



Level 38 Tower Three
300 Barangaroo Avenue
Sydney NSW 2000

P O Box H67 Australia Square
Sydney NSW 1213
Australia

ABN: 51 194 660 183
Telephone: +61 2 9335 7000
Facsimile: +61 2 9335 7001
DX: 1056 Sydney
www.kpmg.com.au

BBY LIMITED (RECEIVERS & MANAGERS APPOINTED) (IN LIQUIDATION)

ACN 006 707 777 (BBYL)

BBY HOLDINGS PTY LTD (RECEIVERS & MANAGERS APPOINTED) (IN LIQUIDATION) ACN

075 187 432 (BBYH)

BROKER SERVICES AUSTRALIA PTY LTD (IN LIQUIDATION)

ACN 074 976 364 (BSA)

Liquidators' Notice to Creditors – Court Application Regarding Distribution of Recoveries

1. INTRODUCTION

Ian Hall and I, Stephen Vaughan were appointed to act as liquidators of BBYL, BBYH and BSA on 22 June 2015 following resolutions passed by creditors that those companies be wound up under section 439C of the *Corporations Act 2001* (Cth).

On 23 August 2019, Mr Hall and I commenced New South Wales Supreme Court Proceedings No. 2019/263477 (*In the Matter of BBY Limited (Receivers & Managers Appointed) (in Liquidation) & Ors*) to seek directions from the Court as to how the liquidators should:

- (a) distribute the net proceeds it has recovered in respect to the insolvent trading claim the liquidators have pursued against Glenn Rosewall, Ken Rosewall and David Perkins in the windings up of BBYL, BBYH and BSA; and
- (b) allocate the remuneration and expenses which have been incurred by the liquidators in pursuing that claim,

amongst the insolvent estates of BBYL, BBYH and BSA.

This note is intended to provide creditors of each of those companies with information concerning the liquidators' application for directions.

2. DIRECTIONS SOUGHT

2.1 How much money is involved

The liquidators' application concern the sum of \$2,503,484.29 which is currently being held in the trust account of Ashurst Australia pending the directions given by the Court.

This amount represents the recoveries the liquidators obtained in a confidential settlement reached by the liquidators with the Directors and Officers Insurer of BBYL, BBYH and BSA (**D & O Insurer**) net of:

- (a) the premium the liquidators have paid to IMF Bentham Limited ACN 067 298 088 who provided the liquidators with litigation funding to pursue these claims; and

- (b) an advanced sum of \$275,000 being paid by the liquidators to Ashurst on account of outstanding invoices for legal fees and expenses.

This amount does not include any payments from Ken Rosewall, Glenn Rosewall or David Perkins who have to date refused to make any payments towards BBYL, BBYH or BSA to settle the insolvent trading claim or otherwise. Nor does it include any payments in respect to the voidable transaction claims which the liquidators are currently pursuing against GARF Pty Ltd (in Liquidation) ACN 102 659 594 or Ficema Pty Ltd ABN 17 639 290 468.

2.2 Why directions are sought

Directions have been sought by the liquidators in circumstances where:

- (a) the liquidators received a one off settlement payment from the D & O Insurer pursuant to a confidential Settlement Deed which did not specify or otherwise provide any indication as to how these recoveries ought to be applied in the windings up of each of BBYL, BBYH or BSA;
- (b) the liquidators pursued an insolvent trading claim in which compensation was sought pursuant to section 588M of the Corporations Act in respect to unpaid debts which were owing by BBYL, BBYH and BSA; and
- (c) the liquidators have been unable to say whether the costs claimed are specifically attributable to work completed for BBYL, BBYH and BSA given that:
 - (i) none of the relevant work items were allocated to either BBYL, BBY or BSA by the people at KPMG and Ashurst who completed that work as in practice the insolvent trading claim was always treated as one claim; and
 - (ii) each BBYL, BBYH and BSA will receive at least some of insolvent trading claim recoveries and have consequently benefited from the liquidators' work.

2.3 Competing models

The liquidators will submit to the Court that there are two methods available to distribute the recoveries and allocate the relevant costs across the BBYL, BBYH and BSA Estates.

This includes a **proportional model** under which the recoveries and costs will be allocated pro-rata amongst the BBYL, BBYH and BSA Estates to mirror the extent to which the unpaid debts owing by those companies made up the insolvent trading claim. Under this model, 89% of the recoveries will be distributed to and 89% of the costs will be allocated to BBYL, 1% of the recoveries will be distributed to and 1% of the costs will be allocated to BBYH and 10% of the recoveries will be distributed to and 10% of the costs will be allocated to BSA.

The alternative is for the liquidators to adopt an **equal allocation model** under which the recoveries and costs will be allocated equally amongst the BBYL, BBYH and BSA Estates regardless of the extent to which the unpaid debts owing by these companies made up the insolvent trading claim. Under this model 33.33% of the recoveries will be distributed to and 33.33% of the costs will be allocated to BBYL, BBYH and BSA.

It is possible for a mixed model to be applied under which a proportionate model is applied to the distribution of the recoveries but an equal allocation model is applied to allocating costs (or vice versa).

2.4 **Impact on creditors**

As part of our application, the liquidators will present evidence to the Court as to how the application of each of these models will impact upon the BBYL, BBYH and BSA Estates. For the purpose of this notice it should be assumed that:

- (a) the application of a proportionate distribution model combined with an equal costs allocation model has the potential to deliver the highest net return to the BBYL Estate but losses to the BBYH and BSA Estates (in the sense that their share of the recoveries will not be sufficient to pay their allocated costs);
- (b) the application of an equal distribution model combined with an equal costs allocation model has the potential to deliver a net return of approximately \$590,000 to each of the BBYL, BBYH and BSA Estates regardless of the extent to which the unpaid debts owing by these companies made up the insolvent trading claim; and
- (c) the application of an proportionate distribution model combined with a proportionate costs allocation model has the potential to deliver a net return of approximately \$1,574,904.66 to the BBYL Estate, \$17,695.56 to the BBYH Estate and \$176,955.58 to the BSA Estate.

It is the liquidators' intention to ask the Court to give directions that the liquidators be permitted to proceed with a proportionate distribution model and a proportionate costs allocation model given this will enable each estate to proportionately benefit from the insolvent trading claim being pursued by the liquidators.

Whether this translates to actual dividends being paid to the creditors of those estates will depend upon the financial position of each of those companies, what other recoveries have been made and the costs which have been incurred in each of the estates.

3. **PARTICIPATION IN THE PROCEEDINGS**

When is the liquidators' application listed for final hearing?

The liquidators' application for directions is listed for final hearing on 23 September 2019 before Justice Rees in the Supreme Court of New South Wales.

Can creditors participate in the proceedings or oppose the directions sought by the liquidators?

Yes, however you do not need to participate in the Court proceedings if you do not wish to.

Non-participation in the proceedings will not affect your status as a creditor of BBYL, BSA or BBYH. However, if you do not participate, orders may be made in your absence which may adversely impact upon your interests.

How can creditors obtain copies of any of the Court Documents?

The liquidators intend to seek orders under section 7 of the *Court Suppression and Non-publication Orders Act 2010* (NSW) that the affidavit of Stephen Vaughan affirmed 23 August 2019 and the exhibit to Mr Vaughan's affidavit be kept confidential and not be disclosed or published save with leave of the Court. Confidentiality orders are being sought given Mr Vaughan's affidavit refers to a number of documents which are confidential and commercially sensitive.

The liquidators are willing to enter into discussions with creditor representatives to make a version of Mr Vaughan's affidavit available provided arrangements can be agreed that will not compromise the liquidators' application for confidentiality.

What do creditors need to do if they wish to participate or oppose the directions sought by the liquidators?

If you wish to be heard or become a party to the proceedings, you should:

- file a Notice of Intention to Appear to seek leave to appear in accordance with rule 2.13 of the *Supreme Court (Corporations) Rules 1999 (Rules)* and serve that notice on the Liquidators' solicitors c/- Ashurst Australia, Level 11, 5 Martin Place, Sydney NSW 2000 (Ref: JKM/DGE/1000-020-357) and otherwise comply, if appropriate, with rule 2.13 of the Rules. If you intend to seek leave to appear please notify Ashurst by no later than 19 September 2019; and
- appear before the Court at the hearing on 23 September 2019 at Law Courts Building, Queens Square, Sydney.

We recommend that you obtain legal advice if you are considering taking these steps.

The time and court details of the proceedings will be specified in the Court List which should be available the day before at the following link:

http://www.lawlink.nsw.gov.au/courtlists/nswsc_lists.nsf/Web+Version+Courtlist

4. **ONGOING COMMUNICATIONS**

We intend to communicate regularly with creditors via email and our dedicated website at <http://www.kpmg.com/AU/bby> on what directions are made by the Court.

Should you have any questions in the meantime, please send your question by e-mail to BBY@kpmg.com.au. It would be helpful if the subject line of your e-mail is titled "BBYL/BBYH/BSA Costs Application".

Yours faithfully



Stephen Vaughan
Liquidator