Judgment Summary
Supreme Court
New South Wales

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

Brereton J

The Supreme Court has given advice and directions to the liquidators of BBY Limited on how to distribute client money to various classes of BBY clients. The liquidators were appointed on the 22 June 2015, having previously been appointed as administrators on 17 May 2015.

The BBY Group provided a range of financial services and products in five broad product lines, namely exchange-traded shares and units ("Equities"), exchange-traded options ("ETOs"), futures contracts and options ("Futures"), foreign exchange contracts ("FX"), a variety of products on an on-line trading platform offered by Saxo Capital Markets Australia ("Saxo"), and other miscellaneous financial products ("Other").

The Corporations Act required client money deposited with BBY to be held in segregated trust accounts. The liquidators hold total client funds and recoveries of about $25.2 million, and there are claims on them of about $43 million, a shortfall of about $17.8 million. In the Equities/ETOs accounts there are funds of $14.5 million and claims of $14.4 million, a surplus of about $100,000. In Futures, FX, Saxo and Other accounts there are funds of $10.7 million and claims of $28.7 million, a deficiency of $18 million. (In Saxo alone, there are funds of $4.5 million and claims of $12.3 million, a deficiency of $7.8 million).

Thousands of BBY clients potentially have an interest in the money held in the segregated accounts and recoveries. The current state of the accounts is the result of many thousands of transactions, commencing from at least 2 December 2011, including transactions in which funds have moved between accounts, not only within but also across product lines. The liquidators are not able to reconstitute the accounts so as to identify where the funds contributed by individual clients were located from time to time, and it is not reasonably and economically practicable to reconstruct the accounts. This gave rise to numerous difficulties, so the liquidators sought the Court's advice and direction.

The principal issue was whether all the segregated accounts should be pooled for the purposes of distribution among all clients, or whether distribution should be on an account-by-account basis. There was no dispute that the accounts corresponding to the same product line should be pooled, and the chief controversial question was whether the Equities and ETOs accounts should be pooled with the Saxo, Futures, FX and Other accounts. If the Equities and ETOs accounts were pooled with the Futures, FX, and Saxo accounts, the $17 million shortfall would be shared by all BBY clients; if not, the Equities

and ETOs clients would be paid in full, and the $17.8 million shortfall would be met by FX, Futures, Saxo and Other clients exclusively.

The Court advised that the Equities and ETOs accounts should not be pooled with the FX, Futures, Saxo and Other accounts.

It is well-established that legal entitlements cannot be altered on a basis of sharing common misfortune. However, pooling can be directed as a pragmatic solution where trust money has been mixed, the identification and tracing of the interests of individual clients' interests is not reasonably and economically practical, and it is reasonable in the circumstances to regard clients' interests in one fund as equal to and indistinguishable from their interests in the others. This means that the Court has to form a view, even if only an imprecise and impressionistic one, as to what is likely to be the extent of the interests of the clients of each fund in the other.

The Court found that, despite mixing in the past of some money from the Saxo accounts into the Equities/ETO accounts, the nature and extent of intervening transactions and the change in the constituency of Saxo clientele meant that current Saxo clients probably had only a very slight interest in the money now in the Equities/ETOs accounts, and it would be a disproportionate windfall to current Saxo clients and a considerable injustice to Equities/ETO clients to direct pooling. As to pooling the Saxo, FX and Futures accounts and excluding the Equities/ETOs the Court was inclined to the view that this would not be a proportionate response, but that given the relevant recency of the mixing transactions the liquidators might be justified in reversing them; however, as this had not been addressed in argument, further submissions would be permitted.

The Court also advised that the liquidators would be justified in proceeding on the basis that certain recoveries from counterparties were held on trust for all clients with entitlements in the relevant product line, but that the recovery from ASX Clear in respect of ETOs (the so-called Returned Collateral) was held for those ETO clients who had open positions at the administration date.

The Court made further directions that the liquidators disregard claims less than $100, set-off positive and negative client positions, and allocate interest received to the clients with entitlements in the relevant accounts.