

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

No. 237028 of 2015

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

STEPHEN ERNEST VAUGHAN AND IAN RICHARD HALL IN THEIR CAPACITY AS LIQUIDATORS OF BBY LIMITED (RECEIVERS & MANAGERS APPOINTED)(IN LIQUIDATION) ACN 007 707 777 AND OTHERS

Plaintiffs

J MAZZETTI PTY LTD AS TRUSTEE FOR J MAZZETTI PTY LTD STAFF SUPERANNUATION FUND AND OTHERS

Defendants

**FIFTH DEFENDANT'S SUMMARY OF CONTENTIONS SETTING OUT THE BASES
UPON WHICH DISTRIBUTIONS SHOULD BE MADE**

1. The Fifth Defendant contends that distributions to clients of BBY Limited (Receivers and Managers Appointed) (In Liquidation) (**BBY**) with an Interactive Brokers account (**IB Clients**) should be made by the liquidators of BBY on the following bases¹:
 - (a) IB Clients should be afforded the opportunity to assert and prove a tracing claim in respect of the Total Counterparty Cash, Stock and Options in the IB Product Line (**the IB Platform Assets**) in their respective sub-accounts on

¹ Employing the terminology used in the table at page 68, par 12.1 of the *Client monies investigations Liquidators' Supplementary Report* dated 15 June 2016.

the IB platform². Any IB Client who proves such a claim should be distributed the funds or assets the subject of that claim; and

- (b) subject to (a) above, the IB Platform Assets should be distributed to IB Clients. Those assets should not be pooled with any other assets for the purposes of making distributions to BBY clients. Nor should any of those assets be distributed to BBY clients other than IB Clients.

2. In addition, the Fifth Defendant:

- (a) contends that cl 7.8.03(6) of the *Corporations Regulations* 2001 does not apply to funds or assets on the IB platform³;
- (b) contends, with respect to subpar 1(b) above, that each IB Client should receive a rateable distribution from the IB Platform Assets calculated by reference to the balance of that client's sub-account on the IB platform⁴ as at 15 May 2015⁵;
- (c) contends, in response to pars 19 to 21 of the Plaintiffs' Summary of Contentions filed 2 August 2016, that the fact that BBY has a contractual right, following a "*Default Event*"⁶, to set-off an IB Client's credit balance against any money due and payable by the client to BBY under the *Online Account Terms*⁷ does not justify the set-off of positive net balances against

² See *Georges (in his capacity as joint and several liquidator of Sonray Capital Markets Pty Ltd (in liq)) v Seaborn International (as trustee for the Seaborn Family Trust)* (2012) 288 ALR 240 (*Sonray*) at [238] to [239]; see also at [86].

³ *Sonray* at [230].

⁴ See, similarly, *Sonray* at [128].

⁵ See *Sonray* at [112] and *Re MF Global Australia Ltd (in liq)* (2012) 267 FLR 27 at [109] to [117].

⁶ *Client monies investigations Liquidators' Supplementary Report* dated 22 December 2015, appendix 16, cl 11.1.

⁷ *Client monies investigations Liquidators' Supplementary Report* dated 22 December 2015, appendix 16, cl 11.1(g).

- negative net balances in accounts held by the same IB Client (at least in the absence of any default); and
- (d) agrees with the contentions at pars 22 and 24 of the Plaintiffs' Summary of Contentions filed 2 August 2016.

4 August 2016

M S HENRY

Counsel for the Fifth Defendant
Ph: 9235 3095
Fax: 9221 5386
Email: msh@7thfloor.com.au