Equity Division
Supreme Court
New South Wales

Case Name:	In the matter of BBY Limited (Receivers and Managers appointed) (in liquidation) (No 3)
Medium Neutral Citation:	[2018] NSWSC 1718
Hearing Date(s):	22 June 2018
Date of Orders:	Monday, 12 November 2018
Date of Decision:	Monday, 12 November 2018
Jurisdiction:	Corporations List
Before:	Brereton J
Decision:	Directions and advice given to Liquidators: see [103]-[114]
Catchwords:	CORPORATIONS – External administration – Liquidation – Liquidators' applications – Application by liquidators of corporate trustee for directions consequent upon previous judgment – Date as at which client entitlements are to be ascertained – Whether the non-Equities/ETOs CSAs should be pooled, or transactions between them reversed – Whether funds in trust accounts in excess of trust obligation should be remitted to secured creditor – Whether liquidators justified in adopting process for claims and distribution – Whether appropriate to approve quantum of remuneration and disbursements in connection with distribution process in advance CORPORATIONS – External administration – Liquidation – Liquidators' remuneration – Where questions of reasonableness and proportionality emerging – Preferable to consider upon completion of administration COSTS – Proceedings by trustee for advice – Costs of all parties to be paid out of trust funds, pro rata according to the value of assets in the funds

(CTH) *Corporations Act 2001,* ss 545, 981A, 981F, 981H
(CTH) *Corporations Regulations 2001,* r 7.8.03
(NSW) *Trustee Act 1925*, s 60, s 63
(NSW) Uniform Civil Procedure Rules 2005, r 42.25

Cases Cited:

13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq) [1999] FCA 144; (1999) 30 ACSR 377
AAA Financial Intelligence Ltd (in liq), Re [2014] NSWSC 1004
Bastion v Gideon Investments (2000) 35 ACSR 466; [2000] NSWSC 939
BBY Limited (Receivers and Managers appointed) (in liquidation), In the matter of [2016] NSWSC 1366
BBY Limited (Receivers and Managers appointed) (in liquidation), In the matter of (No 2) [2018] NSWSC 346
BBY Limited, In the matter of [2015] NSWSC 974
BE Australia WD Pty Ltd v Sutton (2011) 82 NSWLR 336; [2011] NSWCA 414
Buckton, Re; Buckton v Buckton [1907] 2 Ch 406
Deputy Commissioner of Taxation v Starpicket Pty Limited (No 2), Re [2013] FCA 699
Farrow Finance Co Ltd v ANZ Executors and Trustees Co Ltd (1997) 23 ACSR 521
French Caledonia Travel Service Pty Limited (In Liquidation), Re (2003) 59 NSWLR 361; [2003] NSWSC 1008; 48 ACSR 97
Georges v Seaborn International (Trustee), in the matter of Sonray Capital Markets Pty Ltd (in liq) [2012] FCA 75; 87 ACSR 442
Grime Carter & Co Pty Limited v Whytes Furniture (Dubbo) Pty Limited (1983) 7 ACLR 540
Hughes v NM Superannuation Pty Ltd (1993) 29 NSWLR 653
James v Douglas [2016] NSWCA 178
Lehman Brothers International (Europe) (in administration), Re [2010] 2 BCLC 301; [2009] EWHC 3228 (Ch)
MF Global Australia Ltd (in liq), Re (No 2) [2012] NSWSC 1426
MF Global Australia Ltd, Re [2012] NSWSC 994; 267 FLR 27
National Australia Bank Limited v K.D.S. Construction Services Pty Ltd (1987) 163 CLR 668; [1989] HCA 65
North Food Catering Pty Ltd, Re [2014] NSWSC 77
North Food Catering Pty Ltd, Re [2014] NSWSC 77
Rouse v IOOF Australia Trustees Ltd (No 3) [1999] SASC 208
Sakr Nominees Pty Ltd, Re [2016] NSWSC 709

Say Enterprises Pty Ltd, In the matter of [2018] NSWSC 396
Suco Gold Pty Ltd, Re (1983) 33 SASR 99
Tilley v Official Receiver in Bankruptcy (1960) 103 CLR 529; [1960] HCA 86
Timeshare Resort Club Ltd (in liq), Re (2010) 187 FCR 13; [2010] FCA 673
Trio Capital Limited (Admin Apptd) v ACT Superannuation Management Pty Ltd [2010] NSWSC 941
Venetian Nominees Pty Ltd v Conlan (1998) 20 WAR 96
Warton v Yeo [2015] NSWCA 115
Wine National Pty Ltd, Re [2016] NSWSC 4

Category: Consequential orders (other than Costs)

Parties:

(2015/237028)
Stephen Ernest Vaughan and Ian Richard Hall in their capacity as liquidators of BBY Limited (Receivers & Managers appointed) (In liquidation) ACN 007 707 777 (1P)
BBY Limited (Receivers & Managers appointed) (In liquidation) ACN 007 707 777 (2P)
J Mazzetti Pty Ltd ATF J Mazzetti Pty Limited Staff Superannuation Fund & Ors (1D)
Peter Brian Haywood and Bronwen Menai Haywood (ATF the Haywood Superannuation Fund) (2D)
Clive Riseam (3D)
Securities Exchange Guarantee Corporation Ltd (4D)
David Nadin (5D)

(2016/77316)
Brett Lord and Stephen Parbery as receivers and managers of BBY Limited (Receivers & Managers appointed) (In liquidation) ACN 007 707 777 (1P)
BBY Limited (Receivers and Managers Appinted (in liquidation) (2P)

Representation:

(2015/237028)
Counsel:
D Healey (Ps)
DJ Williams QC w G J Parncutt (1D)
V Whittaker (2D)
GES Ng (3D)
JJ Hutton (4D)
MS Henry SC (5D)

Solicitors:
Ashurst Australia (Ps)

	Bamford Lawyers as agents for Partners Legal (1D) Mills Oakley (2D) Corrs Chambers Westgarth (3D) Clayton Utz (4D) Arnold Bloch Liebler (5D) (2016/77316) Counsel: S. Nixon (Ps) Solicitors: K&L Gates (Ps)
File Number(s):	2015/237028 2016/77316

JUDGMENT

1 This judgment relates to a number of issues which were left unresolved by the Principal Judgment delivered on 19 March 2018,[1] and the consequential orders made on 5 April 2018, and pursuant to outstanding interlocutory processes. Those issues may conveniently be stated and arranged as follows:

(1) the date as at which client entitlements are to be ascertained;

(2) whether the non-Equities/ETOs CSAs should be pooled, or transactions between them reversed;

(3) the disposal of the Receivers' proceedings;

(4) the applications made by several parties for re-allocation of the incidence of the costs of the proceedings (interim orders having been made on 19 October 2015) ("the costs re-allocation applications");

[1] *In the matter of BBY Limited (Receivers and Managers appointed) (in liquidation) (No 2)* [2018] NSWSC 346 (Principal Judgment).

(5) the Liquidators' application for approval of their proposed process for claims and distributions, and ancillary matters ("the Liquidators' Distribution Process application"); and

(6) the Liquidators' application for approval of further remuneration for the period 1 October 2016 to 30 April 2017.

Capitalised terms in this judgment have the same meaning as in the Principal Judgment.

At what date are client entitlements to be ascertained?

2 Originally, the Liquidators submitted that, as the ASX reconciliation of Returned Collateral was the only document which quantified the value of ETO positions open as at 17 May 2017 (the date on which the administrators were appointed) which were forcibly closed out, in relation to ETO client claims the date of valuation should be the date of close out, which occurred progressively between 19 and 25 May 2015. The First Defendants responded that a number of other documents were available from which the value of ETO positions could be calculated as at 15 May 2015. The Liquidators replied that it might be possible to undertake and apply a more complex calculation to derive value at the appointment date, if further information could be obtained and verified. As noted in the Principal Judgment,[2] the issue of the date of calculation of entitlements was not further addressed in oral submissions, and I indicated that if it had not been resolved, I would afford a limited opportunity to provide further submissions.

3 The Liquidators have adduced evidence which establishes that, on the information currently available to them, they are unable to establish the valuation of positions which remained open as at 19 May 2015. This is because they continued to trade the Equities/ETOs business on 18 May 2015 and for part of 19 May 2015; and that while the appointment date (or, in reality, the last trading day before it, which was 15 May 2015) is both

[2] *In the matter of BBY Limited (Receivers and Managers appointed) (in liquidation) (No 2)* [2018] NSWSC 346 at [409].

appropriate and ascertainable for all other product lines, there is a difficulty in respect of Equities/ETOs clients who had positions which were liquidated on 18 or 19 May 2015, or left open, because the ASX reconciliation of Returned Collateral remains the only document which quantifies the value of the ETO positions which were open at the appointment date and were subsequently closed out. Because that report shows actual proceeds of the close out, it necessarily values the ETOs at the close-out date, rather than the appointment date. While the Liquidators accepted that, theoretically, a complex calculation could be undertaken to derive value at the appointment date, necessary data to enable such a calculation was not available, despite reasonable endeavours to obtain it. So, while acknowledging that in principle it would be preferable to adopt as the date for ascertainment and valuation of interests the appointment date – which would involve using data from the last preceding trading date, being Friday 15 May 2015 – they submitted that absent the requisite data, the next-best solution was to adopt the certainty of the close-out data for the positions which were closed out following the appointment date. Ultimately, the first defendants accepted this position as the best that could be achieved, and no other party took a contrary position.

4 In my view, as is uncontroversial, it would be preferable to use a consistent date,[3] and the appointment date is the obvious candidate.[4] However, in circumstances where it is not reasonably practicable to determine the value, at that date, of positions which remained open but were closed out subsequently, their value when closed-out is the best available – and a very reasonable – proxy for their value at the appointment date. Accordingly, the Liquidators would be justified in adopting their value when closed out, derived from the ASX reconciliation of Returned Collateral, as their value for the purpose of determining entitlements.

The non-Equities/ETOs CSAs: reversals and pooling

---

[3] *Georges v Seaborn International (Trustee), in the matter of Sonray Capital Markets Pty Ltd (in liq)* [2012] FCA 75; 87 ACSR 442 at [112]; *Lehman Brothers International (Europe) (in administration)* [2010] 2 BCLC 301 at [290]; [2009] EWHC 3228 (Ch); *Re MF Global Australia Ltd* [2012] NSWSC 994; 267 FLR 27 at [110].

[4] Cf *Re MF Global Australia Ltd* [2012] NSWSC 994; 267 FLR 27 at [114], [117], [124]-[129], [134], [143]-[145].

5 In the Principal Judgment, I said:

> *Should the Saxo, Futures and FX CSAs be pooled without Equities/ETOs?*
>
> 344 The proponents of pooling contended that it should apply across all product lines. Their opponents were those representing Equities/ETOs, who were indifferent to whether the Saxo, FX and Futures CSAs be pooled, so long as Equities/ETOs were excluded. Little attention was given as to what should happen with Saxo, FX and Futures CSAs if Equities/ETOs CSAs were excluded from any pooling; as Mr Smith SC pointed out, his client represented all three.
>
> 345 Reference has been made to six transfers, between 8 December 2014 and 26 February 2015, from Saxo to FX, Saxo to Futures, Futures to FX and FX to Saxo, which do not appear to have returned to their sources, but which did not involve mixing with Equities/ETOs. Because this issue was not the subject of argument, I am content for the parties with an interest in it to make further submissions if they wish; however I incline to the view that the size of these transactions relative to the quantum of the funds in issue is such that pooling would not be a proportionate response, but that given the relative recency of the transactions – all occurred within three months before the administration date – the Liquidators may be justified in simply reversing them, except insofar as the amount paid to FX does not exceed the $1 million from FX used in the SCMA 1:1 upload.

6 The six transactions in question were described as follows:

> Non Equities/ETOs transactions
>
> 278 There were a number of transfers of money from Saxo to FX, Saxo to Futures, Futures to FX and FX to Saxo.
>
> 279 On 8 December 2014, $850,000 was transferred from the Saxo Buffer account to the FX Trust account, in order to settle a withdrawal of funds by two FX clients.
>
> 280 On 24 December 2014, US$600,000 was withdrawn from the FX Trust USD account and used to make a payment to a Saxo client, in circumstances where the opening balance of the Saxo USD Buffer account on that day was only $338,691.04.
>
> 281 Also on 24 December 2014, US$383,000 was transferred from Futures SEC USD account to the FX Trust USD account. $151,000 was subsequently restored.
>
> 282 On 12 January 2015, $500,000 was withdrawn from the WLP Omnibus account (a Saxo CSA) and paid to an FX client, apparently because there were insufficient funds in the FX Trust account on that day – it had an opening balance of $415,535.70.

> 283 On 21 January 2015, each of the Saxo Buffer account and Trust Account 3 (Other Trust) contributed $250,000 to the FX Trust account, from which $500,000 was withdrawn to meet a withdrawal request by an FX client.
>
> 284 On 26 February 2015, $500,000 was transferred from the Saxo Buffer account to the Futures Client Segregated account, to meet a withdrawal request by a Futures client.
>
> 285 Save to the extent that has been mentioned in connection with the 24 December USD transaction, the money so transferred does not appear to have been returned to its source account.
>
> 286 These six transactions establish some mixing of Saxo, FX and Futures client money. They do not involve mixing with Equities/ETOs money.

7 The Liquidators submitted that (1) the identification of the six transfers in question was incomplete, and that reversing them would not necessarily result in a more accurate representation of the underlying beneficial interests than leaving them where they fell; and (2) given that they would then evidence mixing, pooling may be appropriate. Counsel for the third defendants perceived that there was an internal conflict between the interest of the Saxo clients, the Futures clients and the FX clients, and made no submissions for or against pooling. When asked whether any of the sub-classes opposed pooling, the response was that the answer would necessarily be driven by the mathematics. In circumstances where the interested defendants made no submission on the question, the Liquidators submitted that they would be justified in pooling the non-Equities/ETOs CSAs, and not undertaking a reversal of transactions between them.

8 As summarised in the Principal Judgment,[5] while the theoretical basis for pooling is the principle that all contributors to a deficient mixed fund hold an equitable charge over the entire fund and its traceable proceeds to the value of their contributions, subject to any dealings and costs, or are equitable tenants in common of the mixed fund as a whole, including its traceable proceeds, subject to such deductions, so that each contributor has an "entitlement" in each fund, the pragmatic nature of the jurisdiction to give advice and directions to a liquidator means that neither strict proof of mixing

[5] *In the matter of BBY Limited (Receivers and Managers appointed) (in liquidation) (No 2)* [2018] NSWSC 346 at [400].

such as would entitle a beneficiary to an equitable proprietary remedy, nor absolute impossibility of tracing, is required; pooling may be directed where the identification and tracing of the interests of individual clients is not in the circumstances of the particular case reasonably and economically practical, on the basis that it is reasonable in the circumstances that the funds be regarded as irreversibly deficient and mixed. However, because the effect of pooling two or more accounts is to treat each client's entitlement to one as identical to its entitlement to the other(s), and so to treat each client as having a rateably equal interest in each fund, it will be warranted only when the funds have become so intertwined that each client's entitlement to one account may reasonably be regarded as identical to its entitlement to the other(s), and this will be so when it is reasonable in all the circumstances to regard each as having a rateably equal interest in the mixed fund. The combination of mixing and impracticability of tracing does not of itself mean that it will necessarily be reasonable to treat each client's entitlement to one account as identical to its entitlement to the other(s), and to regard each as having a rateably equal interest in the mixed fund: whether that will be so is influenced by the scale of the mixing, the relative sizes of the funds and the deficiencies, and above all the extent of the interest of the contributing fund in the mixed fund. That requires the Court to form a view, if it can – albeit an imprecise and impressionistic one – as to what is likely to be the extent of the interest of the beneficiaries of each fund in the other(s). In doing so, the Court is informed, but not controlled, by equitable tracing principles.

9 My conclusion in the Principal Judgment that there had been mixing between the non-Equities/ETOs product lines was based on the six identified transactions referred to above. Reduced to a product-line analysis, those transactions respectively involved transfers:

(1) on 8 December 2014, $850,000 from Saxo to FX;

(2) on 24 December 2014, US$600,000 from FX to Saxo;

(3) also on 24 December 2014, a net US$232,000 from Futures to FX;

(4) on 12 January 2015, $500,000 from Saxo to FX (where FX had an opening balance of $415,535.70).

(5) on 21 January 2015, $250,000 from Saxo to FX; and

(6) on 26 February 2015, $500,000 from Saxo to Futures.

10 The USD/AUD exchange rate on 24 December 2014 was 1.2327. Thus, in summary:

(1) Saxo contributed $850,000 plus $500,000 plus $250,000 (a total of $1.6 million) to FX, and $500,000 to Futures;

(2) Futures contributed US$232,000 net (equivalent to A$285,986) to FX, which in turn was contributed by FX to Saxo, together with a further US$368,000 (equivalent to A$453,633) contributed by FX.

11 Accordingly, on analysis and consolidation of those transactions, Saxo was a net contributor to FX of $1,146,367 ($1,600,000 - $453,633), and to Futures of $214,014 ($500,000 - $285,986). At least at first sight, this would not support an argument that Futures and FX clients should be regarded as having a commensurate interest with Saxo clients in the Saxo funds.

12 The Liquidators submitted that the Court could infer, from the investigations of the Liquidators, the identified mixing transactions, and the manner in which BBY carried on its business – including the movement of cash between accounts, including via house accounts – that it is highly likely that there were many more transfers between CSAs which it would not be economically practicable for the Liquidators to identify and investigate. However, while it is true that the Liquidators investigations were not exhaustive, they were extensive. The case proceeded on the footing that establishment of a case for mixing depended on the identified transactions. Those transactions were important, not least because of their relative recency.

13 The Liquidators also pointed out that complete reversal of payments to FX cannot be effected, as there are insufficient funds in FX to do so, and submitted that this may result in unfair consequences. However, if it did, it would be because in theory FX should contribute more than they were able to to the other product lines, and any unfairness in that is not to FX, but to other product lines, and such unfairness would not be ameliorated, but aggravated, by pooling. In other words, partial restitution, though imperfect, would better reflect the true rights of the parties than no restitution, and the circumstance that not all the funds could be returned would not mean that so much as can be returned should not be. Moreover, it does not seem to me that there are insufficient funds in FX, given that I indicated that the FX transactions should be reversed "except insofar as the amount paid to FX does not exceed the $1 million from FX used in the SCMA 1:1 upload"; the excess is only about $146,367.

14 Thus neither of those two arguments advanced by the Liquidators supports pooling. However, a third does. It will be recalled that in the SCMA 1:1 upload, between 1 April and 12 December 2014, of the $28.7 million transferred by BBY to SCMA, $1 million was ultimately sourced from the FX Trust account, and $6.8 million from Futures client money, which had been used on 13 June 2014 in the Aquila transaction and was temporarily located in three term deposits.[6] When the Saxo relationship was terminated, and the funds held by Saxo were returned to BBY after 1 February 2015, $0.5 million was paid to Futures and $1.1 million to FX.[7] While this more than returned the funds which had been used from FX, the Futures funds were far from fully reconstituted. It was in an attempt to take into account the $1 million taken by Saxo from FX in the SCMA 1:1 upload that in the Principal Judgment I suggested that any reversal of transfers by Saxo to FX would be limited to the extent that it exceeded the $1 million used in the SCMA 1:1 upload. Logically, the same should apply to the $0.5 million paid to Futures, as it was in effect a

---

[6] *In the matter of BBY Limited (Receivers and Managers appointed) (in liquidation) (No 2)* [2018] NSWSC 346 at [256].
[7] *In the matter of BBY Limited (Receivers and Managers appointed) (in liquidation) (No 2)* [2018] NSWSC 346 at [260]-[261]. The $0.5 million paid to Futures is the sixth of the "mixing" transactions referred to above.

partial restoration of funds that had been taken by Saxo (indirectly) from Futures. Moreover, the fact that that would leave $6.3 million unrestored also requires consideration.

15 In deciding whether there should be reversals or pooling or neither, it is necessary to consider that, after allowing for the funds taken by Saxo in the SCMA 1:1 upload, the established "mixing" transactions produce the results that:

(1) Saxo appears to have contributed about $146,367 net to FX (being $1,146,367 less $1,000,000 of FX money used in the SCMA upload);

(2) Futures appears to have contributed $6.586 million net to the funds in the Saxo CSAs (being $6.8 million used in the Saxo upload, plus $285,986 advanced by Futures via FX on 24 December 2014, less $500,000 returned on 26 February 2015).

16 The position in the relevant product lines are as follows:[8]

	Funds	Claims	Dividend
Saxo	5,630,000	12,320,000	0.45
Futures	4,810,000	13,580,000	0.35
FX	1,480,000	3,040,000	0.48
If pooled	11,920,000	28,940,000	0.41

17 This shows that Saxo and FX clients would be adversely affected, while Futures clients would be benefitted, by pooling. However, the $6.586 million contributed by Futures to Saxo exceeds the whole of the current Saxo funds, and while it is not possible to say to what extent current Futures clients were clients whose money was used in the SCMA upload, that provides a good reason for treating Futures clients as having a very substantial interest in the

[8] This is based on the tables attached to Mr Vaughan's affidavit of 5 June 2018. Costs and remuneration – which will reduce the amounts available for distribution – are not provided for, as they are irrelevant for the present exercise.

Saxo CSAs. Likewise, the net contribution by Saxo to FX warrants treating Saxo as having some interest in the FX CSAs.

18 For those reasons, and in the absence of articulated opposition from any party to the pooling of these three product lines, I have concluded that these three product lines have become sufficiently intertwined that each client's entitlement in one may reasonably be regarded as identical to its entitlement in the others, and it is reasonable in all the circumstances to regard each as having a rateably equal interest in the mixed fund. Because of the net contribution of about $146,367 made by Saxo to FX, no injustice would be done to FX clients by the reduction of their dividend from 0.48 to 0.41; and because the whole of the Saxo funds are less than the amount taken by Saxo from Futures, no injustice would be done to Saxo clients by the reduction of their dividend from 0.45 to 0.41 – enabling a commensurate increase in the dividend for Futures clients.

19 Accordingly, the Liquidators would be justified in pooling the non-Equities/ETOs CSAs (being Saxo, Futures and FX), and not undertaking a reversal of transactions between them.

The Receivers' proceedings

20 As noted in the Principal Judgment,[9] by Originating Process filed on 10 March 2016 in proceedings 2016/77316 ("the Receivers' application"), the Receivers sought directions to the effect that they would be justified in causing BBY to pay St George Bank an amount of $710,126.10 contained in the St George 541 Trust Account, on the basis that those funds were subject to the Bank's security interest.

21 According to the supporting affidavit of Mr Lord, on 15 May and 18 May 2015, the St George 541 Trust Account reconciled to the Trust Ledger. The Receivers reconciled cash movements after 18 May 2015, and concluded that

[9] *In the matter of BBY Limited (Receivers and Managers appointed) (in liquidation) (No 2)* [2018] NSWSC 346 at [13].

there was an amount of $710,126.10 in the 541 Account and the NAB Trust Account in excess of the total trust obligation. This was calculated by the Receivers as follows:

	$
Trust obligation as at 18 May 2015	-6,538,691.30
Trustable transactions on 18 May 2015 post trust reconciliation	-545,440.45
Trustable transactions from 19 May 2015 onwards	-2,919,050.43
Stop cheques	-1,026,761.47
Bank interest	-19,279.81
Current trust obligation	**-11,049,223.46**
NAB Trust Account balance as at 4 March 2016	1,026,761.47
STG 541 Trust Account balance as at 4 March 2016	10,732,588.11
Total cash held in Equities/ETOs trust accounts	**11,759,349.58**
Surplus	**710,126.12**

22 This surplus of $710,126.12 is comprised of:

(1) $607,606.36 debtor receipts from 18 May 2015 to 4 March 2016, not yet recovered by BBY; and

(2) $102,519.76 received by cheque deposited on 15 May 2015 in relation to the purchase of 3000 Westpac shares on 12 May 2015, which was cleared on 20 May 2015 and on that date allocated to client account 633807 to clear the debt.

23 The sum of $607,606.36 for "Debtor Receipts from 18 May 2015 to 4 March 2016" represents the total of a number of deposits over that period, of which by far the most significant was $548,858.96 on 19 May 2015, being funds received from IB for international sell trades of Linc Energy Ltd shares completed on behalf of five BBY clients. Another was $38.50 on 28 May

2015, being a cheque deposit in relation to a client account to clear a debt on that account arising from a previously incurred dishonour fee. The others appear to be amounts paid by or on behalf of clients to reimburse BBY for the purchase of shares on behalf of those clients, or to meet margin calls on open ETO positions and/or ETO margin movements in respect of the relevant clients, or applied in reduction of a debt payable by a client because the client account was in debit as a result of BBY having had to meet the market on a "buy" trade in circumstances where the client had not yet paid BBY in respect of that trade.

24 In their statement of facts and contentions of 2 May 2016, the Receivers submitted that those funds were moneys to which (Cth) *Corporations Act 2001*, Subdivision A of Division 1 of Part 7.8 did not apply, with the consequence that they were secured property within the scope of the General Security Agreement between BBY and STG. This contention was advanced on the basis that BBY was beneficially entitled to those moneys which fell within the exceptions in *Corporations Act*, s 981A(2)(b)(i) or (ii), being money paid to BBY to reimburse it for a debt incurred by it in the course of completing a securities transaction on behalf of a client, or money paid to it in discharge of a liability incurred by it in respect of such a transaction to which BBY was beneficially entitled and that that amount should be paid to St George pursuant to its charge.

25 However, in their supplementary submissions dated 1 December 2016, the Receivers (in response to submissions made by the fifth defendants) abandoned their claim in respect of the $548,858.96 received from IB, and also in respect of the $38.50 dishonour fee, thus seeking directions only in respect of the remaining balance of $161,228.64. In that respect, the Receivers pressed that that money was not, having regard to *Corporations Act,* s 981A(2)(b)(i), money to which Subdivision A of Division 1 of Part 7.8 applied. In addition, they submitted that such money was not subject to the trust referred to in (Cth) Corporations Regulations 2001, r 7.8.03(4), or subject to the order of distribution provided for by r 7.8.03(6), because it was not money to which Subdivision A applied, and because the regulation-making

power in s 981H(3)(b) of the *Corporations Act* conferred no power to make regulations imposing any trust in respect of that sum. Further, they submitted that because s 981F and the r 7.8.03(6) operate upon the licensee becoming insolvent,[10] r 7.8.03(6) dealt with funds that were in the relevant account at the moment of insolvency, and not with amounts subsequently received into the account. Because – except for one amount of $102,519.76 which was paid by cheque on 15 May 2015 and cleared on 20 May 2015 – all the moneys the subject of the receivers' application were received into the 541 account from 18 May 2015 onwards, they were received after the relevant insolvency event (being the appointment of the administrators on 17 May 2015).

26 Finally, the Receivers additionally submitted that there was no basis for concluding that the sum of $161,228.64 used by BBY to meet client obligations (and in respect of which BBY was subsequently reimbursed) were funds which were paid out by BBY in breach of trust, and that it did not follow from the second defendants' submission that it was "not at all clear" that the debtor receipts were in reimbursement of BBY for amounts paid by BBY from its own property, from client trust moneys, or from some combination of both, that the onus of establishing that there was a relevant breach of trust had been discharged.

27 As they did not wish to cross-examine any other witness, or to make oral submissions in addition to their written submissions, and in the context that the amount the subject of their claim was now very modest, and that much of the hearing would inevitably be occupied by other issues in which the Receivers had no interest, the Receivers sought to be excused from attendance at the hearing, and the Court acceded to their request. However, as noted in the Principal Judgment,[11] at the hearing the Receivers' application was not further addressed by the Liquidators, and I indicated that I would if desired allow a limited opportunity for further submissions.

---

[10] *In the matter of BBY Limited* [2016] NSWSC 1366 at [123].
[11] *In the matter of BBY Limited (Receivers and Managers appointed) (in liquidation) (No 2)* [2018] NSWSC 346 at [409].

28 At the present hearing, the Liquidators submitted that, of the $161,228.64 ultimately claimed by the Receivers, the $102,519.76 received by cheque deposited on 15 May 2015 (before the appointment date) and cleared on 20 May 2015 (after the appointment date) was conditionally paid (and the debt discharged) on the date on which the cheque was deposited, and that this became unconditional, with effect from that date, once it was subsequently cleared. That submission is in accordance with authority,[12] and correct. This payment related to the purchase on 12 May 2015 of 3000 Westpac shares for client account 633807; the cheque cleared the client's debt to BBY. The Liquidators then submitted that this meant that if the debt was discharged with effect from 15 May 2015, then there was no debt caught by the St George Charge as at the appointment date.

29 However, the Liquidators' submission overlooks the basis of the Receivers' submission, which is that the amount in the 541 Account exceeded the total trust obligation, and was therefore beneficially the property of BBY. That submission is unaffected by the date on which the payment was received, and by whether it was money received by way of reimbursement for a debt incurred in the course of a securities transaction for a client, or paid to it in discharge of a liability so incurred. The payment in question had the effect of producing a surplus in the 541 account over the trust obligation, which surplus is "house money". Regardless of when the payment is taken to have been received, the consequence is that the surplus it created is money to which BBY is beneficially entitled, and not trust money. Accordingly, it is caught by the Bank's security interest, and the Receivers are entitled to cause it to be paid to St George.

30 It follows that the Receivers would be justified in causing the sum of $161,228.64 to be paid from the 541 Account to St George, on the basis that it is subject to St George's security interest pursuant to its fixed and floating charge granted by BBY to St George dated 2 December 2011.

---

[12] *Tilley v Official Receiver in Bankruptcy* (1960) 103 CLR 529; [1960] HCA 86; *National Australia Bank Limited v K.D.S. Construction Services Pty Ltd* (1987) 163 CLR 668; [1987] HCA 65.

Costs reallocation applications

31 An interim regime in respect of costs was established by consent orders made on 19 October 2015, and amended on 23 February 2016 consequent upon the joinder of the fifth defendants, to the following effect:

(1) The Liquidators' remuneration, costs and expenses (and the costs and expenses of BBY to the extent that they were distinguishable), in connection with administering the CSAs and the proceedings, reasonably incurred, were to be paid out of the CSAs on a pro rata basis having regard to the balance of the CSAs on the date of the payment;

(2) The legal expenses reasonably incurred by the second, third and fourth defendants were to be paid out of the CSAs and Recoveries, other than the Returned Collateral and Erroneous Withdrawals, on a pro rata basis having regard to the balance of the CSAs and the quantum of such Recoveries (to the extent they have been received) on the date of the payment;

(3) The legal expenses reasonably incurred by the first defendants were to be paid out of the Returned Collateral and Erroneous Withdrawals, on a pro rata basis having regard to the balance of the CSAs and the quantum of the Returned Collateral and Erroneous Withdrawals on the date of the payment;

(4) The Liquidators' remuneration, costs and expenses (and the costs and expenses of BBY to the extent that they were distinguishable), in connection with recovering or attempting to recover and administering the Recoveries, reasonably incurred, were to be paid out of the Recoveries (to the extent they have been received) to which the relevant remuneration, costs and expenses are attributable.

32 Provision was also made for the referral to the Registrar, for approval, of claims by each party under those orders, and for a facility for the review by the Court of the Registrar's decisions.

33 This regime was established by consent of the parties, when the orders joining the second defendants as representative parties were made on 19 October 2015. As Ms Whittaker for the second defendants submitted, it was a pragmatic interim arrangement, not founded on principle, to meet the necessity for funds to be released to the parties and the Liquidators to enable the prosecution of the proceedings. It was always amenable to later variation to meet the justice of the case. It was always open – and some of the parties envisaged from an early date – that having regard to *inter alia* the outcome of the proceedings, some other allocation of the costs of the proceedings might ultimately be appropriate. For that reason, I am unimpressed by the third defendants' argument that the context and timing of the costs reallocation applications weigh against permitting them.

34 One consequence of the interim regime has been that costs were born according to the cash balances in the various CSAs from time to time. As the Equities/ETOs CSAs largely comprised cash – while the non-equities CSAs largely comprised Recoveries which had not yet been recovered – this meant that the former bore a disproportionate share of the costs. The following table has been extracted from Ms Whittaker's submissions, but I have inserted the third column to facilitate comparison of the extent to which product lines have borne the burden of costs:

Product Line	**Total assets $**	**Share of total assets %**	**Costs borne**	**Share of total costs %**	**Costs/ Assets %**
Equities	8,930,000	21.5	3,965,536	54.5	44.5
ETO	3,950,000	9.5	1,014,604	14.0	25.6
ETO Margin	2,320,000	5.6	838,493	11.5	36.0
Futures	4,810,000	11.6	788,663	10.8	16.0

FX	1,480,000	3.5	425,822	5.8	28.0
Saxo	5,630,000	13.5	160,865	2.2	2.8
IB	14,150,000	34.1	27,681	0.4	0.19
Other	140,000	0.3	61,274	0.8	43.0
Total	41,410,000	100	7,282,938	100	

35 Comparing the third and fifth columns shows that there is no relationship between the total value of assets in a product line and the share of costs which it has borne. The table demonstrates how, under the interim regime, some product lines – notably Equities and ETOs – have borne a disproportionately greater share of costs than others – notably Saxo and IB. This is because costs have so far been allocated pro rata to the cash balances of the CSAs, and while the assets of the Equities and ETOs CSAs are almost exclusively in cash, those of the Saxo and IB CSAs are predominantly in Recoveries – in particular in counterparty positions, which have not yet been realised. In correspondence with other parties, the Liquidators have explained that they have not yet received a direction to realise the Recoveries in the Saxo and IB product lines (noting that the current orders permit IB clients to propound a tracing claim), and are hopeful that upon receiving such a direction, a large proportion of the positions will be able to be liquidated in a short time frame.[13]

36 Essentially, all parties agreed that at least on that account, some reallocation of the costs burden is warranted, so that the Recoveries were counted in ascertaining the quantum of each CSA for prorating purposes. However, the issues raised by the costs re-allocation applications are not confined to that question. In addition:

(1) The first defendants proposed that the costs burden be reallocated, so that they receive the Returned Collateral and the Erroneous

[13] No such direction was sought at the present hearing; this is the subject for further comment, below: at [101].

Withdrawals intact, and bear none of the costs – neither their own, nor those of the Liquidators or the other defendants;

(2) The second defendants (and the fourth defendant) proposed that the Liquidators' costs and those of all the representative defendants be borne *pari passu* across all the CSAs and product lines (rather than that each product line bear its own costs, with the Liquidators' costs allocated rateably), and that the allocation be according to the relative value of client claims in each product line (as distinct from according to the relative value of assets in each product line);

(3) The third defendants did not support any further re-allocation, inferentially therefore contending that, as under the interim regime, each product line should bear its own costs, and a rateable share of the Liquidators' costs, allocated according to the relative value of assets in each product line;

(4) The fifth defendant supported the position that each product line should bear its own representative defendant's costs, and a rateable share of the Liquidators' costs, save that the fifth defendant should not be required to bear any of the Liquidators' costs attributable to the period during which it was excused from attendance. It was agnostic as to whether any *pari passu* allocation should be according to the value of claims or assets.

37 The first defendants' application was founded on the twin propositions that the dispute between them and the other parties was in substance adversarial litigation, in which they substantially succeeded, so that in accordance with ordinary principles their unsuccessful opponents should pay their costs. In practice, as there was no suggestion that the Liquidators were disentitled from indemnification, that would mean that the burden would be cast on the other product lines.

Principles

38 A person who is a party to proceedings in the capacity of trustee is ordinarily entitled to be indemnified in respect of costs, to the extent that they are not recoverable from any other party, out of the trust property.[14] This extends to costs which the trustee is ordered to pay another party, so long as the trustee can establish that the costs in question were properly incurred, or not improperly incurred.[15] A liquidator who, in that capacity, administers trust assets, is entitled to be indemnified out of the trust assets for remuneration, costs and expenses, to the extent that they are referable to administering the trust assets.[16] To the extent that the work is such as would entitle the liquidator to be remunerated or indemnified both by the company and by the trust, so that each would be liable to contribute, but there are no assets of the company available, the expenses are recoverable in full from the trust assets.[17] In respect of work which is referable to administering the CSAs and Recoveries (but not "general liquidation work"),[18] that is the position here, where all the non-trust assets of the company are caught by the St George charge under which the receivers were appointed. However, where a liquidator is, in that capacity, administering more than one trust of which the company is or was trustee, the liquidator is not entitled to visit on the beneficiaries of one trust, the costs and expenses incurred in connection with the administration of another trust.[19] However, where expenses are referable to multiple trusts and precise attribution is not possible, a *pari passu* allocation may be permissible.[20]

---

[14] (NSW) Uniform Civil Procedure Rules 2005, r 42.25; *Re Buckton; Buckton v Buckton* [1907] 2 Ch 406.
[15] *Rouse v IOOF Australia Trustees Ltd (No 3)* [1999] SASC 208 at [43].
[16] *13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)* [1999] FCA 144; (1999) 30 ACSR 377 at 385; *Re Sutherland; French Caledonia Travel Service Pty Ltd (in liq)* (2003) 59 NSWLR 361 at [211], [213]; [2003] NSWSC 1008; 48 ACSR 97; *Re AAA Financial Intelligence Ltd (in liq)* [2014] NSWSC 1004 at [13].
[17] *Re Sutherland; French Caledonia Travel Service Pty Ltd (in liq)* (2003) 59 NSWLR 361 at [212]; [2003] NSWSC 1008; 48 ACSR 97; *Re AAA Financial Intelligence Ltd (in liq)* [2014] NSWSC 1004 at [13].
[18] See further below, at [93]-[95].
[19] *Trio Capital Limited (Admin Apptd) v ACT Superannuation Management Pty Ltd* [2010] NSWSC 941 at [33]-[34]; *Re AAA Financial Intelligence Ltd (in liq)* [2014] NSWSC 1004 at [13].
[20] *Trio Capital Limited (Admin Apptd) v ACT Superannuation Management Pty Ltd* [2010] NSWSC 941 at [34]; *Re Suco Gold Pty Ltd* (1983) 33 SASR 99 at 109-110; *13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)* [1999] FCA 144; 30 ACSR 377 at 386.

39 Although strictly speaking there is a separate trust for each of the 55 CSAs, a consequence of the common ground that the various CSAs within each product line should be pooled, and the direction made to that effect on 5 April 2018, is that each product line of CSAs may be treated, for present purposes, as a separate trust.

40 On those principles:

(1) The Liquidators' costs and expenses, including remuneration, are payable from each product line, according to the extent to which they are attributable to that product line;

(2) However, with the exception of Recoveries, it is not reasonably practicable accurately to attribute the costs and expenses between product lines, so that a *pari passu* allocation is appropriate.

41 As to the costs of the representative defendants, where proceedings are properly brought by trustees for the guidance of the Court, the costs of all parties properly joined are usually treated as a necessary incident and incurred for the benefit of the trust estate, and payable out of the trust assets.[21] In the analogous context of applications by liquidators for directions, the position has been summarised as being that:[22]

(1) Where the application is necessitated by the position adopted by a particular creditor or creditors acting in their own interest and the question is not complex, then costs generally follow the event; but

(2) Where the issues are complex or novel, the starting point is that the costs of all necessary parties are paid by the liquidator and treated as costs in the liquidation.

---

[21] *Re Buckton; Buckton v Buckton* [1907] 2 Ch 406 at 414-415; *Warton v Yeo* [2015] NSWCA 115 at [78]; *James v Douglas* [2016] NSWCA 178 at [55]; *BE Australia WD Pty Ltd v Sutton* (2011) 82 NSWLR 336 at [213]; [2011] NSWCA 414; *Hughes v NM Superannuation Pty Ltd* (1993) 29 NSWLR 653 at 671.

[22] *Farrow Finance Co Ltd v ANZ Executors and Trustees Co Ltd* (1997) 23 ACSR 521 at 527.

42 In *Re Buckton; Buckton v Buckton* [1907] 2 Ch 406, Kekewich J described three classes of case. The first comprised applications by trustees for the assistance of the court in the construction of a trust instrument for their guidance and to ascertain the interests of the beneficiaries, or to have some other question determined which has arisen in the administration of the trust. In such a case, unless the trustees come to court without due cause, the costs of all parties are regarded as necessarily incurred for the benefit of the trust, and are payable on the solicitor/client basis (now, the indemnity basis) out of the trust assets.[23] The second category differs in form but not in substance from the first, and, although the application is made not by the trustee but by a beneficiary, is recognisable as arising because of some difficulty or question which would have justified an application by the trustee; in such a case the same result obtains as in the first class, the proceedings being regarded as necessary for the administration of the trust, and the costs of all parties as necessarily incurred for the benefit of the trust regarded as a whole.[24] The third category involves applications made by beneficiaries propounding a claim adverse to other beneficiaries, and while it is sometimes difficult to distinguish between cases of the second and third classes, once it is clear that the determination of rights between adverse litigants is involved, the unsuccessful party is ordered to pay the successful party's costs.[25]

43 Those three categories are not necessarily exclusive, and as Kekewich J indicated, it is not always easy to discern between the second and the third. However, the present application is in the first class. One starts from the position that these proceedings were in form an application by the Liquidators for judicial advice in connection with the insolvent administration of commercial trusts which had failed, leaving multitudinous disappointed investor/beneficiaries.

44 The first defendants' contention that they should bear no costs essentially involves an argument that there is a fourth class: proceedings which though in

---

[23] *Re Buckton* at 414-415.
[24] *Re Buckton* at 414-415.
[25] *Re Buckton* at 415-416.

form an application brought by trustees for the Court's guidance, is in substance adversarial litigation. In this respect, it is true that the Liquidators' application was brought, in part, in response to threats by the present first defendants to bring their own proceedings to recover the Erroneous Withdrawals and the Returned Collateral. But as recorded in the Principal Judgment (emphasis added):[26]

> By Originating Process filed in proceedings 2015/237028 on 13 August 2015, the Liquidators - *with the aspiration so far as practicable of having the issues resolved in a single proceeding, thereby avoiding incurring the additional time and cost of dealing with various separate legal challenges by clients, creditors and other interested parties – sought the Court's guidance* (by way of declarations, directions under *Corporations Act*, s 479 and s 511, and advice pursuant to (NSW) *Trustee Act 1925*, s 63), *as to how the amounts in the CSAs, and amounts recovered after the administration date from BBL's trading counterparties ("Recoveries"), should be dealt with* ("the Liquidators' Application").

45 There were undoubtedly adversarial aspects to the proceedings, and the first defendants' submission that the Liquidators themselves effectively if not formally advocated pooling is not without force. So too is their submission that the main issue in the proceedings was whether Equities/ETOs should be pooled with other CSAs, to the benefit of the third defendants and the detriment of all other beneficiaries, and that they succeeded on that issue. But notwithstanding those features, these proceedings were fundamentally and ultimately caused by the collapse of a trading trust, which generated numerous issues for resolution, on which the Liquidators reasonably required and appropriately sought the Court's advice and assistance, and for which necessary and appropriate parties were joined to represent the competing interests. It is not uncommon that there will be adversarial aspects in proceedings in the first class, and it is to ensure that competing interests are properly represented and heard that representative defendants are appointed. Although it was only the third defendants who actively – and ultimately unsuccessfully – promoted "pooling", even if it was the Liquidators who first flagged the possibility, the question of pooling was one which, in the light of

---

[26] *In the matter of BBY Limited (Receivers and Managers appointed) (in liquidation) (No 2)* [2018] NSWSC 346 at [5].

authorities such as *MF Global*[27] and *Sonray*[28], could not simply be ignored; it was an issue which reasonably required resolution, and its resolution and the nature of the pooling remedy was clarified in the course of the proceedings. While the outcome vindicates the position adopted from the outset by the first defendants, and for that reason one necessarily sympathises with them, the Liquidators could not prudently have acceded to their demands without the Court's advice, when there was a respectable argument to the contrary. For reasons explained in the first judgment, it was not possible to give such advice in respect of the Returned Collateral at a preliminary stage, and although it was in respect of the Erroneous Withdrawals, it cannot be said that even that question was a straightforward one. It cannot be said that either question was too clear for argument and that the Liquidators should have acceded to the claims of the first defendants without the Court's guidance. Once that is accepted, the conclusion that these were proceedings in the first class is inevitable.

46 I therefore am unable to accept the first defendants' proposition that, so far as concerns their involvement in the proceedings, the proceedings should be regarded as an adversarial contest between them and the Liquidators. The resolution of the position of the first defendants was one of the many issues which arose in the Liquidators' administration of the CSAs, on which they reasonably sought the assistance of the Court, and to which the other representative defendants were properly joined. Moreover, the first defendants' ultimate success in respect of the Returned Collateral was assisted by the arguments of the second defendants against pooling.

47 The next question is whether each representative defendant's costs should be borne by the product line represented by that defendant, or whether they should be payable out of the totality of the CSAs. The second and fourth defendants argued that the costs of all the representative defendants should be borne on a *pari passu* basis by all the product lines, rather than that each

---

[27] *MF Global Australia Ltd, Re* [2012] NSWSC 994; 267 FLR 27

[28] *Georges v Seaborn International (Trustee), in the matter of Sonray Capital Markets Pty Ltd (in liq)* [2012] FCA 75; 87 ACSR 442

product line bear its own costs, substantially for the reasons explained by Black J in *MF Global*:[29]

> 23 I am not satisfied that there should be a reallocation of costs to Product Pools at this point. The overlap of issues between the various client classes was such that representative parties generally provided submissions that were helpful to the resolution of all issues before the Court at the hearing before me. For example, Underdog (although representing the interests of On-line FX account clients) made helpful submissions in respect of the nature of client entitlements that were ultimately of considerable assistance to the interests of CFD clients. The parties were properly conscious of avoiding duplication at the hearing before me so some representative parties will not have incurred costs in addressing issues that other parties had addressed. It seems to me that, while each client representative was acting in its own interests and that of the class it represents, the extent of overlap between the issues to be addressed by the client representatives is such that some classes of client will unfairly benefit, and others would unfairly suffer, if there is now a reallocation of the costs incurred to the particular Product Pools. In particular, a party which devoted greater efforts to advancing a submission which benefited all clients would be disadvantaged by such a reallocation, against a party which did not incur the costs of preparing or advancing such submissions, in the knowledge that the first party would do so. It seems to me that a re-allocation of costs to Product Pools at this point has the potential to create cross-subsidies and inequities where one representative party has incurred costs in making submissions for the benefit of all.

48 There are not insubstantial arguments in favour of leaving the representative defendants' costs to be borne by their respective product lines. One is that I have declined to order pooling between product lines, yet providing for costs to be borne by all the product lines would effectively visit the costs of advancing one trust's interests on the others. Another is that the costs incurred by each representative defendant were incurred to advance the interests of the clients within their represented product line, and by leaving each product line to bear its own costs imposes a discipline on each to incur only those costs reasonably necessary and proportionate to the proper advancement of its position. As the fifth defendant points out, the costs incurred by the representative defendants vary considerably: the first defendants' costs are $1,090,966; the second defendants' are $1,488,919; the third defendant's are $849,618; and the fifth defendant's only $377,312. There is considerable attraction in the argument that those who have been

[29] *In re MF Global Australia Ltd (in liq) (No 2)* [2012] NSWSC 1426 at [23].

economical in their legal expenditure should enjoy the benefit of their frugality, and not have to subsidise the largesse of others.

49 However, in my view that would ultimately not reflect a proper application of the approach applicable to the first class referred to in *Re Buckton.* In a simpler case, of a fixed trust with three beneficiaries, in which the trustee sought advice which impacted on the beneficial interests, and two of the beneficiaries supported one construction and the third another, the result of the proper application of *Re Buckton* would be that the costs of all three, and those of the trustee, would be paid out of the trust fund as a whole, before the fund was distributed between the beneficiaries – not that each beneficial interest would bear its own costs. Allocation of representative defendants' costs to their own product line would essentially mean that each would bear its own costs, rather than that the costs of all necessary parties to the resolution of issues – which were not confined to any one product line but involved all of them – would be borne by the whole fund before distribution between beneficial interests. Each representative defendant was involved in the resolution of issues which related not only to its own product line, but also to other product lines. Each was appointed with the view that it was necessary to have its interest represented in order to enable the proper determination of the issues. Some benefited from submissions made by others. The principle that in such a case the costs are payable out of the fund, and not out of each beneficiary's share respectively, is best reflected in this case by the costs being payable out of the whole of the CSAs, and because it is not reasonably practicable accurately to attribute them to particular product lines, on a *pari passu* basis.

50 A further question is the basis for such a *pari passu* allocation. The second and fourth defendants submitted that the allocation should be according to the quantum of client claims in each product line as a proportion of total client claims. The alternative is that it be according to the value of assets in each product line as a proportion of total assets. In support of the former, the second and fourth defendants contended that such an approach was more consistent with the Court's rejection of pooling, that an asset value

apportionment was arbitrary as there is nothing to support the view that more work was attributable to accounts with greater values, and that while client claims were a known and settled parameter, asset values might change with the outcome of Recoveries, so that a calculation based on asset values would be an interim position, while one based on client claims could be final. This last argument reflected what Black J had said in *MF Global*:[30]

> 12 In my view, such costs should be paid, as RMF contends, from the Product Pools pro rata to the value of estimated client claims as at 31 October 2011. The course is consistent with the direction given in the Judgment that the Liquidators would be justified in determining entitlements on a contractual basis as at the Appointment Date, by reference to gross liquidation value calculated under the client agreements on the basis of 31 October 2011 mark-to-market prices. The alternative approach of an allocation by reference to the value of the CSAs and Recoveries as at 27 July 2012 has the difficulty that that date would represent an interim position that may change if further Recoveries are obtained.

51 Once it is decided that product lines should not be left to bear their own costs, I do not accept that there is anything inconsistent between costs being apportioned on an asset-value basis rather than on a claims basis. Both bases involve, to some extent, the use of one product line's money to pay another's costs; that is in the nature of an order that costs be payable out of the fund.

52 The notion of a *pari passu* allocation or distribution is ordinarily implicitly on the basis of the value of the various accounts involved, rather than the quantum of claims on them. As it seems to me, in *MF Global* Black J used the value of claims as a proxy for the value of the respective accounts, for reasons of convenience. That may be appropriate where there is reason to think that it will provide an expeditious and not unjust reflection of the true position. But I do not see how that can be so here, where some CSAs are in surplus and others deficient. The effect of such an approach would be that the greater the shortfall between claims in a particular product line and the assets in that line, the greater would be the erosion of those assets by costs. As the third defendant rightly submits, given the certainty of the CSA balances and the value of Recoveries received by the Liquidators, those balances and

[30] *Re MF Global Australia Ltd (in liq) (No 2)* [2012] NSWSC 1426 at [12].

Recoveries provide a safer basis for a pro rata allocation of costs across product lines.

53 I do not accept the argument, advanced by the fourth defendant, that an asset-based reallocation would leave Equities/ETOs clients in a worse position than had a pooling order been made. Had a pooling order been made, the costs of all parties would have been deducted from a single pooled fund, with the net fund available for distribution on a pooled basis, so that Equities/ETOs CSAs would have been in effect diminished by pooling with Saxo etc CSAs. An asset-based allocation would have exactly the same effect so far as concerns costs, with costs in effect coming from a single pooled fund, applied pro rata to each product line, and the balance being distributed on a product line basis. The result so far as costs are concerned is exactly the same, and not more adverse to Equities/ETOs CSAs than had pooling been decreed.

54 The first defendants argued that their success – and the corresponding failure of the third defendants – especially in circumstances where it was the Liquidators who first raised the prospect of "pooling" – meant that costs should be visited exclusively on the product lines other than Equities/ETOs. However, that outcome would be entirely inconsistent with the position that the third defendants were necessary parties properly joined to achieve the resolution of difficult issues, whose costs should be regarded as necessarily incurred in the due administration of the trust. The established practice, following *Re Buckton,* is that once it is decided that the case is in the first class, the costs of all proper parties are regarded as necessarily incurred for the benefit of the trust as a whole, and one does not depart from this, and visit costs on the shares of individual parties, on the basis of the respective success or failure of the positions for which they contended.

55 Accordingly, but subject to the qualifications referred to below, and subject also to approval in accordance with the regime established under the 19 October 2015 orders, the Liquidators' remuneration, costs and expenses (and the costs and expenses of BBY to the extent that they were distinguishable),

in connection with administering the CSAs and the proceedings, reasonably incurred, and the legal expenses reasonably incurred by the second, third, fourth and fifth defendants should be paid out of the assets of the product lines on a pro rata basis according to the value of assets in each product line as a proportion of the total assets of all product lines.

Costs during the period while the IB clients were excused

56 The fifth defendant contended that its class should not be required to bear any of the Liquidators' costs of the proceedings referable to the period from 5 December 2016 (when they were excused from attendance at the hearing, consent orders having been made which resolved in their favour that their CSAs would not be pooled with other CSAs) and either 19 March 2018 (when the Principal Judgment was delivered) or at least 3 February 2017 (being the conclusion of the hearing from which they were excused). They also submitted that they should not be required to bear any other representative defendants' costs, particularly in respect of that period.

57 On 5 December 2016, orders were made, by consent, to the effect that the IB Platform assets be distributed to the IB Clients (who the fifth defendant represents), and excusing the fifth defendant from appearing at the hearing which was appointed to commence on 31 January 2017. As a result, the fifth defendant did not participate in the substantive hearing. Because of the consent orders, no issue affecting its product line was in issue at that hearing. It was not merely a matter of the fifth defendant not participating, being content to rely on the submissions of other parties; the consent orders had resolved the position so far as it was concerned.

58 To revert to a simplified analogy, where a trustee applies for advice as to the construction of a trust instrument under which there are three beneficiaries, but the question affects or potentially affects the interest of only two and the third is unaffected and does not participate, the costs would ordinarily be payable out of the shares of the two whose interests are affected, and the third would not bear any costs. In this case, there being no issue affecting the

fifth defendant's class after 5 December 2016, its product line should not have to bear any of the costs of the proceedings – of the Liquidators or the other representative defendants – after that date.

59 The fifth defendant submitted that, on the same basis, they should not have to bear any of the Liquidators' remuneration during the same period. However, in my judgment, remuneration is in a different category and, as I point out below,[31] is ultimately attributable to the whole of the administration, and not to particular periods of it. The fifth defendant's exemption is from the Liquidators' – and other defendants' – legal costs and disbursements during the period while it was not an active party, but not in respect of Liquidators' remuneration.

60 There is a question as to whether the exemption should operate until judgment was delivered on 19 March 2018, or only until the conclusion of the hearing on 3 February 2017. After 5 December 2016, the fifth defendant had no further role to play in the proceedings until the question of costs arose, upon delivery of judgment, and the exemption from having to bear any of the costs of the proceedings – of the Liquidators or the other representative defendants – should therefore extend until judgment was delivered on 19 March 2018.

Liquidators' costs relating to Recoveries

61 The Liquidators' costs and expenses referable to Recoveries are distinguishable because, unlike the costs of these proceedings, they can be readily enough allocated accurately between the various trusts to which they relate, so that it is not necessary to resort to a rateable allocation. Such an allocation reflects the adage that those who benefit from the expenditure should bear the burden. It is also consistent with the approach adopted by Black J in *MF Global,* in directing that the Liquidators in that case would be justified in paying their remuneration costs and expenses relating to

[31] See at [99].

Recoveries from the CSAs and Recoveries of product lines to which the relevant recovery related.

62 Accordingly, the Liquidators' remuneration, costs and expenses (and the costs and expenses of BBY to the extent that they are distinguishable), in connection with recovering or attempting to recover and administering the Recoveries, reasonably incurred, should be paid out of the CSAs and Recoveries of the product lines to which the relevant remuneration, costs and expenses are attributable.

The Liquidators' Distribution Process application

63 By an interlocutory process filed on 28 February 2018, the Liquidators seek directions to the following effect:

(1) That they would be justified in adopting a proposed process for verification and adjudication of claims and distributions, as described in Mr Vaughan's affidavit of 27 February 2018 ("the Distribution Process");

(2) That (subject to any further applications by them), their remuneration costs and expenses incurred in connection with:

(a) the verification stage of the process, up to a total of $614,685 plus GST;

(b) the adjudication stage of the process, at a rate of $9,000 per month for the duration of the stage, and $1,425 plus GST for each claim adjudicated;

be paid out of the CSAs and Recoveries pro rata having regard to the balance of the CSAs and Recoveries that have been received as at the date of payment;

(3) That they are justified in treating clients, in respect of each client account with an account balance of $100 or less as having no entitlement to participate in the process or to receive a distribution in respect of such account;

(4) That they are justified in publishing or sending any notices, correspondence or other relevant material to clients as part of the Distribution Process by email where practicable and by alternative means specified in the application;

(5) That they would be justified in converting funds held with BNZ into Australian dollars; and

(6) That they would be justified in distributing the BNZ funds such that the BNZ Accounts attributed to a particular product line are treated in the same way as the CSAs in that product line.

The proposed Distribution Process

64 The Liquidators have developed, in consultation with Link Market Services, a proposed process to facilitate the verification, adjudication and processing of client claims on CSAs and Recoveries, so that distributions can be made. In summary, the proposed Distribution Process involves the following steps:

(1) Log In. Clients will be sent a personalised circular which notifies them of their unique login details, which will enable them to access a bespoke online portal managed by Link. Notifications will also be published on KPMG's BBY web page and a web page maintained by Link, and in a national newspaper and an ASIC Gazette. Clients who are unable to access the internet will be able to proceed by hard copy documentation.

(2) Verification. Upon logging into the portal, clients will be presented with their general information, contact details and bank account details, as held in the Liquidators' records, and prompted to confirm if it is correct.

If they confirm it is correct, they will be asked to provide details of their preferred bank account into which distributions, once verified, are to be paid. If they do not agree with the information presented, they will be provided with an opportunity to submit alternative information and supporting documentation.

(3) Claim details. Clients will be presented with their claim details (including account numbers, names and claim values extracted from BBY's records), for each product line, which they will be able to review and either confirm, or reject any with which they disagree. Should a client contend that their claim is greater than as presented, they will be directed to a screen which enables them to complete and submit a claim form and supporting documentation for adjudication. A client who does not log on, confirm or reject the details loaded within 90 days will be deemed to have accepted them.

(4) Adjudication. Where a client submits a claim form, the Liquidators will adjudicate the claim within 28 days.

(5) Distribution. Once all claims have been verified (and where appropriate adjudicated), and assuming no orders are made requiring in specie distributions to be made, a distribution model will be created, based on the principles established by the Principal Judgment, available funds, costs and accepted claims, and providing for retention of sufficient to provide for future distributions in respect of disputed claims, and Liquidators' remuneration, costs and expenses. The Liquidators will then cause BBY to give a distribution notice under (NSW) *Trustee Act 1925,* s 60, and upon expiry of the notice provide sufficient funds to Link, and bank account details, to enable the distributions to be paid.

65 Link have estimated their costs up to and including the verification stage – including the design and creation of the bespoke online portal – at $418,760 plus GST. The Liquidators have consulted an alternative service provider, but

have concluded that no other service provider offers a similar proven level of capacity, competence and experience as Link. The Liquidators have estimated their own costs (remuneration) for the verification stage at $195,925 plus GST, plus disbursements. Thus the total estimated cost of the verification stage is $614,685 plus GST. In addition, the Liquidators estimate their costs of the Adjudication stage at between $410,250 plus GST and $1,835,250 plus GST, depending on the number of claims that require adjudication.

66 There were two issues with the proposed distribution process. The first was raised by the first defendants, who submitted that they should not have to bear any of the costs of its implementation. This submission was advanced on two bases.

67 The first was that, for essentially the same reasons for which they contended that they should be immunised from exposure to any costs of the proceedings and should not have to bear any part of the parties' costs or the Liquidators' remuneration and expenses – namely that the Erroneous Withdrawals and Returned Collateral should be regarded as separate from the pre-appointment funds held in the CSAs, that they never ought to have become embroiled in the dispute, and that so far as concerned them, the proceedings were in substance an adversarial contest in which they had succeeded – it was unjust that they should have to bear the cost of having their own funds returned to them. This submission fails, for the reasons I have already given for rejecting the equivalent argument in connection with the costs reallocation applications.

68 The second basis for the first defendants' submission was that whatever might be the position in respect of other claimants on the funds, the position with respect to the Returned Collateral was straightforward, and the Liquidators knew precisely which clients were entitled to what sums, which correspond precisely with the funds held, so that there was no need for the complex and expensive process envisaged by the Liquidators. However, once provision is made – as it will have to be in conformity with my above decision on the question of costs – for the impact of legal costs and expenses

of the liquidation, the funds held by the Liquidators in respect of the Returned Collateral will not correspond precisely with the total of the claims thereon, and the claimants will not receive 100c in the dollar, but a dividend. And although the Liquidators may well think that they know the quantum of each such claim, it is reasonable that they should give each claimant an opportunity to confirm or dispute what they believe to be the position. Moreover, it would still be necessary to obtain from the claimants particulars of the account into which any distribution is to be paid. The proposed distribution process is reasonably necessary for the administration of the CSAs a whole, including the claims of the first defendants' class, and its costs are properly born by the interests of all the clients, including those represented by the first defendants.

69 The second issue was raised by the fifth defendant, who expressed concern that insofar as the proposed Distribution Process contemplated (1) the lodgement of claim forms, and (2) that once all client claims had been verified, and where required adjudicated, and "assuming no orders are made requiring in specie distributions to be made", a distribution model would be created and implemented, this might not accommodate the ability of the class represented by the fifth defendant to make tracing claims, which had been specifically reserved to them by the orders made by consent on 5 December 2016 which resolved their interest in the substantive proceedings.

70 The 5 December 2015 orders relevantly provided:

> 2 The plaintiffs are justified in:
>
> (a) distributing the IB Platform Assets in their entirety to the IB Clients;
>
> (b) not distributing the IB Platform Assets, or any part thereof, to clients or former clients of the Second Plaintiff other than the IB Clients;
>
> (c) offering the IB Clients the opportunity to assert and prove a claim, including a tracing claim, in respect of the IB Platform Assets (or any part thereof);
>
> (d) distributing any part of the IB Platform Assets in respect of which a tracing claim is proved to the IB Client who proved the claim upon payment by that IB Client to the first plaintiffs of their costs of:
>
> (i) Adjudicating the IB Client's claim: and

(ii) Distributing the assets the subject of the claim to the IB Client.

(e) subject to (c) and (d) above, directing the sale of those IB Platform Assets other than open derivative position (as defined in the order made on 27 September 2016); and

(f) making a rateable distribution of the IB Platform Assets (including the proceedings of the sales referred to at (e) above) to each IB Client who makes a claim against the IB Platform Assets (but who does not prove a tracing claim against the IB Platform Assets) equal to [a formula was provided].

71 It was therefore submitted that the process needed to accommodate any tracing claims, which it would if the reference to "claim forms" included tracing claims, but that the reference to the assumption that no orders are made requiring *in specie* distributions to be made should be expressed as "excepting in specie distributions which may be made separately".

72 The Liquidators did not in principle oppose preserving the capacity of the class represented by the fifth defendant to make tracing claims, but pointed out that, given that the IB Clients would have to bear their share of the costs and expenses, this left unresolved issues as to how the costs referable to the IB Clients and any tracing claims were to be dealt with. They suggested that a practical approach might be to value the tracing claim at the date of the claim, and thus allow and distribute a monetary sum rather than the specific asset. Mr Henry SC, for the fifth defendant, could not embrace this without instructions, but indicated that so long as the facility to make a tracing claim were preserved, it might well turn out that there were few if any, and the issue might disappear or be *de minimis.*

73 As the capacity to make tracing claims has been explicitly reserved to the IB clients, the Distribution Process must accommodate tracing claims – both in order to facilitate their adjudication by the Liquidators, and in order to avoid the Distribution Process failing because an assumption on which it is founded is falsified (as would be the case if there were but one claim that established an entitlement to an in specie distribution). It will do this if it is stipulated that the "claims" to be lodged by any client who disputes the proposed distribution include any tracing claim; and if rather than assuming that there will be no *in*

specie distributions, such distributions are excepted from the process. It may be that, if tracing claims are made, further guidance is then required as to how they are to be satisfied after provision for costs and expenses, in which case such advice can then be sought and given; but it may well be that there are no or so few tracing claims as not to present any practical difficulty.

74 Accordingly, the Liquidators would be justified in adopting the proposed Distribution Process for verification and adjudication of claims and distributions, as described in Mr Vaughan's affidavit of 27 February 2018, provided that:

(1) Under Stage 3 (Claims), the "claims" which may be lodged by any client who disputes the proposed distribution include any tracing claim; and

(2) Under Stage 5 (Distribution), rather than the Distribution Process assuming no orders are made requiring in specie distributions to be made, the Distribution Process except in specie distributions (if any), which may be made separately, with any assets to be specifically distributed being excluded from the available funds for distribution under the distribution model.

75 The Liquidators seek the Court's approval, in advance, for the estimated costs of establishing and implementing the distribution process. They say that Link will not undertake the work involved unless assured of the payment of its fees; and that while the Liquidators have previously personally guaranteed and paid Link's fees in relation to work carried out in connection with the distributions of the Erroneous Withdrawals, they do not wish to do so in relation to the proposed Distribution Process. Further, the Liquidators say that they do not wish to carry out further work or incur substantial costs in relation to the Distribution Process without prior court approval not only of the Distribution Process but also of the associated costs.

76 As discussed below, the Liquidators have to date received approval for remuneration from the trust assets, in respect of administering the trusts, of total of $3,224,539.70,[32] and they have a pending claim for further remuneration of $486,865.40. As indicated below,[33] in view of the issues of proportionality that now arise, it is preferable that further questions of remuneration be deferred, pending completion of administration of the CSAs. Even if *Corporations Act,* s 545, encompasses remuneration as distinct from out of pocket expenses, which may be doubted, it is not engaged, because there remain ample trust assets from which remuneration can be allowed, to the extent that it is appropriate. One might ask, what do the Liquidators propose to do if they do not receive the advance approval they seek: surely they would not retain the $20 million or so client funds undistributed, unless and until the Court gives them an approval in advance for their estimated costs and remuneration of making distributions.

77 The amount which would be paid to Link is not in the nature of liquidators' or trustee's remuneration, but a disbursement. It is plainly referable to administering the trust property (that is, the CSAs and Recoveries) and appears to be a cost that would be reasonably incurred by the Liquidators in so doing. In respect of disbursements, as distinct from remuneration, no Court approval or specific order is necessary in the absence of a challenge, although they should be scrutinised by the Liquidators to ensure that they are reasonable and properly payable.[34] The Court has an inherent jurisdiction to review liquidators' disbursements as they are officers of the Court,[35] and to disallow a trustee's disbursements on taking a trustee's account.

78 It is true that a trustee may seek a direction that he would be justified in paying certain disbursements, in order to obtain prior protection in respect of

---

[32] See [86]-[87] below.
[33] See [99]-[100] below.
[34] Cf *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96 at 100-101 (Kennedy and Ipp JJ); *Re Timeshare Resort Club Ltd (in liq)* (2010) 187 FCR 13 at 20 [36]-[37]; [2010] FCA 673 (Barker J); *Re Wine National Pty Ltd* [2016] NSWSC 4 at [12] (Black J).
[35] Cf *Deputy Commissioner of Taxation v Starpicket Pty Limited (No 2)* [2013] FCA 699 at [21] (Gordon J).

such a disbursement.[36] However, the ordinary principles that relate to judicial advice to trustees and liquidators would indicate that such advice ought not routinely be sought in respect of ordinary commercial decisions, though it may be sought where there is likely to be controversy. One very good reason for this is that liquidators and trustees ought not be encouraged to inflict on the estate the costs of seeking for themselves the protection of judicial advice, except where there is good reason to do so. Here, there is nothing particularly remarkable or controversial about what is proposed – the receipt and adjudication of claims and the distribution of assets is an ordinary function of liquidation and administration. This proposed disbursement is dwarfed by, for example, the amounts expended on solicitors' costs and counsels' fees, for which no need for prior approval as to quantum was perceived.

79 It is not appropriate that the Court be asked to approve in advance costs of performing an ordinary function of a liquidation or administration – that is, receiving and adjudicating claims and distributing the assets – on the basis that if not approved, the Liquidators do not wish to undertake it. As a trustee is entitled to be indemnified out of trust property for any liability incurred in that capacity, the Liquidators' protestation that they personally guaranteed Link's fees in relation to the distribution of the Erroneous Withdrawals is a rather hollow one, since they were always entitled to be indemnified in respect of it out of the CSAs. Approval of the Distribution Process, which I have indicated I will give, necessarily imports that it is reasonable for the Liquidators to engage Link, and that their reasonable out-of-pocket costs of doing so are a proper disbursement for which they are entitled to be indemnified out of the trust property, namely the CSAs and Recoveries. Such disbursements fall within the order that provides that the Liquidators' costs and expenses (and the costs and expenses of BBY to the extent that they are distinguishable), in connection with administering the CSAs, reasonably incurred, be paid out of the assets of the product lines on a pro rata basis, according to the value of

[36] *Re Sakr Nominees Pty Ltd* [2016] NSWSC 709 at [8]; although that was a case about a liquidator, there is no reason why the same principles should not apply: cf *In the matter of Say Enterprises Pty Ltd* [2018] NSWSC 396.

assets in each product line as a proportion of the total assets of all product lines.

80 For those reasons, I am not minded to grant an approval in advance for the quantum of disbursements and remuneration associated with the Distribution Process.

Small account balances

81 This issue has already been addressed in the Principal Judgment[37] and by paragraph 9 of the orders and directions made on 5 April 2018. No further direction in this respect appears to be necessary.

Electronic communications

82 For reasons which I gave on a similar application made in connection with the voluntary administration of BBY,[38] it is appropriate that there be a direction that the Liquidators would be justified in publishing or sending any notices, correspondence or other relevant material to clients as part of the Distribution Process by electronic means where practicable, with alternative means of communication to cover the circumstances where it is not practicable or might not be effective.

BNZ funds

83 There were a number of bank accounts held in the name of BBY (NZ) Limited, with Bank of New Zealand ("BNZ"). Those funds ("BNZ Funds") were transferred by the Liquidators to National Australia Bank NZD foreign currency accounts, and amount to about $388,139.

84 The BNZ accounts appear to have been intended to hold client moneys with BNZ, and were apparently associated with particular product lines. The Liquidators have now concluded that BBY (NZ) Limited did not operate

[37] *In the matter of BBY Limited (Receivers and Managers appointed) (in liquidation) (No 2)* [2018] NSWSC 346 at [393]-[397], [408].
[38] *In the matter of BBY Limited* [2015] NSWSC 974.

independently of BBY, but facilitated trading by BBY clients who were residents of New Zealand in BBY products, and were part of the product lines to which they were designated, in the same way as CSAs maintained by BBY in Australia. There is no dispute about this.

85 Accordingly, there should be directions:

(1) that the Liquidators would be justified in converting the BNZ Funds into Australian dollars; and

(2) that they would be justified in distributing the BNZ Funds such that the BNZ Accounts attributed to a particular product line are treated in the same way as the CSAs in that product line.

Remuneration

86 The Liquidators have obtained approvals from meetings of creditors and the Committee of Inspection for remuneration (for acting as Liquidators) for the period from the appointment date to 30 September 2016 of $6,500,137 plus GST (of which $2,927,439 relates to "Client Work", as work in connection with the administration of the trusts constituted by the CSAs, as distinct from general liquidation work, as it has been characterised), and for the period 1 October 2016 to 31 December 2016 of a further $607,445 plus GST (of which it appears that $160,180 relates to "Client Work"); thus, the total remuneration so far approved by creditors, ostensibly for the period up to 31 December 2016, amounts to $7,107,582 plus GST, of which $3,087,619 relates to "Client Work", and the balance to general liquidation work not referable to administration of the trust accounts.

87 The Liquidators say that while remuneration of $7,107,582 plus GST has been so approved, only $2,342,896 referable to Client Work has been paid because, aside from trust money, BBY's property is subject to the St George Charge, and any further remuneration will be recoverable only if there are further recoveries for the insolvent estate, or to the extent that remuneration for Client Work is approved and payable from CSAs.

88 On 19 October 2015, the Court made orders to the effect that, until further order, the Liquidators' remuneration costs and expenses, and BBY's costs and expenses, in connection with administering the CSAs and these proceedings, reasonably incurred, be paid out of the CSAs on a pro rata basis having regard to the balance of the CSAs on the date of payment, on an indemnity basis (order 10); that the Liquidators' remuneration costs and expenses, and BBY's costs and expenses, in connection with recovering or attempting to recover and administering Recoveries, reasonably incurred, be paid out of the Recoveries, to the extent they have been received, to which the relevant remuneration, costs and expenses are attributable, on an indemnity basis (order 11); and that for those purposes, the matter be referred to a Registrar for examination and approval of the Liquidators' remuneration, costs and expenses and BBY's costs and expenses, and the Registrar's decision be subject to review in the same manner as a Registrar's decision approving the remuneration of a liquidator (order 12).

89 Pursuant to the 19 October 2015 orders, the Liquidators have from time to time applied to the Registrar for approvals under orders 10, 11 and 12, and have obtained approvals as follows:

(1) On 8 June 2016 the Registrar approved remuneration of $723,570 inclusive of GST (and also $531,634.59 GST inclusive for solicitors' costs, $13,122.49 for disbursements, and $123,948 for counsels' fees).

(2) On 14 October 2016, the Registrar approved remuneration in the amount of $1,003,145.90 inclusive of GST (and also $603,603 GST inclusive for solicitors' costs and disbursements, and $7,788 for counsels' fees).

(3) On 31 May 2017, the Registrar (on the First Plaintiffs' Interlocutory Process filed on 23 December 2016) approved remuneration in the amount of $1,497,823.80 inclusive of GST (and also $206,676.80 GST

inclusive for solicitors' costs, $23,891.10 for disbursements, and $7,788 for counsels' fees).[39]

90 Thus the total *remuneration* so far approved pursuant to the 19 October orders and paid or payable out of the CSAs amounts to $3,224,539.70. I have not been able to reconcile this with the Liquidators' evidence and submissions, which refers to their having drawn only sum of $2,342,896.

91 By interlocutory process filed on 7 August 2017, the Liquidators seek the Court's approval, pursuant to paragraph 12 of the 19 October 2015 orders, for their remuneration for the period 1 October 2016 to 30 April 2017, in the sum of $486,865.40 (GST inclusive), of which $58,490 relates to administering the CSAs, $378,770 to conducting the proceedings, and $5,345 to Recoveries.

92 Insofar as the approval of the committee of inspection may be a relevant consideration, the approval for the period 1 October 2016 to 31 December 2016 of a further $607,445 plus GST included $160,180 (plus GST), referable to Client Work, of the $486,865.50 for which the Court's approval is presently sought, meaning that some $282,425 plus GST of the present claim has not yet been formally approved by the Committee, although the time costs relating to that work were disclosed to a Committee meeting on 24 July 2017, when no issue was raised as to them.

93 The application is in the nature of one for approval of a trustee's remuneration. The court's power to allow remuneration to a liquidator in respect of the administration of trusts of which the company was a trustee is now well established. In this respect, as was said in *Re North Food Catering Pty Ltd*:[40]

> As Black J summarised the position in *Re MF Global Limited (in liq) (No 2)* [2012] NSWSC 1426 (at [55]), the principles regarding the payment of

[39] Also on 31 May 2017, on the First Plaintiffs' Interlocutory Process filed on 17 May 2017, the Registrar approved a further $313,394.40 GST inclusive for solicitors' costs and $124,645.39 for disbursements.

[40] [2014] NSWSC 77 at [9].

liquidator's remuneration out of the assets of a trust of which the company in liquidation is the trustee include the following:

(1) The court has an inherent equitable jurisdiction to allow a trustee remuneration, costs and expenses out of trust assets, and this extends to a person such as a liquidator who is, for practical purposes, controlling a trustee (see *Re Application of Sutherland* [2004] NSWSC 798; (2004) 50 ACSR 297; *Trio Capital Ltd (admin appointed) v ACT Superannuation Management Pty Ltd* [2010] NSWSC 941; (2010) 79 ACSR 425).

(2) The court may decline to exercise that jurisdiction where the company does not solely act as trustee and has sufficient beneficial assets to meet the liquidators' remuneration costs and expenses and where the work done by the liquidator in relation to trust assets may properly be treated as done for the purposes of winding up the company affairs. Thus, generally where a company has assets which are not held on trust, the liquidators' costs should usually fall on its non-trust assets (see *Re GB Nathan & Co Pty Ltd (In Liquation)* (1991) 24 NSWLR 674 at 685-689; *Re Greater West Insurance Brokers Pty Ltd* [2001] NSWSC 825; (2001) 39 ACSR 301).

(3) Where the company has both trust assets and assets held beneficially by the company, the costs can be apportioned such that the remuneration attributable to the statutory liquidation work would fall on the assets beneficially owned by the company, whereas that which related to administering the trust property might fall on the trust assets (see *Re French Caledonia Travel Service Pty Ltd (in liq)* [2003] NSWSC 1008; (2003) 59 NSWLR 361; 48 ACSR 97 at [212]).

94 Further, where the company has no function other than acting as a trustee, and all its assets are trust assets, then the Court may allow all the costs and expenses of its liquidation, including remuneration, to be paid from the trust assets.[41] Essentially, this is because, the company having no function other than as trustee, the costs of winding it up are properly to be seen as an expense of the trust.

95 BBY did not act exclusively as trustee, but also carried on business in its own right, and held property beneficially, as well as on trust. Accordingly, this is not a case in which it is appropriate to treat all the costs of the liquidation as being costs of administering the trusts and payable out of the trust assets. It follows that BBY's trust assets – and in particular the CSAs - are not available to pay remuneration for general liquidation expenses not referable to

[41] *Re Suco Gold Pty Limited In Liquidation* (1983) 33 SASR 99 (King CJ); *Grime Carter & Co Pty Limited v Whytes Furniture (Dubbo) Pty Limited* (1983) 7 ACLR 540 (McLelland J); *Re French Caledonia Travel Service Pty Limited (In Liquidation)* (2003) 59 NSWLR 361 at 423 [201]; [2003] NSWSC 1008; 48 ACSR 97 (Campbell J); *Bastion v Gideon Investments* (2000) 35 ACSR 466 at 480 [70]; [2000] NSWSC 939 (Austin J); *Re North Food Catering Pty Ltd* [2014] NSWSC 77 at [11]-[17].

administration of the CSAs. Further, as the Liquidators point out, because the secured creditor St George is entitled to all the assets held beneficially by the company BBY, as a matter of practicality there are no assets available to fund such of their remuneration as is not allowed out of trust assets. However, that is no reason why costs of the liquidation which are not referable to administration of the trust assets should be paid out of them.

96 The present application was, at the request of the first defendants, not heard and determined by the Registrar, but referred to me. The first defendants are concerned at the cumulative impact on the trust funds – and thus on the return to creditors – of the remuneration claimed, superimposed on that which has already been allowed, and on such legal costs as have been paid and are payable out of the CSAs. They submit that of available funds in the CSAs of about $16 million, the legal costs, remuneration and expenses of the Liquidators are now about $8 million, and the costs of the representative defendants about $4 million, so that if allowed in full, three-quarters of what might have been available for distribution has been consumed. Admittedly this is not a simple administration; the investigation of the CSAs, and the resolutions of the issues to which they have given rise in these proceedings, has involved and may yet involve significant complexity and responsibility. But it is also not a small administration, even when only the CSAs are considered; and at first sight, the expenditure of three quarters of a distributable fund of $16 million (if that be the correct figure, as the first defendants suggest) on liquidators and lawyers does raise questions of proportionality and reasonableness. The first defendants wish to contend that any further remuneration should be moderated, having regard to its reasonableness and proportionality to the funds in the liquidation.

97 No party proposed that I proceed forthwith to determine the application. There was a suggestion, on behalf of the first defendants, that I should refer it back to the Registrar, with some observations and guidance about reasonableness and proportionality. I do not think that it would be at all appropriate to pre-empt the Registrar's consideration with any such

observations and guidance. If the Registrar were to consider the matter, the Registrar's decision would be amenable to review by the Court.

98 The Liquidators did not oppose referral back to the Registrar, and suggested that the Registrar might at least be able to undertake the "line-by-line" review that it has sometimes been said should not be expected of a judge. However, it seems to me that the issues that will arise on this application are not of the kind that call for a "line-by-line" review: rather, they will be questions of reasonableness and proportionality having regard to the administration as a whole.

99 It seems to me that such questions can best be dealt with in the context of the administration as a whole. Although, at least in the context of liquidations, a practice has developed of making interim claims for remuneration on a periodic basis, ultimately remuneration is allowed for the administration as a whole, not for discrete periods of it. Particularly when questions of proportionality arise, it may be desirable or even necessary to review the whole of the administration, and not just work done during the period of the latest claim. Moreover, there may well be further remuneration claims, up to the finalisation of the administration of the CSAs.

100 Accordingly, the remuneration application – and any further remuneration application in respect of work done in the administration of the CSAs – should be adjourned to await finalisation of the administration of the CSAs.

An outstanding issue

101 As noted above,[42] in correspondence with other parties, the Liquidators have explained that they have not yet received a direction to realise the Recoveries in the Saxo and IB product lines (noting that the current orders permit IB clients to propound a tracing claim), and are hopeful that upon receiving such a direction, a large proportion of the positions will be able to be liquidated in a short time frame. The applications presently before the Court do not include

[42] See at [35] above.

an application for such a direction, and if one is considered necessary it seems desirable that it be made in a manner which will incur as little additional cost as practicable. For that reason, I will permit such an application to be made returnable, if the Liquidators so desire, when short minutes to give effect to this judgment are brought in, with a view to its being disposed of on that occasion if possible.

Conclusion and orders

102 My conclusions may be summarised as follows:

As to the date at which client entitlements are to be ascertained:

103 While it would be preferable to use a consistent date, for which the appointment date is the obvious candidate, in circumstances where it is not reasonably practicable to determine the value, at that date, of positions which remained open but were closed out subsequently, their value when closed-out is the best available – and a very reasonable – proxy for their value at the appointment date. Accordingly, the Liquidators would be justified in adopting their value when closed out, derived from the ASX reconciliation of Returned Collateral, as their value for the purpose of determining entitlements.

As to whether the non-Equities/ETOs CSAs should be pooled, or transactions between them reversed:

104 The Liquidators would be justified in pooling the non-Equities/ETOs CSAs (being Saxo, Futures and FX), and in not undertaking a reversal of transactions between them.

As to the Receivers' proceedings:

105 To the extent that at the appointment date the amount in the 541 Account exceeded the total trust obligation, it was beneficially the property of BBY, and caught by the St George charge. The Receivers would be justified in causing the sum of $161,228.64 to be paid from the 541 Account to St George, on the basis that it is subject to St George's security interest.

As to the costs re-allocation applications:

106 Subject to approval under the procedures established by para 12 of the orders made on 19 October 2015, and subject also to the qualifications which follow, the Liquidators' remuneration, costs and expenses (and the costs and expenses of BBY to the extent that they are distinguishable), in connection with administering the CSAs and the proceedings, reasonably incurred, and the legal expenses reasonably incurred by the second, third, fourth and fifth defendants, should be paid out of the assets of the product lines on a pro rata basis according to the value of assets in each product line as a proportion of the total assets of all product lines.

107 The qualifications are:

(1) The fifth defendant should not bear any of the costs of the proceedings, of the Liquidators or of the other defendants, that were referable to the period between 5 December 2016 and 19 March 2018. However, this qualification does not extend to Liquidators' remuneration referable to that period;

(2) The Liquidators' costs and expenses referable to Recoveries should be paid from the CSAs and Recoveries of the product lines to which the relevant recovery relates.

As to the Liquidators' distribution process application:

108 The Liquidators would be justified in adopting the proposed Distribution Process for verification and adjudication of claims and distributions, as described in Mr Vaughan's affidavit of 27 February 2018, subject to the following qualifications:

(1) Under Stage 3 (Claims), the "claims" which may be lodged by any client who disputes the proposed distribution include any tracing claim; and

(2) Under Stage 5 (Distribution), rather than the Distribution Process assuming no orders are made requiring in specie distributions to be made, the Distribution Process except in specie distributions (if any), which may be made separately, with any assets to be specifically distributed being excluded from the available funds for distribution under the distribution model.

109 Approval of the Distribution Process necessarily imports that it is reasonable for the Liquidators to engage Link, and that their reasonable out-of-pocket costs of doing so are a proper disbursement for which they are entitled to be indemnified out of the trust property, namely the CSAs and Recoveries. Such expenses fall within the order that provides that the Liquidators' costs and expenses (and the costs and expenses of BBY to the extent that they are distinguishable), in connection with administering the CSAs, reasonably incurred, be paid out of the assets of the product lines on a pro rata basis according to the value of assets in each product line as a proportion of the total assets of all product lines. However, it is not appropriate to approve in advance the quantum of remuneration and disbursements associated with the Distribution Process.

110 The question of disregarding account balances that do not exceed $100 has already been addressed in the Principal Judgment, and by paragraph 9 of the orders and directions made on 5 April 2018, and no further direction in this respect appears to be necessary.

111 There should be a direction, as proposed by the Liquidators, to the effect that the Liquidators would be justified in publishing or sending any notices, correspondence or other relevant material to clients as part of the Distribution Process by electronic means.

112 There should be directions that the Liquidators would be justified (1) in converting the BNZ Funds into Australian dollars; and (2) in distributing the BNZ Funds such that the BNZ Accounts attributed to a particular product line are treated in the same way as the CSAs in that product line.

As to the Liquidators' remuneration application:

113 The Liquidators' remuneration application, and any further remuneration application in respect of work done in connection with the administration of the CSAs, should be adjourned pending finalisation of the administration of the CSAs.

Plaintiffs to bring in short minutes:

114 The Court directs that the plaintiffs bring in short minutes of orders to give effect to this judgment on a date to be fixed, when any application for advice in connection with the realisation of Recoveries in the Saxo and IB product lines may also be made returnable.

****