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TRANSCRIPT OF PROCEEDINGS

O/N H-1206043

FEDERAL COURT OF AUSTRALIA

VICTORIA REGISTRY

MIDDLETON J

No. NSD 464 of 2020

**APPLICATION IN THE MATTER OF VIRGIN AUSTRALIA HOLDINGS LTD
(ADMINISTRATORS APPOINTED) and OTHERS**

MELBOURNE

10.15 AM, WEDNESDAY, 20 MAY 2020

**DR R. HIGGINS SC appears with MR R. YEZERSKI and MR D. KROCHMALIK
for the 1st plaintiff**

**MR P. HANKS appears with MS C. CONWAY for the Deputy Commissioner of
Taxation**

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HIS HONOUR: Yes, Doctor Higgins.

DR R. HIGGINS SC: May it please the court, I appear with my learned friends MR YEZERSKI and MR KROCHMALIK for the first plaintiff.

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HIS HONOUR: Yes. And Mr Hanks.

MR P. HANKS: Your Honour, I appear with MS CONWAY for the Deputy Commissioner for Taxation.

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HIS HONOUR: Thank you. Before we start, I need to make an order of the court dealing with its circumstances. Noting the matters that were noted in this proceeding on 15 May, the court orders

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(1) That pursuant to section 17.4 of the Federal Court of Australia Act, the public be excluded from this hearing listed at 10.15 am on 20 May 2020 other than by the following arrangements:

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(a) Any member of the public is able to join the hearing via the Microsoft Teams platform by providing an email address to the associate of Middleton J as stipulated in the court notice of proceedings, and;

(b) Any member of the public is able to listen to the hearing via the Microsoft Teams platform by dialling a number and ID allocated to the hearing published on the court list.

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(2) Members of the public other than the media representatives who attend the hearing via the methods in paragraph 1 of these orders do so on the condition that they are:

(a) Permitted to observe or listen to the hearing but are in no circumstances permitted to participate in the hearing.

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(b) Prohibited from making any recording or photographic record of the hearing or any part thereof by any means whatsoever, and;

(c) Advised that any failure to observe the conditions in (a) and (b) may constitute a contempt of court and be punishable as such.

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Now, Dr Higgins and Mr Hanks, I have had the opportunity of very quickly reading the proposed orders and the submissions in support of paragraph (a) of the interlocutory process filed on 11 May and I take it that Mr Hanks, your client doesn't oppose the orders that are proposed being made today, is that right? You may be on mute.

MR HANKS: Yes, your Honour. I just had to go a tech - - -

HIS HONOUR: Yes.

MR HANKS: - - - I was. I hope I am not now.

5 HIS HONOUR: No, we can hear you.

MR HANKS: That is correct, your Honour. Good. The orders that your Honour has before you were the product of discussions between my client and the first plaintiffs.

10 HIS HONOUR: All right. Thank you. Now, Dr Higgins, I am relatively familiar with the Ansett litigation that raises one issue. But the real issue as you seem – as you, I think, rightly say, is we’re dealing with the potential liabilities, not the past liabilities to the extent there are any. Is that the – do I understand that to be the
15 position, really?

DR HIGGINS: Your Honour, payments have been made so there is actual and potential liabilities.

20 HIS HONOUR: Yes.

DR HIGGINS: But the version of the submissions concerning the Ansett litigation and the like was to satisfy your Honour that the mere fact that the order is framed as conditional does not render it hypothetical.

25 HIS HONOUR: Yes.

DR HIGGINS: The condition is in the event of liability and there is a real argument that such liability would arise.

30 HIS HONOUR: Yes. All right. But - - -

DR HIGGINS: But that liability is both backward looking and forward looking.

35 HIS HONOUR: Yes. So as I understand, then the issue as to whether the existing liability exists will be a matter that will be determined whether there is a liability or not and then with potential liabilities, we have the regime which is put forward in the orders which puts obligations still on the administrators to act in good faith and not fraudulently and not negligently, I think.

40 DR HIGGINS: Yes, your Honour.

HIS HONOUR: But at the same time, looks after the ability to make the claims which are effectively, really, on behalf of the employees.

45 DR HIGGINS: That’s precisely so, your Honour.

HIS HONOUR: Yes.

DR HIGGINS: Yes.

5 HIS HONOUR: All right.

DR HIGGINS: Can I confirm to your Honour that the court has also received an affidavit of a Mr McCall of 19 May 2020?

10 HIS HONOUR: Yes. Yes. I had read that. Yes. Thank you.

DR HIGGINS: Thank you, your Honour.

15 HIS HONOUR: Let me just – the other thing I noticed – it’s an unusual situation, hence we’re here talking about it because the receipts, as again, you mentioned this, but it’s quite an important factor, I think. The receipts of the JobKeeper payments, they’re actually paid or prepaid to the employees, aren’t they? So - - -

DR HIGGINS: Yes, your Honour.

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HIS HONOUR: - - - that’s the way the mechanism or the legislation works.

DR HIGGINS: Precisely.

25 HIS HONOUR: So what would happen if a company wasn’t in administration? The company would be responsible for the repayments, if there was something done incorrectly?

DR HIGGINS: Yes, your Honour. That’s our understanding.

30

HIS HONOUR: All right.

DR HIGGINS: The company would be, yes.

35 HIS HONOUR: And what about the directors? Only if they had been acting insolvent in an insolvency situation?

DR HIGGINS: Your Honour, can I – in answer to your Honour’s earlier question as to the liability of the company, that may be jointly and severally with the employees.

40

HIS HONOUR: I see.

DR HIGGINS: So I should clarify that answer. And your Honour asked a further question?

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HIS HONOUR: Yes. What would happen in the situation, would the directors be liable? Would the directors themselves as being the agents of the company relevantly be liable other than the company or, as you say, the employees?

5 DR HIGGINS: No, your Honour. Our understanding is there would be no personal liability short of the obligations under sections 180 - - -

HIS HONOUR: Yes.

10 DR HIGGINS: - - - etcetera.

HIS HONOUR: Yes.

15 DR HIGGINS: But there would be no personal direct liability for a direction in that circumstance.

HIS HONOUR: All right.

20 DR HIGGINS: And it's in that respect that the administrators find themselves in a different position.

25 HIS HONOUR: Yes. I understand that. There's nothing peculiar in the Taxation Act that I need to worry about, is there? I should ask Mr Hanks this, maybe. That overrides any particular matter of the administration or something that would occur if the administration goes into liquidation?

MR HANKS: If your Honour is addressing that to me - - -

30 HIS HONOUR: Yes. I am, yes.

35 MR HANKS: - - - I am not aware of any – yes, I am not aware of any particular provision that would affect that question, your Honour. The primary liability for overpayment of JobSeeker would arise under section 9 of the, what I call “Coronavirus Act” that's the Coronavirus Economic Response Package (Payments and Benefits) Act 2020. Now, that creates, in effect, a debt to the Commonwealth in the case of an overpayment. But that liability falls on the entity that received the JobKeeper payment.

40 HIS HONOUR: Right.

MR HANKS: Which would be the employer.

HIS HONOUR: Yes. I see.

45 MR HANKS: There is then, a secondary – what I call a secondary liability or it's otherwise described as a joint and several liability. But it falls on any person who has contributed to the overpayment. Typically, that would be an employee who had

provided information that turned out to be incorrect and that information formed the basis of the application made by the employer.

HIS HONOUR: Yes. Yes.

5

MR HANKS: For the payment. There is, also, a liability that falls on anyone who has contributed to the overpayment through fraud. But those liabilities are all dealt with in section 9 of the Coronavirus Act.

10 HIS HONOUR: All right. That's all I needed to know for the moment about that. Thank you very much, Mr Hanks.

MR HANKS: I thank your Honour.

15 HIS HONOUR: Anything else, Dr Higgins, you wish to bring to my attention at the moment? I am prepared to make the orders that are sought. I will give my reasons for doing so when I publish my reasons for the orders I made on Friday.

20 DR HIGGINS: Your Honour, there is nothing else that I believe we need to bring to the Court's attention.

HIS HONOUR: All right. Well, thank you, again - - -

25 MR HANKS: There is one thing I – your Honour - - -

HIS HONOUR: Yes. Yes, Mr Hanks.

30 MR HANKS: Thank you. There is one short statement that I would wish to make if I could.

HIS HONOUR: Yes.

35 MR HANKS: We would want to emphasise that these orders are very peculiar to the particular situation faced by the administrators. They're a response to that situation and the challenges that the administrators face in the particular fact that Virgin Airlines is one of two national airlines operating in Australia, the fact that the COVID-19 pandemic has resulted in severe and ongoing restrictions on travel in the interests of national security and the third factor that marks this case out from the general run of cases is that the group of companies under administration employs
40 more than 10,000 workers and it's in light of those matters, your Honour, that the Deputy Commissioner has taken the position that these orders are appropriate.

45 HIS HONOUR: Yes. Thank you, Mr Hanks. I will explain similar sentiments in my reasons. But undoubtedly, as I have said before, the orders that are being made are of the extraordinary nature that need to be made in the circumstances that you have outlined.

MR HANKS: Thank your Honour.

HIS HONOUR: And I am satisfied that that is the appropriate thing to do and future
5 administrations will, when they rely upon this, if they do, as a precedent will have to
understand fully the circumstances in which these orders are made. That is for
another time. All right.

(1) I will make the orders which are proposed which will be made forthwith.
They will be put up on the Portal so everybody can see them.

10 And that deals with all the orders that were sought at the moment, doesn't it, Dr
Higgins?

DR HIGGINS: That's so, your Honour.

HIS HONOUR: All right. And again, I thank you for your assistance. Thank you,
15 Mr Hanks, and your junior. We will now adjourn the court.

MATTER ADJOURNED at 10.27 am INDEFINITELY