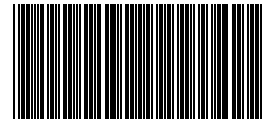




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Form 40  
UCPR 35.1



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### AFFIDAVIT OF Stephen Ernest Vaughan - 08 Mar 2016

#### COURT DETAILS

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

#### TITLE OF PROCEEDINGS

First Applicant	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 Applicant	BBY Limited (Receivers and Managers Appointed)(In Liquidation) ACN 006 707 777
First Respondent	J Mazzetti Pty Ltd ATF J Mazetti Pty Limited Staff Superannuation Fund & ORS ACN 006705602
Second Respondent	Securities Exchanges Gurantee Corporation Limited

#### FILING DETAILS

Filed for	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, Applicant 1 BBY Limited (Receivers and Managers Appointed)(In Liquidation) ACN 006 707 777, Corporation subject of the proceedings 1 BBY Limited (Receivers and Managers Appointed)(In Liquidation) ACN 006 707 777, Applicant 2
Legal representative	EMANUEL JOHN POULOS
Legal representative reference	
Telephone	02 9258 6000
Your reference	02-3003-4959

#### ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Affidavit (General) (e-Services), along with any other documents listed below, were filed by the Court.

Affidavit (UCPR 40) (239353036\_\_1\_Affidavit of Stephen Vaughan affirmed on 8 March 2016.PDF)

[attach.]

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

No 237028 of 2015

IN THE MATTER OF BBY LIMITED (RECEIVERS & MANAGERS APPOINTED) (IN LIQUIDATION)  
ACN 006 707 777

**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**

First Plaintiffs

**BBY LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)  
ACN 006 707 777**

Second Plaintiff

**J MAZZETTI PTY LTD ACN 006 705 602 AS TRUSTEE FOR  
J MAZZETTI PTY LTD STAFF SUPERANNUATION FUND (AND OTHERS)**

First Defendants

**and others**

**AFFIDAVIT OF STEPHEN ERNEST VAUGHAN**

On 8 March 2016, I, Stephen Ernest Vaughan of 10 Shelley Street, Sydney in the State of New South Wales, Official and Registered Liquidator, affirm:

1. Ian Hall and I are the First Plaintiffs in this proceeding.
2. I have affirmed this affidavit in support of the Plaintiffs' Interlocutory Process dated 8 March 2016. By that Interlocutory Process, Mr Hall and I seek directions from the Court under sections 479 and 511 of the *Corporations Act 2001* (Cth) and section 63 of the *Trustee Act 1925* (NSW) in respect of certain actions Mr Hall and I wish to take in respect of financial products and cash held by particular counterparties for BBYL and/or its clients.
3. This affidavit should be read in conjunction with the affidavit I affirmed in this proceeding on 23 December 2015 (**December Affidavit**) which exhibited a report that Mr Hall and I had prepared on the client monies investigations undertaken by KPMG since our appointment on 17 May 2015

  
\_\_\_\_\_  
Signature of deponent  
\_\_\_\_\_  
Signature of witness

Filed on behalf of the plaintiffs  
Prepared by:  
**Ashurst Australia**  
Lawyers  
Level 11, 5 Martin Place  
Sydney NSW 2000

DX: 388 Sydney  
Tel: (02) 9258 6000  
Fax: (02) 9258 6999  
Ref: EP RYZA 02 3003 4959  
Attention: Ryan Zahrai

(the **CSA Report**). Capitalised terms in this affidavit have the same meaning as defined in the December Affidavit unless indicated otherwise.

4. Now shown to me and marked "**Exhibit SV-9**" and "**Confidential Exhibit SV-10**" respectively are two folders containing documents behind numbered tabs to which I will refer in this affidavit. I refer to these exhibits as "**SV-9**" and "**SV-10**", respectively, in this affidavit.
5. A reference to a **Tab** or **page number** is a reference to the document behind the corresponding tab or the corresponding page, of Exhibit SV-9 or Confidential Exhibit SV-10, as the case may be. The material in Confidential Exhibit SV-10 contains identifying information relating to clients of BBYL.
6. I make this affidavit from my own knowledge and from information, which I believe to be true, obtained during the course of the investigations conducted by Ian Hall, me and our staff into BBYL's affairs, including through review of the books and records by me and my staff. Where I have relied upon specific books or records I have specifically identified them in this affidavit. Where I have relied upon things that were said to me or my staff by former employees or persons concerned with the business of BBYL I have specifically indicated so.

#### **Saxo Capital Markets (Australia) Pty Ltd**

7. Saxo Capital Markets (Australia) Pty Ltd (**SCMA**) operates an international online trading platform facilitating trades in relation to foreign exchange contracts, contracts for difference, securities, futures contracts and other financial products. At pages 35 to 37 of the CSA Report, I provided a detailed description of how clients of BBYL used Saxo to trade in financial products located outside of Australia.
8. At paragraphs 106 to 110 of the December Affidavit, I set out the terms of the Saxo Agreements. Those agreements in effect provided that BBYL and SCMA dealt with each other as principals and that SCMA considered that its only client was BBYL notwithstanding that individual clients of BBYL who used the Saxo Online Platform had separate "*sub-accounts*" on the platform, could log in to view their open trades and trading history, place orders for new trades and close out existing trades, using that platform.
9. At paragraphs 192 to 196 of the December Affidavit, I referred to a series of correspondence which my solicitors had with SCMA in the period between 5 August 2015 and 9 December 2015.
10. Based on that correspondence and on my review of the books and records of BBYL, the position of BBYL in respect to SCMA can be summarised as follows:
  - (a) as at 7 August 2015, SCMA held cash in BBYL accounts totalling A\$216,593 at prevailing exchange rates. A summary of cash held appears as one spreadsheet in one of the Excel workbooks attached to an email from Anthony Griffin to my solicitors on 13 August 2015. A copy of that email, and of the spreadsheet to which I refer, is behind **Tab 1 of SV-9**;

- (b) on 2 December 2015, the cash held by SCMA was converted into Australian dollars and paid into a segregated trust account opened by the liquidators for the sole purpose of receiving money paid by SCMA. The amount paid was A\$206,624.91. SCMA retained an amount of A\$19,384 to cover costs it may incur in future in connection with liquidating and refunding the proceeds of the remaining securities held by it for BBYL. An email from Raksha Adhar of SCMA to my solicitors relating to that payment is behind **Tab 2 of SV-9**. How and to whom the liquidators disburse these funds will depend upon the directions and declarations given by the Court in this proceeding;
- (c) as at the date of this affidavit, SCMA holds a large number of physical shares (via its sub-custodian Citi) on behalf of BBYL (**Saxo Shares**). Based on a spreadsheet attached to an email sent by Raksha Adhar, Senior Compliance Manager at SCMA, to my solicitors on 12 November 2015, the Saxo Shares had a market value of about \$4.35 million as at 12 November 2015. A copy of that email and of the attached schedule of shares (generated from the books and records of SCMA) appears behind **Tab 3 of SV-9**; and
- (d) I am informed that from discussions arising between SCMA and my solicitors, SCMA has indicated that it is unwilling to sell any of the Saxo Shares without a direction from the Liquidators to do so. A copy of the Institutional Trading Agreement dated 21 June 2012 (the **ITA**) between BBYL and SCMA, together with subsequent variations thereto, appears behind **Tab 4 of SV-9**.

11. In the email dated 9 December 2015 (behind **Tab 2 of SV-9**), Raksha Adhar of SCMA explained to my solicitors that SCMA were not in a position to confirm or explain how BBYL offered relevant products to its clients. I set out below my understanding of how this occurred.

#### **BBYL's client application form**

12. In paragraphs 60–61 of my December Affidavit I explain that BBYL clients were required to complete a client application form prior to trading with BBYL. That form specified the terms and conditions and product disclosure statements (**PDS**) applicable to trading in each product line. The client application form dated July 2014 appears behind **Tab 7 of SV-9** and the client application form dated December 2014 appears behind **Tab 8 of SV-9**. In the case of products offered via the IB Online Platform and the Saxo Online Platform the client could also elect the particular categories of financial product in which they wished to trade.
13. For "*BBY Online Trader*", which was the way BBYL branded the Saxo Online Platform, the following terms and conditions and PDS were specified to apply in the client application form dated July 2014:
- (a) the "*BBY Online Account Terms*" (the **Online Account Terms**), a copy of which (dated June 2013) is at **Tab 9 of SV-9**;
- (b) the "*BBY FSG*" (the **FSG**), a copy of which (dated February 2014) is at **Tab 10 of SV-9**; and

- (c) the "*BBY Online Trader Product Disclosure Statement*" (the **Online Trader PDS**), a copy of which (dated June 2013) is at **Tab 11 of SV-9**.
14. BBYL's relationship with SCMA was terminated in December 2014 and "*BBY Online Trader*" does not appear on the client application form dated December 2014.
15. For "*BBY Online Professional*", which was the way BBYL branded the IB Online Platform, to which I refer in paragraphs 21 to 29 below, the following terms and conditions and PDS were specified to apply in the client application forms dated July 2014 and December 2014:
- (a) the Online Account Terms;
- (b) the FSG; and
- (c) depending on the client's product selection:
- (i) the "*BBY Online Professional Foreign Exchange and Commodities Product Disclosure Statement*" (the **Online Professional FX & Commodities PDS**), a copy of which (dated June 2012) is at **Tab 12 of SV-9**;
- (ii) the "*BBY Online Professional Futures and Derivatives Product Disclosure Statement*" (the **Online Professional Futures & Derivatives PDS**), a copy of which (dated June 2012) is at **Tab 13 of SV-9**; and
- (iii) the ASX explanatory booklet "*Understanding Options Trading*". A copy of the March 2015 edition of that document obtained from the ASX website is at **Tab 14 of SV-9**.

#### **BBYL's dealings with its clients in respect of the Saxo Online Platform**

16. It is my understanding that the Saxo Shares came to be held by SCMA on behalf of BBYL in the following circumstances:
- (a) BBYL's product disclosure information and client application forms referred to the Saxo Online Platform as "*BBY Online Trader*". The Online Account Terms (**Tab 9 of SV-9**), the FSG (**Tab 10 of SV-9**) and the Online Trader PDS (**Tab 11 of SV-9**) were the documents which set out the terms upon which customers of BBYL accessed and traded products using BBY Online Trader;
- (b) in accordance with the terms of those documents, clients of BBYL used BBY Online Trader (that is, the Saxo Online Platform) to enter into what were described as "*Equity Contracts*" under the Online Trader PDS. As described in the Online Trader PDS, under these "*Equity Contracts*" clients would acquire a 'synthetic share' from BBYL (an OTC financial product) which replicated the economic effect of share ownership (but did not confer on the client any legal, beneficial or other interest in the underlying share). Unlike other derivatives

offered by BBYL, which were generally leveraged, clients would pay (as margin) an amount equal to the full face value of the underlying security upon opening an Equity Contract. Whether a client made a profit or loss on an Equity Contract would depend upon whether the value of the underlying securities had increased or fallen between the date upon which the derivative was first opened and when it was closed out. The profits would be paid by BBYL, whereas losses in value were retained from BBYL from the margin paid by the client;

- (c) to hedge against the risk that BBYL may need to pay a profit to a client under their Equity Contract, BBYL would use the margin paid upfront by a BBYL client on entering into an Equity Contract to purchase the relevant underlying securities through SCMA. These underlying securities would, as I understand it, be purchased by BBYL acting as principal and not on behalf of, or as trustee for, any BBYL client. The intention was that if a client made a profit on closing out an "Equity Contract", the obligation of BBYL as principal to pay that profit to the client could be funded by BBYL selling the underlying securities held via SCMA;
  - (d) the execution of trades by clients on the Saxo Online Platform appears to have been the means by which the client obtained an "Equity Contract" from BBYL and simultaneously caused BBYL to acquire the underlying security via SCMA; and
  - (e) in accordance with section 981D of the *Corporations Act 2001*, BBYL would routinely draw upon client monies in the Saxo CSAs to fund the purchase of the underlying securities used to hedge against any profits payable by BBYL to clients under their "Equity Contracts".
17. The schedule of Saxo Shares attached to the email at **Tab 3 of SV-9** appears to purport to record the clients of BBYL in respect of whom particular Saxo Shares were acquired. The numbers in the column entitled "*CounterpartID*" appear to correspond with the numbers in the column "*AccCode*" in a spreadsheet contained within the "*Outstanding Client Accounts*" file described in section 4.2.4 of the CSA Report and located in the books and records of BBYL. A copy of that spreadsheet is at **Tab 1 of SV-10**. Although in this way the schedule of Saxo Shares purports to record the particular clients to whom securities held by SCMA are referable, my staff and I have undertaken an extensive review of the books and records of BBYL and have not located any records capable of proving which clients' funds were in fact drawn upon to pay for the acquisition of each Saxo Share.
18. Accordingly, monies paid by clients of BBYL other than the clients in respect of whom particular securities are recorded as being held may have been used to acquire those securities, presumably in reliance on section 981D of the *Corporations Act 2001*.
19. There is likely to be a significant shortfall in client money and other assets available to meet the entitlements of BBYL's Saxo clients. In those circumstances, and as a matter of practice, it is not possible for the liquidators to distribute the Saxo Shares in specie and rateably amongst each of the clients with an entitlement. In any event, the client's entitlement is to an amount of money, rather



than to any security which BBYL may have purchased as a matter of convenience to hedge its obligation to pay such amounts, as discussed above. I therefore consider that the practical way in which to distribute these assets is through selling the Saxo Shares on the market and dealing with the sale proceeds as Recoveries to be distributed as the Court may direct.

20. In my opinion it is in the best interests of the clients of BBYL that the Saxo Shares be sold, because:
- (a) BBYL's business will not continue to be traded and it is consistent with that outcome that the shares be realised; and
  - (b) I cannot pay a final dividend to clients without recovering assets from SCMA. The most practical means of paying those dividends are to sell the Saxo Shares and convert these assets into cash.

### **Interactive Brokers LLC**

21. Interactive Brokers LLC (**IB**) had a relationship with BBYL which was similar in some respects to BBYL's relationship with SCMA. Clients of BBYL could log into a BBYL-branded IB trading platform to trade securities, options, FX contracts, futures contracts and other financial products on Australian and international markets.
22. In section 3.6.2 of the CSA Report, I provided a summary of BBYL's relationship with IB. BBYL and IB dealt with each other as principals and IB considered that its only client was BBYL notwithstanding that individual clients of BBYL who used the IB Online Platform had separate "*sub-accounts*" which they could log in to in order to view their open trades and trading history, place orders for new trades and close out existing trades, using that platform.
23. At paragraphs 197 to 200 of the December Affidavit, I referred to correspondence that my solicitors had with IB in the period between 5 August 2015 and December 2015.
24. Based on that correspondence and on my review of the books and records of BBYL, the position of BBYL in respect to IB can be summarised as follows:
- (a) IB maintained two "omnibus" trading accounts in the name of BBYL, designated "I322325" and "I242781". Each omnibus account comprised:
    - (i) a "master" account referable to BBYL; and
    - (ii) various sub-accounts, mostly referable to underlying clients of BBYL;
  - (b) notwithstanding that IB maintained records of sub-accounts in the name of underlying clients of BBYL, IB regarded itself as dealing, at all times, with BBYL as principal;



- (c) IB currently holds cash on behalf of BBYL in a variety of currencies in the two omnibus trading accounts, representing:
- (i) cash deposited by clients of BBYL and transferred by BBYL to IB but not used to trade;
  - (ii) the proceeds of the close out of positions and the realisation of securities prior to the date of my appointment which were not paid to BBYL by IB before 17 May 2015; and
  - (iii) the proceeds of the close out of positions and or the realisation of securities since the date of my appointment;
- (d) the overall cash balance of the BBYL omnibus accounts is negative in some currencies. If all amounts (as at 1 March 2016) were converted into Australian dollars they would equate to approximately A\$8.0 million after satisfying the net liabilities in particular currencies;
- (e) IB continues to hold a large number of securities and open derivative positions on behalf of BBYL (**IB Financial Products**);
- (f) by clause 13(F)(8) of the Interactive Brokers Institutional Services Customer Agreement applicable to the omnibus trading account designated "I322352" (**Tab 5 of SV-9**), IB has the discretion, but not the obligation, upon the insolvency or appointment of a receiver to BBYL to liquidate all or any part of any "Account position". By clause 19A(5) it is an "Event of Default" if a receiver, trustee, conservator, liquidator or similar officer is appointed for BBYL. Upon an Event of Default IB is entitled pursuant to clause 19B to terminate the agreement and has the right (but not the obligation) to liquidate all or any part of any or all of the positions in BBYL's accounts;
- (g) clause 13 of the Interactive Brokers Institutional Services Customer Agreement applicable to the omnibus trading account designated "I242781" (**Tab 6 of SV-9**) is substantially the same as the relevant parts of clauses 19A(5) and 19B of the terms applicable to the account designated "I322352" described in paragraph (f) above; and
- (h) notwithstanding the rights set out in paragraphs (f) and (g) above, I am informed by my solicitors that, in discussions between IB and my solicitors, IB has indicated that it is unwilling to exercise those rights.
25. Copies of the master activity statement reports (for the "master" level of each omnibus account), activity statement reports (on a consolidated basis for the "master" level and all sub-accounts within each omnibus account) and client summary reports (summarising each sub-account of each omnibus account) for the BBYL omnibus accounts as at 1 March 2016 are behind **Tabs 2, 3 and 4**



of **SV-10** (for the omnibus account designated "I322325") and **Tabs 5, 6 and 7 of SV-10** (for the omnibus account designated "I242781").

26. A chain of emails exchanged between Thomas Lee of IB and my solicitors, ending with an email dated 10 December 2015, appears behind **Tab 15 of SV-9**.
27. I am informed by my solicitors and believe that Mr Lee of IB and Corey McHattan and others of Ashurst Australia had a number of telephone calls in or about November and December 2015 and that, during those telephone calls, Mr Lee confirmed that:
- (a) IB does not intend to close out or otherwise sell the IB Financial Products until they receive an instruction from the Liquidators to do so;
  - (b) IB cannot calculate the final amount payable to BBYL until all of the IB Financial Products have been sold and open positions closed out; and
  - (c) it will be difficult for IB to pay any material amount across to BBYL until all open positions have been closed, other financial products sold and negative currency balances addressed. Rather than margin calls, IB primarily relies on its "auto close out" feature which will automatically commence closing out open positions and/or selling assets if a client does not have sufficient collateral to meet its margin obligations. Currently, the totality of the BBYL accounts with IB have a significant margin "buffer". If this buffer was withdrawn, any subsequent negative movements in the total value of positions would likely lead to auto close out being triggered.

**BBYL's dealings with clients in respect of the IB Online Platform**

28. To facilitate an orderly distribution of monies to clients it is, in my opinion, desirable that the liquidators instruct IB to close out and otherwise sell all of the IB Financial Products and remit the sale proceeds to the liquidators to be distributed by the liquidators as the Court may direct in this proceeding.
29. In my opinion, it is in the best interests of the clients of BBYL that the IB Financial Products be closed out and sold. I have formed this view because:
- (a) BBYL's business will not continue to be traded and it is consistent with that outcome that the shares be realised;
  - (b) some of the IB Financial Products may not expire for a significant period of time. It would therefore be impractical for me to keep positions open until expiry;
  - (c) as a matter of practice, it would be very difficult for the liquidators to distribute the IB Financial Products (which include foreign financial products) in specie to the clients of BBYL that the Court may determine to be entitled to them;

- (d) if it is necessary to distribute the IB Recovery among clients pro rata, the only practical way in which such a distribution could be achieved would be by selling the IB Financial Products and distributing the proceeds as the Court may direct; and
- (e) IB holds a significant fund and I cannot pay dividend to IB clients without recovering funds from IB.

### **BBYL's client agreements**

- 30. Clause 22.1 of the Online Account Terms (**Tab 9 of SV-9**) provides that BBYL or a client may terminate their relationship on 3 Business Days' notice. Clause 22.2 provides that, following termination, BBYL will immediately "*Close Out*" any "*Open Transactions*" at the then prevailing "*Prices*" (as those terms are defined therein).
- 31. I have the following significant difficulties in attempting to rely on the above provisions to aid the recovery of funds from SCMA and IB:
  - (a) the Online Account Terms purport to apply to a very wide range of financial products and are infelicitously drafted. It is not clear to me, for example, whether shares held by SCMA or IB constitute "*Open Transactions*" that are to be "*Closed Out*" on termination, or whether instead those "*Transactions*" (being the purchase of the securities) were "*settled*" (and ceased to remain "open") when the securities were acquired and the purchase price was paid by the underlying clients. If the latter is the case, then it is not clear to me that the Online Account Terms give me the power to sell the Saxo Shares or the IB Financial Products that are shares or other similar products;
  - (b) I anticipate that particular clients may wish to assert an entitlement to return of the Saxo Shares or securities held by IB in specie;
  - (c) BBYL is obliged (rather than permitted) to "*Close Out*" any "*Open Transactions*" upon termination of the contract. That is, if I were to terminate the contracts, BBYL would be obliged to "*Close Out*" any "*Open Transactions*" when, for the reasons noted above, it is not clear to me what that would entail;
  - (d) it is not clear to me whether the Online Account Terms take effect as separate contracts in respect of the IB Online Platform and the Saxo Online Platform so that the termination of one such contract does not affect the other, or whether after terminating the Online Account Terms with any client BBYL is required to "*Close Out*" any "*Open Transactions*" on either the IB Online Platform or the Saxo Online Platform; and
  - (e) there is some prospect that a client could argue that the Saxo Shares and/or IB Financial Products constitute an "*investment*" within the meaning of regulation 7.8.03(5) of the *Corporations Regulations 2001* (Cth). If the Saxo Shares and/or IB Financial Products are




an investment within the meaning of that regulation, they are taken to be the subject of a trust in favour of each person who is entitled to be paid money from the CSA from which the investment was made. The entitlement of clients to monies in particular CSAs is a matter in issue in this proceeding.

32. In my opinion it is desirable that each of the foregoing issues is determined efficiently, as part of the proceeding. The Online Account Terms do not provide for the giving of notice in any particular manner. This proceeding is the most convenient means by which clients of BBYL may put their position, and by which all clients may be bound to a particular outcome.

### Conversion of currency

33. On 1 March 2016, my solicitors, on my instruction, directed ADM Investor Services International Limited (**ADM**), a futures broker to which BBYL passed orders for execution and clearing, to close out the four remaining open futures positions held for BBYL and/or its clients.
34. On 3 March 2016, Jean-Marc Lamontagne-Defriez of ADM advised my solicitors by email that BBYL's account with ADM held "*deficit balances*" in Japanese Yen and Canadian Dollars, and requesting a direction as to which positive currency balance should be applied against those liabilities. A copy of the statement of account provided by Mr Lamontagne-Defriez appears behind **Tab 16 of SV-9**.
35. My understanding is that ADM will not pay the ADM Recovery to BBYL until the "*deficit balances*" and other fees and costs are deducted from the Recovery.
36. I anticipate that this issue may also affect the IB Recovery. Accordingly, I seek the direction in paragraph 4 of the Interlocutory Process.

AFFIRMED at Sydney

Signature of deponent

Name of witness

Address of witness

Capacity of witness

Sydney

JACK TYLER URFORD

Level 11, 5 Martin Place, Sydney

Solicitor

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

1 I saw the face of the deponent.

2 ~~I have known the deponent for over 12 months~~ OR

I confirmed the deponent's identity using the following identification document:

NSW DRIVER'S LICENCE # 15 73A M

Signature of witness