



Issued: 30 November 2018 1:34 PM

### JUDGMENT/ORDER

#### COURT DETAILS

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

#### TITLE OF PROCEEDINGS

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

#### DATE OF JUDGMENT/ORDER

Date made or given	26 November 2018
Date entered	28 November 2018

#### TERMS OF JUDGMENT/ORDER

THE COURT makes orders and directions in accordance with the attached short minutes.

#### SEAL AND SIGNATURE



Signature	N. Abdi (L.S.)
Capacity	Chief Clerk
Date	30 November 2018

If this document was issued by means of the Electronic Case Management System (ECM), pursuant to Part 3 of the Uniform Civil Procedure Rules (UCPR), this document is taken to have been signed if the person's name is printed where his or her signature would otherwise appear.

## **PARTY DETAILS**

### **PARTIES TO THE PROCEEDINGS**

#### **First Application under Corporation Law**

##### **Plaintiff(s)**

First Plaintiff

Stephen Ernest Vaughan and Ian Richard Hall in their capacity as Liquidators of BBY Limited (Receivers and Managers Appointed)(In Liquidation) ACN 006 707 777

Second Plaintiff

BBY Limited (Receivers and Managers Appointed)(In Liquidation) ACN 006 707 777

##### **Defendant(s)**

First Defendant

J Mazzetti Pty Ltd ATF J Mazetti Pty Limited Staff Superannuation Fund & ORS  
ACN 006705602

Second Defendant

Peter Brian Haywood and Bronwen Menai Haywood as trustees for the Haywood Superannuation Fund

Third Defendant

Clive Riseam

Fourth Defendant

Securities Exchanges Guarantee Corporation Limited

Fifth Defendant

David Nadin

### **ATTACHMENTS TO ORDERS**

(BBY 2018 - Final Orders 26.11.18 - SMO.pdf)

[attach.]

**In the matter of BBY Limited (receivers and managers appointed) (in liquidation)**

Supreme Court of New South Wales Proceedings No 2015/237028

Supreme Court of New South Wales Proceedings No 2016/77316

**SHORT MINUTES OF ORDER**

THE COURT ORDERS AND DIRECTS THAT:

**Date at which client entitlements are to be ascertained**

1. The Liquidators would be justified in:
  - a. subject to Order 1(b) below, adopting the Last Trading Date as the date at which the entitlements of Clients are to be ascertained (even if an entitlement or obligation extant at that date crystallised into a payment to or from a CSA at a later date); and
  - b. notwithstanding Order 1(a) above, adopting, in respect of ETO Clients who had positions which were open as at the Last Trading Date and subsequently closed out, the value of those positions when closed out, as derived from the ASX reconciliation of Returned Collateral (being Confidential Exhibit 119 contained within Exhibit PX14 in the proceedings), as the value of those positions for the purpose of determining the entitlements of those clients.

**Pooling of non-Equities/ETOs CSAs without reversal of transactions**

2. The Liquidators would be justified in pooling the CSAs in the Saxo, Futures, FX and Other product lines and in not undertaking a reversal of transactions between any of those CSAs.

**Receivers' proceedings (No 2016/77316)**

3. The Receivers would be justified in causing the sum of \$161,228.64 to be paid from the 541 Account to St George pursuant to the Charge.

**Costs re-allocation among product lines**

4. 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, 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 at the Reference Date as a proportion of the total value of the assets of all product lines as at the Reference Date, save that:

- a. the Fifth Defendant, and the assets in the IB product line, should not bear any of the legal costs and disbursements of the Liquidators in connection with the proceedings referable to the period after 5 December 2016 up to (but excluding) 19 March 2018;
  - b. 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 assets of the product lines to which the relevant remuneration, costs and expenses of the recovery are attributable.
5. The legal expenses of the First Defendant, Second Defendant, the Third Defendant and the Fifth Defendant in connection with the proceedings, 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 at the Reference Date as a proportion of the total value of the assets of all product lines as at the Reference Date, save that the assets in the IB product line should not bear any of the legal costs and disbursements of the First Defendant, the Second Defendant or the Third Defendant referable to the period after 5 December 2016 up to (but excluding) 19 March 2018.
6. For the purposes of:
- a. Order 4, the procedures established by Order 12; and
  - b. Order 5, the procedures established by Order 7,
- of the Orders made on 19 October 2015, and any approvals given under them, continue to apply and, accordingly, as soon as reasonably practicable the Liquidators transfer any amounts necessary between:
- c. the combined assets of the Saxo, Futures, FX and Other product lines; and
  - d. the assets of the IB product line; and

- e. the assets of the ETO product line; and
- f. the assets of the Equities product line,

so as to give effect to Orders 2, 4 and 5 with respect to the approvals given as at the date of transfer.

#### **Client monies distribution**

7. The Liquidators are justified in adopting the Distribution Process to verify and adjudicate Client claims and to make any Distributions of Client entitlements, including with respect to any Unclaimed Money.

#### *Distribution Process costs and disbursements*

8. The Liquidators and BBY need not, prior to paying costs, expenses and disbursements from, or reimbursing themselves out of, the CSAs or Recoveries in respect of the Distribution Process, obtain the approval of the Court pursuant to the orders made on 19 October 2015 and, to the extent necessary, Orders 10 to 13 of the orders made on 19 October 2015 are varied accordingly.

#### *Electronic communications*

9. The Liquidators would be justified in publishing or sending any notices, correspondence or other relevant material to Clients as part of the Distribution Process, including giving notice of intended distribution for the purposes of section 60 of the *Trustee Act 1925*, by:
  - a. sending copies of any notices, correspondence or other relevant materials to the email address of each Client for whom the Liquidators or BBY holds an email address;
  - b. sending copies of any notices, correspondence or other relevant materials to the postal address of any Client for whom the Liquidators or BBY hold a postal address, not being a person referred to in 8(a) above;
  - c. by notice or link on the webpage maintained by KPMG relating to the external administration of BBY:
    - i. at URL [www.kpmg.com/au/bby](http://www.kpmg.com/au/bby), requesting Clients who have not received an email or postal notification described in 8(a) or 8(b)

above to contact the Liquidators for further details, or to prepare and submit the information required for the Verification Stages;

- ii. at URL [www.kpmg.com/au/bby](http://www.kpmg.com/au/bby) providing notice of intended distribution for the purposes of section 60 of the *Trustee Act 1925*;
- d. publishing notice of the intended Distribution Process:
  - i. at URL [www.kpmg.com/au/bby](http://www.kpmg.com/au/bby);
  - ii. a webpage maintained by Link Market Services;
  - iii. a national newspaper; and/or
  - iv. an ASIC Gazette; and
- e. publishing notice of intended distribution for the purposes of section 60 of the *Trustee Act 1925* in a national newspaper.

#### **BNZ Funds**

10. The Liquidators are justified in:
  - a. converting the BNZ Funds into Australian Dollars; and
  - b. 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.

#### **Liquidators' remuneration application**

11. The Liquidators' application for approval of remuneration filed 8 August 2017 is adjourned to a date to be fixed and the Liquidators have liberty to restore such application to the List on reasonable notice by arrangement with the Associate to the Corporations List Judge.

#### **Realisation of Saxo Recoveries**

12. the Liquidators would be justified in directing the sale of securities held by the Second Plaintiff through SCMA upon termination of the contracts constituted by the Online Account Terms with the Saxo Clients.

### **Realisation of IB Recoveries**

13. Subject to Order 7 above, the Liquidators would be justified in directing the sale of securities held by the Second Plaintiff through IB upon termination of the contracts constituted by the Online Account Terms with IB Clients.

### **Definitions**

**541 Account** means the account held by BBY with St George with account name *BBY Ltd Client Trust Account* and account number 553452541.

**BBY** means the Second Plaintiff.

**BNZ Accounts** means the accounts held in the name of BBY (NZ) Limited with the Bank of New Zealand, identified at paragraph 41 of the affidavit of Stephen Ernest Vaughan affirmed 27 February 2018, including as subsequently transferred into NAB NZD foreign currency accounts.

**BNZ Funds** means the total funds held in the NAB NZD foreign currency accounts into which the funds in the BNZ Accounts were transferred and which, as at 31 January 2018, totaled NZD \$388,133.99, identified at paragraph 22 of the affidavit of Stephen Ernest Vaughan affirmed 27 February 2018.

**Charge** means the fixed and floating charge dated 2 December 2011 granted by BBY to St George.

**Client or Clients** means, respectively, a client or clients of BBY.

**CSA or CASs** has the same meaning as in the Orders made 5 April 2018.

**Distributions** means distributions of amounts held in CSAs or as Recoveries.

**Distribution Process** means the process described in paragraph 11 of the affidavit of Stephen Ernest Vaughan affirmed 27 February 2018 with the following modifications:

- (1) as to *Step 3 - claim details*, paragraph (iii) is replaced with the following:

In the event a Client rejects any of their Claim Details on the basis they contend that their claim(s) is/are greater than their stated Claim Details or (in respect of IB Clients) that they contend that they are entitled to an asset or assets *in specie*, via tracing, the Link Portal will present the Client with an alternative screen which will instruct them to print and complete a claim form (**Claim Form**). The Client will then be required to

complete the Claim Form and submit it directly to Link within 21 days, along with any relevant supporting documentation which can substantiate the Client's claim(s) or right to any asset in specie.

Acceptable supporting documentation will generally be:

- (A) a statement on BBYL letterhead; or
- (B) a system generated report from the relevant Product Line's white label platform, which indicates the Client's entitlement as at the calculation dates approved by the Court; and
- (C) in respect of claims of IB Clients for assets in specie, such other documentation and any submission which establishes the right of the Client to the asset.

Link will then collate all information and documentation received and provide it to the Liquidators who will manually adjudicate each Claim Form (see below).

(2) as to *Step 5 – distribution*, paragraphs (i), (ii) and (iii) are replaced with the following:

- (i) Once all Client claims have been verified (and adjudicated where required), ~~and assuming no orders are made requiring in specie distributions to be made,~~ a distribution model will be created which will calculate the required cash Distributions based on the judgment handed down in the Proceedings, available funds, costs and accepted claims (the **Distribution Quantum**). The distribution model will also ensure that sufficient CSA funds, assets and Recoveries are retained (i.e. not initially distributed to Clients) in order to provide for:
  - (A) any future Distributions which may ultimately need to be made to Clients whose claims may be the subject of dispute or an appeal to the Court under Division 90 of Schedule 2 (Insolvency Practice Schedule (Corporations)) to the CA; and
  - (B) the Liquidators' ~~costs, remuneration, costs~~ and expenses and the legal expenses of the First Defendant, Second Defendant, Third Defendant and Fifth Defendant, ~~and estimates of those amounts insofar as they have not been determined, approved or otherwise quantified as at the date of the Distributions; and~~



- (C) any *in specie* claims made by IB Clients (which are to be excluded from the Distribution Quantum) and which:
- (1) have been allowed by the Liquidators or the Court;  
or
  - (2) where an adjudication of such a claim has not been made or an appeal against a disallowance of such a claim has not been determined finally by the Court.

In the event of paragraph (i)(C) applying, the Liquidators must not liquidate the assets the subject of an *in specie* claim unless and until the claim has been adjudicated and any appeal therefrom determined finally by the Court.

- (ii) Once the Distribution Quantum has been calculated and confirmed, the Liquidators will cause BBYL to give notice under section 60 of the Trustee Act (the **Distribution Notice**).

Once the claims for *in specie* distribution of assets have been finally determined by adjudication or by the Court, the Liquidators will cause BBYL to give notice under section 60 of the Trustee Act (the **In Specie Distribution Notice**).

- (iii) At the expiration of the Distribution Notice, KPMG will forward to Link:

- (A) sufficient CSA and Recoveries proceeds; and
- (B) bank account details for each Client entitled to a Distribution (where details have been provided),

to enable Link to process the Distributions in respect of each Client through electronic funds transfers or cheque, and account to KPMG accordingly.

At the expiration of the In Specie Distribution Notice, the Liquidators will, at the cost of the relevant Client and upon payment by that Client of a proportionate amount (according to the value of the asset the subject of the *in specie* distribution as a proportion of the value of all assets in the IB product line as at the Reference Date) of the Liquidators' remuneration, cost and expenses and the legal expenses of the First Defendant, Second Defendant, Third Defendant and Fifth Defendant to be borne by the assets of the IB product line subject to Orders 4 and 5, cause BBYL to convey to the relevant Client *in specie*, any asset to which the Client's claim to the asset in specie has been allowed by the Liquidators or the Court.

**ETO Clients** means Clients in the ETO product line who had open positions as at the Last Trading Date on exchange-traded financial products, being those Clients represented by the First Defendant.

**Futures Clients** means Clients in the Saxo product line, being represented by the Third Defendant.

**FX Clients** means Clients in the FX product line, being represented by the Third Defendant.

**IB** means Interactive Brokers LLC.

**IB Clients** means Clients in the IB product line, being those clients represented by the Fifth Defendant.

**Last Trading Date** means 15 May 2015.

**Liquidators** means the First Plaintiffs.

**Online Account Terms** means the BBY Online Account Terms (June 2013) (being Appendix 16 contained within Exhibit PX13 in the proceedings).

**Other product line** means any product line other than IB, Futures, FX and Saxo product lines.

**Other Clients** means Clients in the Other product line, being represented by the Third Defendant.

**Product line** means the product lines into which BBY organized its business identified at paragraph 43 of the affidavit of Stephen Ernest Vaughan affirmed 23 December 2015.

**Receivers** means the First Plaintiffs in proceedings no 2016/77316.

**Reference Date** means:

- (A) in respect of the assets in all product lines other than the ETO product line, the Last Trading Date; and
- (B) in respect of the assets in the ETO product line:
  - 1. the Last Trading Date in respect of assets comprising CSAs; and
  - 2. the date on which open ETO positions were closed out, as derived from the ASX reconciliation of Returned Collateral.

**Saxo Clients** means Clients in the Saxo product line, being represented by the Third Defendant.

**SCMA** means Saxo Capital Markets (Australia) Pty Ltd.

**St George** means St George Bank, a division of Westpac Banking Corporation

**Unclaimed Money** means a Client's entitlement in the event that a Client:

- (A) does not claim the Client's entitlement; or
- (B) cannot be located or contacted after reasonable attempts have been made by the Liquidators or their agents; or
- (C) cannot be paid the Client's entitlement for any reason (including the provision or holding of incorrect banking details or the non-provision of banking details); or
- (D) does not cash any cheque comprising the Client's entitlement,

and that situation prevails for 6 months from the expiration of the "Distribution Notice" given under the Distribution Process.

