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TRANSCRIPT OF PROCEEDINGS

O/N H-1202887

FEDERAL COURT OF AUSTRALIA

VICTORIA REGISTRY

ANDERSON J

No. NSD 464 of 2020

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

MELBOURNE

10.17 AM, WEDNESDAY, 13 MAY 2020

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

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THIS PROCEEDING WAS CONDUCTED BY VIDEO CONFERENCE

HIS HONOUR: Yes, Dr Higgins.

5

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

HIS HONOUR: Do we have any other appearances for anyone who wishes to address the court today? All right. Thank you. I just need to make a number of preliminary observations and make an order. The court notes that section 17(1) of the Federal Court of Australia Act 1976 requires that the jurisdiction of the court be exercised in open court, but section 17, subsection (4) of the Act allows for the public to be excluded if the court is satisfied that their presence would be contrary to the interests of justice. The court must balance the importance of this matter being heard and determined in open justice.

Justice requires this hearing be conducted as soon as reasonably possible and that it not be delayed indefinitely pending the end of the current viral pandemic. The best practical arrangement in the circumstances of a pandemic have been put in place to allow interested members of the public and the press to observe or listen to this hearing. These arrangements are identified in paragraph 1 of the orders below which I am about to make. It would be contrary to the interests of justice for the public to have access to the hearing other than in accordance with the arrangements identified in paragraph 1 of the orders below because the result would be to have the hearing deferred indefinitely. The court orders that:

- (1) Pursuant to section 17(4) of the Act, the public be excluded from this hearing listed at 10.15 am on 13 May 2020 other than by the following arrangements:
 - (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 to 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 Microsoft Teams platform by dialling the number and ID allocated to the hearing published on the court list.
- (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 and listen to the hearing, but are in no circumstances permitted to participate in the hearing,

- (b) prohibited from making any recording or photographic record of the hearing or any part thereof by any means whatsoever and advise that any failure to observe the conditions at (a) and (b) may constitute a contempt of court and punishable as such.

5 I should indicate that I have had the opportunity of reading the material that has been
filed in support of this application by the administrators. I have just received an
affidavit of Ms Adams of 13 May, which will be excluded from what I have just said
because I haven't had a chance to read that affidavit, but it seems to be an affidavit,
what I would call, of service indicating where various people have been notified of
10 what has been proceeding. So I will assume that that is what it's about, but if there's
anything that needs to be brought to my attention in relation to notification of
interested parties, then, Dr Higgins, I'm sure you will do so.

I just want to make two observations having read the material and indicating an
15 approach that I would be taking. The first observation I made when the matter first
came before me: that the COVID-19 pandemic is causing great disruption to the
whole of the Australian community and the economy; nevertheless, existing laws
that are made or authorised by Federal or State Parliaments must be adhered to and
enforced by the courts. However, the COVID-19 pandemic and the consequent
20 restrictions on the movement and behaviour of people is a reason to apply flexibility
in the application, and perhaps adaption, of existing laws and to exercise any
discretion residing in a court to ensure that the Australian community and economy
are supported during this time of crisis.

25 The other observation I want to make is this. The court should support innovative
measures that are considered appropriate by the administrators as long as the
interests of the relevant creditors are taken into account. It is important that there be
an efficient progression of the administration and in a timely manner as far as the
circumstances permit. Obviously the role of the airline industry in Australia as a
30 whole, of which Virgin is a part, is important to the whole community and to the
national interests generally. Yes, Dr Higgins. Can I just indicate this for you to
perhaps make the hearing more streamlined. If you go to your proposed orders.

DR HIGGINS: Yes, your Honour.

35 HIS HONOUR: Unless there is anything you think needs to be added to the
material or something which you think particularly has to be brought to my attention,
I am happy to make the orders that are under the following headings, and I will
indicate them to you.

40

DR HIGGINS: Yes, your Honour.

HIS HONOUR: So the introductory orders 1 and 2 I have no difficulty with. I have
no difficulty with adding Tiger International No. 1 Proprietary Limited, so the orders
45 under that matter can be made. I have no difficulty with the procedural orders in the
first meeting of creditors, 4 to 5; other notices to creditors to provide electronically,

6; conducting meetings of creditors electronically, 7 and 8; Committee of Inspection, 9, 10 and 11; and extending of the convening period until 18 August 2020, which is referred to in 12 and 13.

5 DR HIGGINS: Yes, your Honour.

HIS HONOUR: I have no difficulty with Virgin company loan moneys orders in order 20, nor the report on company activities and property in order 21, nor bank account order, 23, or the other ancillary orders, 24 to 29 inclusive. What I will want
10 to, nevertheless, discuss with you is limitation of the administrator's liability, particularly in relation to the current Rio Tinto agreement and particularly in relation to JobKeeper liabilities. And the other matter – I think the only other matter that I would like to discuss with you is order 22, which deals with leave for members of the Committee of Inspection to derive profit.

15 DR HIGGINS: Yes, your Honour.

HIS HONOUR: So they are the matters that I think I need just to discuss through with you, and we will see what we do with the orders in relation to those matters.
20 Otherwise I can indicate that I am happy, based upon the material, that the orders that I've indicated to you that I'm content to make are appropriate, and I will provide reasons for that – for those orders being made.

DR HIGGINS: Your Honour, before coming to the substance of the issues
25 your Honour has identified, can I clarify what the court's position is in respect of order 17 and 18, in respect of conditional credit. Is that a matter on which your Honour would appreciate further submission or is your Honour content to

HIS HONOUR: No. I am content with conditional credits, orders 17 and 18, in the
30 circumstances.

DR HIGGINS: May it please the court. Your Honour, can I begin by identifying all of the materials upon which we rely so that the record is clear. We rely upon the
35 affidavit of Mr Strawbridge of 23 April that was read at the first hearing. We rely upon the second affidavit of Mr Strawbridge of 11 May 2020 and tender its exhibits. We read and rely upon the third affidavit of Mr Strawbridge of 11 May and tenders its exhibits. Your Honour should also have received an affidavit of Matthew James Carr affirmed on 12 May 2020 which concerns service on the Committee of Inspection members. And as your Honour has recently identified, the court has been
40 provided this morning with an affidavit of Kassandra Suzann Adams sworn on 13 May 2020, and I read that and tender its exhibits.

Your Honour, can I come immediately to the contents of that affidavit because it does contain material of the kind your Honour alluded to, being material to which I
45 must draw your Honour's attention. Does your Honour – I appreciate your Honour has not read this, so I will give your Honour an opportunity to do so. The initial paragraphs 5 to 6 identify service of the materials upon the aircraft lessors. Then

paragraph 7 identifies that the bounce backs were received and, therefore, it inferred that the emails were received. Paragraph 8 concerns service upon Rio Tinto. Paragraph 9, the ACCC. That's, obviously, your Honour, in respect to the conditional credits principally. Paragraph 10 concerns service on ASIC. And
5 paragraph 11 on the Fair Entitlements Guarantee. That is, the Commonwealth Australia represented by the Attorney General's Department. The following paragraph, your Honour, records communications with the parties that have fallen from the service of those materials. Can I begin with paragraph 12, your Honour?

10 HIS HONOUR: Can I just ask you this question? Have you received some communication from all of those parties referred to in paragraph 5 to 11? Have they all responded in one way or another?

15 DR HIGGINS: Your Honour, the answer to that question is, yes, we have. We have, your Honour.

HIS HONOUR: All right. The reason I ask that is that, obviously, the communications to them have been very recent. But if they've responded, that's – you can take it as responses. That's fine. Thank you.

20

DR HIGGINS: I'm instructed that that's the case, your Honour.

HIS HONOUR: Thank you.

25 DR HIGGINS: If your Honour then returns to paragraph 12. This concerns paragraph 14 of the orders, which is a matter for which your Honour has sought further instructions – further submissions, rather, and I will make them shortly. But can I draw to your Honour's attention that MinterEllison, on behalf of Rio Tinto Services, has sought an amendment to the form of the order, which is order 14(b).
30 We have provided your Honour's chambers with two sets of orders. Can I clarify whether your Honour has a version that reflects what's in 14(b) – that language.

HIS HONOUR: Yes, I have seen that, and I now understand where it – why – I don't know why, but I understand where it comes from now. Thank you.

35

DR HIGGINS: Yes, your Honour.

HIS HONOUR: Yes. All right. Thank you.

40 DR HIGGINS: Your Honour, can I also return to my earlier answer to your Honour's question as to responses. Can I qualify that in this respect? A response has been received from Fair Entitlements Guarantee, ASIC, the ACCC and Rio Tinto and certain aircraft lessors, but not the entire population of aircraft lessors. So certain lessors have replied, but not all of them, your Honour.

45

HIS HONOUR: Have you received any communication from the ACCC?

DR HIGGINS: your Honour. We have received a response from ASIC, your Honour.

HIS HONOUR: Thank you.

5

DR HIGGINS: Can I turn, then, to paragraph 13 of Ms Adams' affidavit and draw your Honour's attention. There has been communication with Norton Rose Fulbright acting on behalf of certain aircraft lessors. And in terms of that communication are set out in that paragraph. That, relevantly, confirms paragraph 15 of the orders,
10 which is agreement and the aircraft lessors put a call, which your Honour would have seen.

HIS HONOUR: Yes.

15 DR HIGGINS: But most pertinently for this morning's purposes, your Honour, is the material set out in paragraph 18 to 22. We received, late yesterday – as accorded in paragraph 18 – a letter from King & Wood Mallesons on behalf of the Commonwealth of Australia representing the Attorney-General's Department in respect of FEG. Can I invite your Honour to read through paragraph 18 through to
20 21, please?

HIS HONOUR: Paragraph 21.

DR HIGGINS: 18 through to 21, your Honour.
25

HIS HONOUR: Yes. Thank you.

DR HIGGINS: The position, as we understand it, is that, your Honour, Mr Moore of counsel is attending this morning and can appear if necessary. We have been
30 requested by the Attorney-General's Department to stand certain orders in interlocutory process over for a day or so. And I will come to the period for which that standover should occur. But they've requested that they need more time to consider certain orders within the short minutes. Similarly, your Honour, if your Honour looks at paragraph 22, communication was received from the Deputy
35 Commissioner of Taxation. And, again, Ms Ponley of counsel, I understand, is attending this morning and can appear if necessary. And the issue – it is also our assertion orders be stood over to allow the Deputy Commissioner more time to consider those matters. Can I indicate to your Honour, by reference to the short minutes, what those orders are?
40

HIS HONOUR: They look as though they're the ones that I wanted further submissions on. Is that right?

DR HIGGINS: There is an almost perfect correspondence, your Honour. Can I
45 indicate that in the minute of proposed orders there was no objection amongst the Attorney-General or the Deputy Commissioner to paragraph 14, of which your Honour did seek submissions on. But paragraph 15 they have asked to be stood over.

They have asked that paragraph 19 – that’s JobKeeper – be stood over. They have asked that paragraph 20, which is the loan moneys, which your Honour did not have a difficulty with, be stood over. They have asked that paragraph 21, the – again, not a matter your Honour was concerned with – be stood over. And they’ve also
5 asked that paragraph 23, which is the bank account, be stood over.

HIS HONOUR: I thought 22 was included as well, but am I wrong about that?

DR HIGGINS: I don’t believe there was an objection to that, your Honour. I will
10 confirm that, but I don’t believe that the leave to – that was the paragraph upon which your Honour sought submissions, but I don’t understand that that has been objected to or - - -

HIS HONOUR: 18(a):
15

The Commonwealth of Australia may wish to be heard by the court on paragraphs 14, 18 to 20 and 22.

DR HIGGINS: Yes, your Honour. Those are references to the interlocutory
20 process.

HIS HONOUR: I see. I see. Sorry.

DR HIGGINS: to the order, given that that
25

HIS HONOUR: Yes, I see. I see. I’m sorry. I’m sorry.

DR HIGGINS: Not at all, your Honour. So there’s just one out, because of the next
30 order in the short minutes.

HIS HONOUR: Yes, I see.

DR HIGGINS: So it’s 15 in respect of limited liability. 19 to 21 in respect of
35 And 22 in respect of bank accounts is what we understand issues have been raised.

HIS HONOUR: Yes.

DR HIGGINS: And subject to your Honour’s views, it may be conveniently
40 immediately to deal with that issue. Certain of those orders are not orders that concerns your Honour. However, if your Honour had – and I should say, we are ready to proceed in respect of each of those orders this morning. But given that our learned friends have sought time to consider them on behalf of the Deputy Commissioner and the Attorney-General’s Department, if your Honour were able to stand certain orders over to Friday morning, that is not a course to which we would
45 object to allow our learned - - -

HIS HONOUR: I think I'm inclined to give time to these interested parties to look at these matters, and it could be of assistance to me. And we can adjourn a day or two until Friday without any difficulty, I assume, from the administrator's point of view. So if there's no need to – for me to determine it today – or when we can
5 determine it Friday with other interested parties having the opportunity to consider the position and put any further material to me, then that's what I will do, I think.

DR HIGGINS: Yes, your Honour. And, with respect, we agree that that's a sensible course. It is important, if possible, that it be heard on Friday because bids
10 are due on Friday, and your Honour will have seen that from Strawbridge's first affidavit of 11 May at paragraph 14(c). So these are matters upon which it would be useful to have an indication.

HIS HONOUR: Well, I - - -
15

DR HIGGINS: And I should - - -

HIS HONOUR: I can hear it at 10.15 am on this Friday.

20 DR HIGGINS: Yes, your Honour. We're indebted to the court. I should - - -

HIS HONOUR: What I would hope for, or anticipate, is that anyone who has anything they want to put to me in relation to that would file any material in support of what they want to say if an agreement can't be reached by 12 noon on the
25 Thursday.

DR HIGGINS: Yes, your Honour. And I should say, your Honour, that it is not the case that anyone has yet foreshadowed an objection. What they have sought is more time. And, in the circumstances, that appears appropriate.
30

HIS HONOUR: Well, can I just say, whilst I indicated some matters that I would be – don't need any further talk about – should we leave all the limitation of administrator's liability – the whole sweep of those matters – so that's proposed orders 14 right through to 19. And did you say the Virgin company loan moneys
35 were in dispute or not dispute time.

DR HIGGINS: Yes, your Honour. More time is sought by our learned friends in respect of that.

40 HIS HONOUR: All right. Well, then, we can leave that one until Friday. And then the bank account matter we can leave until Friday.

DR HIGGINS: Yes, your Honour. That's a matter upon which they seek more time.
45

HIS HONOUR: All right. Have I covered everything they want more time on?

DR HIGGINS: Your Honour has covered the matters they want more time on, but can I mention again the topic of conditional credit. That falls within the limitation of liability paragraph.

5 HIS HONOUR: Yes.

DR HIGGINS: That is a matter which your Honour was not concerned by and no interested party has raised a concern with. We would be grateful, if possible, for those orders to be made today to facilitate the administration immediately making
10 such credits available to consumers.

HIS HONOUR: I don't have a problem with that, so I will make that order today.

DR HIGGINS: Your Honour, the other two paragraphs convenient for me to
15 address your Honour on today – subject to your Honour's position – is paragraph 14 of the orders, which is the current Rio Tinto agreement. That is a matter on which your Honour has got further submission but which is not raised by any interested parties and also order 22 which is:

20 *leave for members of the committee to derive profit*

Which is, again, a matter which your Honour has brought our attention to.

HIS HONOUR: All right.
25

DR HIGGINS: Which no other interested party has raised.

HIS HONOUR: Well, can we go to paragraph 14 - - -

30 DR HIGGINS: Yes, your Honour.

HIS HONOUR: - - - which is the current Rio Tinto agreement. And my only difficulty with that was to have a used explanation as to the amendment which has now been partly explained in paragraph 12 of the affidavit of Ms Adams, the
35 correspondence of MinterEllison. That's where it derives from - - -

DR HIGGINS: Yes, your Honour.

HIS HONOUR: - - - I take it?
40

DR HIGGINS: Yes. That's correct, your Honour. And if your Honour has access to the exhibit to Ms Evan's affidavit - - -

HIS HONOUR: Yes.
45

DR HIGGINS: Your Honour will find the relevant communication from MinterEllison on behalf of Rio Tinto behind tab 4.

HIS HONOUR: Yes.

DR HIGGINS: And if I can invite your Honour, in particular, does your Honour have the first page of that affidavit?

5

HIS HONOUR: Yes.

DR HIGGINS: The email at the foot of the page commencing:

10

Matt, thank you

Your Honour will see there a direct explanation for the request for the additional text.

15 HIS HONOUR: All right. Thank you. Let me have a look. All right. I am prepared to make the order in the terms suggested by MinterEllison. The administrators are happy with that, I take it?

DR HIGGINS: Yes, your Honour. They are, for this intent.

20 HIS HONOUR: All right. So I will make that order. Now:

the leave for members of the committee of inspection to derive profit

25 That's the other outstanding one in my mind.

DR HIGGINS: Yes, your Honour. That's order 22 which your Honour reads.

30 HIS HONOUR: What I am concerned about is the order itself is very, very wide. And I understand the reason for the need to have leave in the circumstances of this particular matter because you may have committee members who have an interest in the other side of the transaction, and as you point you - - -

DR HIGGINS: Yes, your Honour.

35 HIS HONOUR: - - - this is unlike a liquidation, where the company is not seeking to carry on. And I also understand your point that if anyone complains about it, they can always come back to the court. But I would like to see if we can devise a technique for more transparency so that everybody knows – in other words, a disclosure, maybe, a disclosure mechanism.

40

DR HIGGINS: Yes, your Honour.

45 HIS HONOUR: With a transaction that does occur where there is a profit made or there is a conflict, I presume, if there's conflict, they will be disclosed – it be disclosed to the committee, probably, and the administrators and maybe, necessarily, to the court in a schedule. I don't want to make extra work for everybody in a

complicated situation as it is. But I feel very uncomfortable in making the order that's proposed in such an open-ended way.

5 DR HIGGINS: Yes, your Honour. It's one possible course, your Honour. I understand the issue your Honour has raised that we adjourn to seek to draft up an order in those terms that provide for a form of disclosure and then it would be a 22A or a new 23 that would accompany 22 but qualify its operation in the matter your Honour intends.

10 HIS HONOUR: Well, I don't need to make 22 today, do I? I can make that Friday, can't I?

DR HIGGINS: That's so your Honour, yes. I think that's correct.

15 HIS HONOUR: All right. I think, let's leave the – that issue to Friday, as we're coming back in two days' time. And you may like to think about and devise a form of words that captures my concept, which would solve my problem.

20 DR HIGGINS: Yes. Your Honour, we will do so. We will propose that form of order and notify our friend.

HIS HONOUR: All right.

25 DR HIGGINS: On that basis, your Honour, I believe although if you go through the orders to confirm this, that I have addressed your Honour on the orders with which your Honour had concerns but which any interested parties had not expressed concerns about. Your Honour has indicated a willingness to make the weft and a set of orders have been stood over until Friday to give our learned friends more time to consider them.

30 HIS HONOUR: Yes. Why don't we just, for the sake of complete accuracy, if I go through the minutes of proposed orders indicating what I am prepared to make today
- - -

35 DR HIGGINS: Thank you.

HIS HONOUR:

40 (1) So it will be order 1, order 2, order 3, order 4, order 5, order 6, order 7, order 8, order 9, order 10, order 11, order 12, order 13, order 14, order 17, order 18.

DR HIGGINS: Your Honour - - -

45 HIS HONOUR: - - - is 21, was order 21 report on company activities and property was that subject to people wanting to add things?

DR HIGGINS: Your Honour, order 20 in the order of the Virgin Company loan moneys was subject to a request for more time, as was order 21 - - -

HIS HONOUR: All right.

5

DR HIGGINS: - - - s orders 20 or 21.

HIS HONOUR: All right. Well, I will not make orders 20 or 21.

10 DR HIGGINS: Thanks, your Honour.

HIS HONOUR:

(2) Will not make order 22.

(3) Will not make order 23.

15 (4) Will make orders 24, 25, 26, 27, 28 and 29.

So Dr Higgins, if you could re-engross then renumber them - - -

DR HIGGINS: Yes, your Honour.

20 HIS HONOUR: - - - I will then authorise the entry of those orders. And then, I suppose, I should another order, simply being:

(5) That the further return be at 10.15 am on 15 May.

Is that the right day? I think it is, yes.

25 DR HIGGINS: Yes, your Honour. We will do that, your Honour.

30 HIS HONOUR: All right. Thank you. Once I have heard the matter on Friday, and as I have indicated, if anyone wishes – any interested party wishes to add comment or oppose or support, in fact, any of the orders sought, I would appreciate that information being put before me by noon – no later than noon Thursday and then we can proceed by then. I will provide my reasons next week after I have heard that hearing and that will be combined reasons for what I do on Friday and what I have done today.

35 DR HIGGINS: May it please the court.

HIS HONOUR: All right. Nothing further?

40 DR HIGGINS: Nothing further, your Honour.

HIS HONOUR: All right. Thank you. We will now adjourn the court.

MATTER ADJOURNED at 10.48 am UNTIL
5 **10.15 AM FRIDAY, 15 MAY 2020**