitlement to the Trust Property, other than to require BBYL to comply with the terms of the deed (cl 1.4(a));

(c) an Insolvency Event or a breach by BBYL of the deed that materially adversely affects the interests of Clients (meaning Saxo clients by reason of the definitions of Client, Client Transaction, Platform, Market Agreement and Hedge Counterparty) is a Trigger Event (cl 5.8); and

(d) upon a Trigger Event BBYL holds the Trust Account beneficially for Clients (ccl 1.4(b) and 2.2(a)).

10. Pursuant to clause 2.1(d) of the Declaration, BBYL could withdraw funds from the Trust Account only for the permitted purposes specified in that sub-clause. Those purposes were:

(a) to pay to a trust account under Part 7.8 of the Corporations Act for the benefit of a Client;

(b) to pay Clients in full or partial satisfaction of BBYL's obligations under Client Transactions;

(c) to pay BBYL amounts it was entitled to be paid under Client Transactions;

(d) to pay BBYL amounts it was entitled to be paid under the Declaration;

(e) to meet contractual obligations to SCMA corresponding with Client Transactions; and

(f) for any purpose BBYL determined following termination of the trust on 20 business days' notice to Clients.

11. On 30 June 2012, pursuant to a "nomination of trust", BBYL nominated:

(a) the eBridge Buffer account ending 0256;

(b) the "BBY Protection Trust" account ending 5874; and

(c) certain other bank accounts,

as Trust Accounts (and therefore Trust Property) for the purpose of the Declaration.

⁵ Appendix 17 to the December Affidavit.

⁶ Appendix 59 to the December Affidavit.

12. Prior to execution of the Declaration by BBYL on 30 June 2012:
- (a) on 31 May 2010, Stonebridge Securities Limited executed a Declaration of Limited Trust in substantially the same form and nominated an ANZ bank account as a Trust Account. On 18 August 2010, Stonebridge Securities Limited nominated the eBridge Buffer account ending 0256 as a Trust Account for the purpose of that Declaration of Limited Trust;
 - (b) in June 2011, agreements between Stonebridge Securities Limited and Saxo Bank A/S were novated to Australian Financial Market Services Ltd (later known as Smartrader Ltd) pursuant to a Deed of Novation; and
 - (c) at some time on or before 3 May 2012,⁷ Smartrader Ltd executed a Declaration of Limited Trust in substantially or exactly the same form which nominated:
 - (i) the eBridge Buffer account ending 0256;
 - (ii) the "SmarTrader Protection Trust HIA" account ending 5874; and
 - (iii) certain other bank accounts,as Trust Accounts (and therefore Trust Property) for the purpose of that Declaration of Limited Trust.
13. The liquidators have not yet located any "nomination of trust" nominating the Saxo Buffer account ending 356 held by BBYL with St George bank as a Trust Account pursuant to the Declaration dated 30 June 2012 made by BBYL.

E Distribution of the IB Recovery

14. The plaintiffs do not oppose IB clients being afforded the opportunity to assert and prove a tracing claim in respect of the "IB Platform Assets" (as defined in the fifth defendant's summary of contentions).
15. The plaintiffs do note that:
- (a) tracing claims could increase costs associated with making distributions;
 - (b) to the extent that the assets the subject of a tracing claim are exchange-traded products quoted on a foreign market, delivery of those assets to the claimant would require arrangements to be made with a participant of the relevant foreign market or a clearing house (as applicable);
 - (c) to the extent that the assets the subject of a tracing claim are over-the-counter products, "delivery" of those assets to the claimant would likely require novation of the relevant contract from BBYL to another counterparty willing to assume obligations to the client under that contract; and

⁷ Based on file metadata for a copy of the executed deed. The deed itself is undated.

- (d) it is the plaintiffs' understanding that Interactive Brokers LLC (which generally deals with wholesale clients) may not be willing to assume a direct contractual relationship with BBYL's underlying clients as contemplated by paragraphs 15(b) and 15(c) above.

Ashurst Australia

30 August 2016