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IN THE MATTER OF VIRGIN AUSTRALIA HOLDINGS LTD (ADMINISTRATORS APPOINTED) & ORS

Federal Court of Australia proceedings No. NSD 464 of 2020

SUBMISSIONS OF BC HART AGGREGATOR, L.P. AND BC HART AGGREGATOR (AUSTRALIA) PTY LTD ON THE INTERLOCUTORY PROCESS LISTED FOR HEARING ON 17 AUGUST 2020

Introduction

1. These are the submissions of BC Hart Aggregator, L.P. and BC Hart Aggregator (Australia) Pty Ltd (**the Purchasers**) in respect of the interlocutory process filed 11 August 2020 (**Interlocutory Process**) by Broad Peak Investment Advisers Pte. Ltd and Tor Investment Management (Hong Kong) Ltd (**the Applicants**). The Purchasers are subsidiaries of Bain Capital Private Equity LP, Bain Capital Credit LP and their related entities (**Bain Capital**).

2. The Purchasers have been granted leave to appear in these proceedings as an interested person pursuant to rule 2.13(1)(c) of the *Federal Court (Corporations) Rules 2000*.

3. The Purchasers oppose the Applicants being granted the relief sought. The relief sought by the Applicants, which is ostensibly procedural in nature, would:

   a. impermissibly interfere with and second-guess the exercise of the Administrators' discretion in their approach to convening and conducting the second meeting of creditors;

   b. impermissibly interfere with substantive rights and obligations under binding arrangements in force between the Purchasers and the Administrators; and

   c. affect the attitude and willingness to commit capital and resources of prospective purchasers in future administrations when dealing with administrators of corporate groups with complex assets and circumstances.

That interference occurs in circumstances in which the Administrators and the Purchasers entered into a binding agreement following an extensive sale process(during which the Applicants submitted a back up recapitalisation proposal[1]). That interference runs a real risk of disrupting implementation of the binding transaction that arose out of that process,[2] and is occurring in circumstances where Bain Capital has committed (and is continuing to commit) substantial resources to implementation of the transaction.[3]

4. Further, having regard to the terms of the binding Sale Deed executed by the Purchasers and the Administrators, the relief sought by the Applicants lacks utility.

Preliminary matters

5. Before considering the form of relief sought by the Applicants, these submissions address briefly the following four matters which have a bearing on that relief:

   a. the outcome of the administrators' sale process and the consequences of the transaction with the Purchasers;

   b. the suggested entitlement to have a DOCA proposal put before the second meeting of creditors;

   c. the appropriateness of an independent third party having any role in the performance of the administrators' functions; and

   d. the role of the Court in approving procedural matters relating to the second meeting of creditors.

6. **First**, the Sale Deed executed by the Administrators on 26 June 2020, by which the Administrators agreed to sell the business and assets of the Virgin Companies to the Purchasers (**Sale Deed**), and other transaction documents in connection with the sale, were entered into following an extensive process for the sale or recapitalisation of the business and assets of the Virgin Companies conducted by the Administrators.[4] The transaction contained in the Sale Deed and other transaction documents reflected the culmination of that sale process and, in the Administrators'

[1] Strawbridge Affidavit 14.8.20 at [36(j)].
[2] Clifton Affidavit 14.8.20 at [33]; Strawbridge Affidavit 14.8.20 at [66]-[68].
[3] Clifton Affidavit 14.8.20 at [20]-[30].
[4] Strawbridge Affidavit at 14.8.20 at [33]-[36].

view, provided the most favourable terms available for the sale or recapitalisation for the benefit of the creditors of the Virgin Companies as a whole.[5]

7. Bain Capital participated in the sale process on the basis that:

   a. parties to the sale process would be required to execute non-disclosure agreements that could be enforced, including for the benefit of the successful purchaser;[6]

   b. the sale process in which the Bain Capital participated was to be the only sale process conducted by the Administrators;[7]

   c. the nature of the business of the Virgin Companies required a firm proposal to be put in place in accordance with the timetable for the Sale Process;[8] and

   d. there was a clear timetable, including in respect of the Administrators' desire to have a sale effected by 30 June 2020.[9]

8. Bain Capital have committed very substantial resources to the sale process and to implementing the transaction since the Sale Deed was executed.[10]

9. In light of the costs of participating in the Sale Process and implementing its preferred restructuring proposal, Bain Capital would not have participated in the sale process in the absence of the Administrators committing to a final, binding and exclusive transaction with the Purchasers at the conclusion of the sale process.

10. The Applicants were involved in the sale process undertaken by the Administrators. The proposal submitted by the Applicants during that process was considered and rejected by the Administrators.[11]

11. Since the completion of the sale process, and as part of the process of implementing the transaction contemplated by the Sale Deed and other transaction documents, Bain Capital has:

[5] Strawbridge Affidavit 14.8.20 at [36(l)], [42].
[6] Clifton Affidavit 14.8.20 at [11].
[7] Clifton Affidavit 14.8.20 at [12(a)].
[8] Clifton Affidavit 14.8.20 at [12(b)].
[9] Clifton Affidavit 14.8.20 at [12(c)].
[10] Clifton Affidavit 14.8.20 at [20]-[27]
[11] Strawbridge Affidavit 14.8.20 at [36(j)].

a. taken on the economic risk of the ongoing conduct of the administration of the Virgin Companies;[12]

b. provided a A$125 million facility to the Administrators and the Virgin Companies;[13] and

c. undertaken substantial negotiations with counterparties and stakeholders (which discussions are ongoing). The outcome of those discussions is likely to have a significant impact on the future prospects of the Virgin Australia business following implementation of the transaction.[14]

12. The authorities clearly recognise that a process undertaken by voluntary administrators prior to the second meeting of creditors can limit the range of options available at the second meeting of creditors. Such matters are business and commercial decisions made by an administrator, and are not to be fettered by the Court: *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia & Ors* (1998) 195 CLR 1 at [55], [61], [143].

13. For example, voluntary administrators have the power to sell the assets and undertaking of a company before the second meeting of creditors: *Brash Holdings Ltd v Shafir* (1994) 14 ACSR 192; *Re Pan Pharmaceuticals Ltd* (2003) 47 ACSR 139; [2003] FCA 855 at [12]. Such a sale necessarily limits the options available at the second meeting of creditors.

14. Similarly, the administrators may enter into contractual arrangements that inform the scope of any alternative DOCA proposal: *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 5)* [2020] FCA 986 at [14]. The matter was put in these terms by Black J in *Re TEN Network Holdings Limited (Administrators Appointed) (Receivers and Managers Appointed)* [2017] NSWSC 1247 at [38] to [40]:

> I should, however, also add several tentative observations as to that question, although they are not necessary to my decision, which may be of practical importance to the manner in which complex administrations are conducted. First, there is no doubt that, at the second meeting of creditors convened under s 439A of the Act, it is the creditors and not the administrators who decide whether the relevant company should execute a deed of company arrangement specified in the resolution before that meeting (even if it differs from any proposed deed that accompanied any notice of meeting) or alternatively that the administration should end or that the company

[12] Strawbridge Affidavit 14.8.20 at [37].
[13] Strawbridge Affidavit 14.8.20 at [37].
[14] Clifton Affidavit 14.8.20 at [31].

> should be wound up. The creditors and not the administrator have the power to make that decision, because s 439C of the Act so provides, although the administrator has a casting vote if the majority of creditors by number and value reach a different result. The Administrators did not suggest to the contrary in this case.
>
> It is perhaps difficult to see why, in a complex administration, the administrators should not or do not have power to take steps to negotiate a deed of company arrangement which will be put to creditors for approval, even if their doing so potentially narrows the range of other options that may be available to creditors. The administrators have wide statutory powers while a company is under voluntary administration, under s 437A of the Act, including control of the company's business, property and affairs, power to terminate or dispose of the company's business and power to exercise any power that the company or any of its officers could have exercised if the company were not in administration. Where a company's assets are under the control of receivers, there would be no utility in putting a deed of company arrangement proposal to creditors unless the receivers would cooperate in its implementation. Where a bidding process for assets is conducted by receivers and administrators, one might expect that bidders would generally not make their best offer until that offer can lead to a concluded (although potentially conditional) transaction, and not if that offer would simply be the starting point for further negotiations at or after a second meeting of creditors. I emphasise, however, that these observations are tentative and not necessary to the decision in this matter.

15. In this administration, the sale process undertaken by the Administrators, culminating in the entry into the Sale Deed with the Purchasers, has limited the scope of possibilities available at the second meeting of creditors.

16. The Administrators in this case have entered into a binding agreement to sell the business and assets of the Virgin Companies to the Purchasers pursuant to an asset sale agreement or, if approved by creditors at the second meeting, one or more deeds of company arrangement. The effect of the obligations undertaken by the parties under the Sale Deed is that if the sale does not proceed by deed of company arrangement for any reason, the sale will proceed pursuant to the asset sale agreement.[15]

17. **Second**, the relief sought in the Interlocutory Process is premised on an assumption that all deed proposals submitted to the Administrators are required to be put to the second meeting of creditors or, alternatively, that all DOCA proponents have an equal entitlement to have their proposal considered and voted on by creditors. The *Corporations Act 2001* (Cth) (***Corporations Act***) does not contain such a requirement or entitlement.

18. The structure of the *Corporations Act* requires the administrators to convene a meeting under section 439A at which the creditors may resolve either that the company execute a deed of company arrangement, that the administration should

[15] Strawbridge Affidavit 14.8.20 at [38]-[41]; Strawbridge Confidential Affidavit (Applicants and BC Hart Aggregator) 14.8.20 at [11]

end or that the company be wound up: s 439C. Rule 75-225 of the *Insolvency Practice Rules (Corporations) 2016* (***IPR***) provides that the notice convening the meeting must be accompanied by a statement setting out the following:

> (i) whether, in the administrator's opinion it would be in the creditors' interests for the company to execute a deed of company arrangement;
>
> (ii) whether, in the administrator's opinion it would be in the creditors' interests for the administrator to end;
>
> (iii) whether, in the administrator's opinion it would be in the creditors' interests for the company to be wound up;
>
> (iv) the reasons for the opinions referred to in paragraphs (i) to (iii);
>
> (v) such other information known to the administrator as will enable the creditors to make an informed decision about each matter covered by (i), (ii) or (iii); …
>
> (vi) if a deed of company arrangement is proposed – details of the proposed deed.

19. The *Corporations Act* does not require or contemplate recommendations or resolutions in respect of multiple DOCA proposals. The *Corporations Act* requires the report to identify ***the*** deed of company arrangement proposed.

20. There is no freestanding obligation on an administrator to put a proposal before the second meeting of creditors at all including, for example where there is no realistic possibility of the proposal being accepted: see *Macks v Viscariello* [2017] SASCFC 172; 130 SASR 1 at [251]-[253]).

21. **Third**, the administrators are the persons tasked with making a recommendation to the creditors in respect of the options available to them. The role of administrators has been described as providing an "expert opinion" on the matters addressed in their report: *Deputy Commissioner of Taxation (Cth) v Pddam Pty Ltd* (1996) 19 ACSR 498. In *Macks v Viscariello* (2014) 103 ACSR 452 the statutory task of the administrator in making the recommendation (now contained in rule 75-225(3) of the *IPR*) was described as follows at [87] to [88]:

> The recommendation as to where the company's interests best lie requires a sophisticated and complex business judgment to be made. The future of a financially distressed company depends on many varied contingencies. It is not susceptible to objective, and scientifically certain, analysis. The decisions are necessarily based to a material extent on an intuitive assessment which must be made quickly.
>
> Moreover, different creditors may have different views about where their respective interests lie. There may be significant differences between the views of secured creditors and unsecured creditors. As between unsecured creditors the interests of a

> supplier of goods may differ from those of an employee. The statutory requirement that the voluntary administrator form a single view as to the best interests of the company necessarily requires that he or she weigh the competing interests and identify a course which optimises the overall outcome.

22. The role of the administrator in forming that recommendation may be contrasted with the position of a "third party" expert, for which there is generally no role. In *Re TEN Network Holdings Limited (Administrators Appointed) (Receivers and Managers Appointed)* [2017] NSWSC 1247, Black J rejected a submission that a report to creditors was defective because it did not include an expert report, stating at [57]:

> I am not satisfied that the Section 439A Report did not satisfy the requirements of s 439A(4) of the Act by reason that such an independent expert's report was not provided. That section requires the provision of information known to the Administrators that will enable the creditors to make an informed decision about the specified matters…. I am also not satisfied that an order should be made under s 447A of the Act modifying the operation of s 439A(4) to require provision of such a report. Such a modification seems to me to be inconsistent with structure of Pt 5.3A of the Act, so far as that Part contemplates that the Administrators, rather than third party experts, will make a recommendation to creditors at the second creditors' meeting. It also seems to me to be inconsistent with the well-recognised objectives of Pt 5.3A of providing a relatively prompt resolution of the position in respect of a company in administration, so as to maximise the chances of the company or its business continuing in existence, or result in a better return for creditors and members than would result from an immediate winding up. A requirement, whether generally or in this case, for the provision of an independent expert's valuation of the relevant business has the capacity to delay the second creditors' meeting in a manner which is inconsistent with that objective. I am not satisfied that the Administrators should be restrained from holding the second meeting of creditors until that information is provided for the same reasons.

23. **Fourth**, the regime created by Part 5.3A of the *Corporations Act* is one that places the control of the administration in the hands of the administrators and the creditors. As observed by the High Court in *Lehman Brothers Holdings Inc v City of Swan* (2010) 240 CLR 509 at [32]:[16]

> The chief difference between Pt 5.3A and earlier provisions for statutory composition and arrangements in corporate insolvency is the role played by the Court. Earlier provisions required court approval before the scheme was effective; Pt 5.3A provides for disallowance by the Court after the deed has been made.

24. The primary remedies available to creditors under the *Corporations Act* are remedies available after the second meeting of creditors, in particular the ability of a creditor to apply to terminate a deed of company arrangement under s 445D of the *Corporations Act*.

25. In *Re TEN Network Holdings Limited (Administrators Appointed) (Receivers and Managers Appointed)* [2017] NSWSC 1247, Black J made the following observation

[16] See also *Mighty River International Limited v Hughes* (2018) 265 CLR 480 at [6] (Kiefel CJ and Edelman J).

regarding the role of the Court before the views of creditors are known, stating at [127]:

> It also seems to me that it is important that the Court does not, in applications of this kind, deal with matters that are properly dealt with after the event, when creditors' views are known, and a full factual examination of the issues can be undertaken without the time pressures of an urgent application for final interlocutory relief. I am not persuaded that the Court should seek to determine any substantive application by Fox, at this point, rather than in the context of an application properly brought under s 445D of the Act.

26. His Honour had earlier pointed out, at [51], that, in determining any such application, the Court would have a discretion to grant relief if the relevant information would not have affected the voting.

27. In this case, neither the content of the Administrators' report to creditors in accordance with rule 75-225 of the *IPR* nor the outcome of the second creditors meeting is known. In those circumstances, the proper scope for the Court to become involved in the process is limited. The position may be contrasted to the role of the Court in convening meetings for the approval of a scheme of arrangement under s 411(1) of the *Corporations Act*, where procedural directions as to voting and provision of information are regularly made. There is no warrant or occasion for the Court to make such orders in the context of a second meeting of creditors under Pt 5.3A.

28. Having regard to the matters identified above, the form of the relief sought by the Applicants in this case can be addressed briefly.

Ballot and proxy voting: submission of DOCA proposals (paragraph 3(a) to (e))

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29. Paragraphs 3(a) to 3(e) of the Interlocutory Process seek to impose a regime for the submission, publication of details, and debate and promotion of DOCA proposals.

30. Those orders lack any utility in the circumstances of this case. That is because, as explained above, the process undertaken by the Administrators has limited the scope of the options available at the second meeting of creditors. The mechanism contained in the Sale Deed means there will not be any occasion to vote on any competing DOCA proposal as the sale will proceed pursuant to the asset sale agreement if the creditors do not approve the Purchaser's proposed DOCA.

31. In any event, the administrators have indicated that they will provide creditors with details of the Applicants' proposed DOCA in their report to creditors and will comment on it.[17] Orders requiring them to do so are unnecessary.

32. Quite aside from these considerations, the orders are based on the misconceived notion that there is a freestanding entitlement to have every DOCA proposal given equal air time by the administrators. There is no such entitlement.

33. To the extent these proposed orders deal with the provision of information to creditors, the administrators are already under an obligation to prepare a report to creditors which must contain "such other information known to the administrators as will enable creditors to make an informed decision…": *IPR r 7*5-225(3)(v). There is no reason to believe that such a report will not provide creditors with the information required to participate and vote at the second meeting of creditors. To the extent that there are any deficiencies in such information, the *Corporations Act* provides a remedy: *Corporations Act* s 445D(1)(a)-(c). Whether that remedy should be granted will depend on a range of considerations, including the court's assessment of the impact that the deficiency has had on the vote and any other factors relevant to the exercise of the court's discretion at the time it comes to be exercised.

Ballot and proxy voting: voting process (paragraphs 3(f) to (g))

34. Paragraphs 3(f) to (g) appear designed to ensure that a resolution relating to the Applicants' DOCA proposal, and indeed any other DOCA proposal, is included on any ballot.[18] These orders should not be made. By reason of the mechanism contained in the Sale Deed (as outlined above), the orders lack utility. They also proceed on the misconceived notion that the administrators must give every competing DOCA proposal an equal opportunity to be accepted.

Facilitator (paragraphs 4 to 6)

35. Paragraphs 4 to 6 of the Interlocutory Process deal with the appointment of a "Facilitator".[19]

36. The process proposed in paragraph 4(a) interferes with the exclusivity granted to the Purchasers pursuant to the Sale Deed. The regime contained in paragraph 4 and 5

[17] Cheetham Affidavit 11.8.20 at [30].
[18] Cheetham Affidavit 11.8.20 at [32(a)].
[19] Strawbridge Confidential Affidavit (Applicants and BC Hart Aggregator) 14.8.20 at [10].

of the Interlocutory Process, if implemented, would cause the Administrators to breach those provisions of the Sale Deed.

37. The transaction documents entered into by the parties contain exclusivity provisions designed to ensure that the winning bidder has the ability to negotiate exclusively with Virgin's stakeholders. As explained by Mr Strawbridge in his 9 July 2020 affidavit at [27]-[28], that privilege is critical to ensuring that a DOCA can be propounded by the winning bidder which maximises the likelihood of the business of the Virgin Companies continuing in the future. The Purchasers ability to do that is undermined and disrupted if the Applicants can negotiate with the same stakeholders aided by either the Administrators or a facilitator[20]. Procedural orders which have the effect of allowing that to occur should not be made.

38. In considering the proposed role of any "Facilitator" in reporting and seeking directions from the court as proposed by paragraphs 4(b) to (d), it should be borne in mind that it is the Administrators who are obliged to consider the options available to the Virgin Companies and report to creditors. The suggestion that a "Facilitator" should also be involved in reporting to creditors is antithetical to the structure of Part 5.3A of the *Corporations Act* which, as Black J identified in *Re TEN Network Holdings Limited (Administrators Appointed) (Receivers and Managers Appointed)* [2017] NSWSC 1247 at [57], requires administrators, rather than third party experts, to make a recommendation to creditors.

39. The concern that the Administrators are somehow disabled from summarising and fairly reporting on the Applicants' DOCA proposal[21] is misconceived. As already noted, the Administrators have made it plain that they intend to set it out and comment on it.[22] It is inappropriate to second-guess whether they will do so "fairly" before they have even undertaken the task.

Conclusion

40. For the reasons outlined above, the Applicants' interlocutory process should be dismissed. Whatever grievance the Applicants may have as to the substance of the contractual arrangements agreed between the Administrators and the Purchasers, the making of procedural orders for the convening of a meeting should not provide an avenue for attacking or overriding those arrangements, when the Applicants would

[20] Clifton Affidavit 15.8.20 at [33].
[21] Cheetham Affidavit 11.8.20 at [32(c)].
[22] Cheetham Affidavit 11.8.20 at [30].

otherwise need to wait until after the meeting to bring any challenge to the DOCA or obtain an injunction (at the price of an undertaking as to damages) to restrain either the meeting or the sale.

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