In the matters of VAH Newco No.2 Pty Ltd (in liquidation) (subject to deed of company arrangement) & Anor -

Federal Court of Australia Proceeding No. NSD 818 of 2020

Richard Hughes in his capacity as Liquidator of each of VAH Newco No.2 Pty Ltd (in liquidation) (subject to deed of company arrangement) and VB Investco Pty Ltd (in liquidation) (subject to deed of company arrangement)

First Plaintiff

& Ors

PLAINTIFFS' OUTLINE OF SUBMISSIONS

A. INTRODUCTION

1. These are the submissions of the First Plaintiff, Richard Hughes of Deloitte (**Mr Hughes** or **the Liquidator**) in his capacity as liquidator of each of the Second and Third Plaintiffs (the **Companies**), with respect to the Interlocutory Process filed on 30 September 2020.

2. The Second Plaintiff, VAH Newco No.2 Pty Ltd (in liquidation) (subject to deed of company arrangement) (**VAH Newco 2**), and the Third Plaintiff, VB Investco Pty Ltd (in liquidation) (subject to deed of company arrangement) (**VB Investco**) are each the subject of a member's voluntary liquidation.

3. In this proceeding, on 30 July 2020, the Court made orders (see *Hughes, in the matter of Vah Newco No. 2 Pty Ltd (in liq)* [2020] FCA 1121 (***VAH (No 1)***)):

   (a) granting leave for Mr Hughes together with the Fourth Plaintiffs, Messrs Algeri, Strawbridge and Greig of Deloitte, to be appointed as the administrators of each of the Companies (**the Administrators**); and

   (b) staying the winding up of the Companies.

4. In *VAH (No 1)* at [44]-[45], Middleton J noted that the orders were made in circumstances where a proposed restructure of the Virgin group of companies (**Virgin Companies**) was on foot and the Court retains the discretion to consider (at a later point) whether it is in the creditors' interests that the windings up be terminated.

5. In this application, the Liquidator now applies to terminate the windings up having regard to the progress of the restructure of the Virgin Companies and the passage of a number of deeds of company arrangement that have been executed (including relevantly by the Companies).

B. FURTHER FACTUAL BACKGROUND

6. The background to the affairs of the Companies, and their role as part of the broader group of Virgin Companies, is set out in the affidavit of Mr Hughes sworn on 24 July 2020 and is summarised in *VAH (No 1)* at [6]-[20]. It is worth emphasising, however, that the Companies did not actively carry on any business and their only liabilities are contingent claims arising from being party to a Deed of Cross Guarantee dated 18 June 2007 (**DOCG**) (either directly or by an assumption deed) and, in the case of VAH Newco 2, by reason also of having guaranteed certain notes issued by the parent entity of the Virgin Companies: Affidavit of Mr Hughes sworn 30 September 2020 (**Third Hughes Affidavit**) at [36].

7. Since the earlier orders were made in this proceeding, the following events have occurred culminating in the execution of a number of deeds of company arrangement by each of the Virgin Companies.

8. On 3 August 2020, Messrs Hughes, Strawbridge, Algeri and Grieg were appointed as the joint and several administrators of each of the Companies: Third Hughes Affidavit at [8].

9. On 25 August 2020, the Administrators issued their report to the creditors of each of the Virgin Companies (including VAH Newco 2 and VB Investco) (**Report**) in advance of the second meeting of creditors of each of the Virgin Companies (**Second Meetings**): Third Hughes Affidavit at [10].

10. In the Report, the Administrators outlined a proposal for a restructure of the Virgin Companies proposed by BC Hart Aggregator, LP (**Bain**), which had previously entered into a transaction for sale of the assets and business of the Virgin Companies in the course of their administrations (**Bain Proposal**): Third Hughes Affidavit at [11]-[12].

11. The Bain Proposal consisted of a series of deeds of company arrangement (**Bain DOCAs**), including a primary deed of company arrangement (**Primary DOCA**) for each of the Virgin Companies that are bound by the DOCG or which are otherwise dormant entities: Third Hughes Affidavit at [12]-[13]. The Primary DOCA relevantly encompassed VAH Newco 2 and VB Investco.

12. As set out in the Third Hughes Affidavit at [14], [17] and [22(b)], the effect of the Bain DOCAs is that:

    (a) Bain is ultimately to assume control of the Virgin Companies upon completion of the Bain DOCAs;

    (b) employment for the Virgin Companies' employees is to continue and, otherwise, payment of entitlements will be made in full for those employees whose employment is not maintained;

    (c) aircraft and associated airline equipment are to be retained by the Virgin Companies;

    (d) the Virgin Companies will continue to honour travel credits and prepaid customer flights at full value;

    (e) Bain is to make a cash contribution of between $447 million and $572 million with respect to the claims of unsecured creditors;

    (f) a creditors' trust is to be established upon effectuation of the Bain DOCAs comprising four pools of funds (**Creditors' Trust**);

    (g) debts and claims of creditors with respect to the Virgin Companies are to be released and extinguished, except for certain excluded claims such as the claims of continuing employees and the claims of certain excluded contractual counter-parties (being those with whom the Virgin Companies intend to continue to contract post-restructure), and creditors are to receive a dividend from the relevant pool of the Creditors' Trust with respect to their debts and claims;

    (h) the expected return to ordinary unsecured creditors is between 9 and 13 cents in the dollar, to be payable from the Creditors' Trust;

(i) completion of the Bain DOCAs is subject to an order being made by the Court for the transfer, to Bain or its nominee, of the shares in the parent company of the Virgin Companies, Virgin Australia Holdings Limited (Administrators Appointed (at that time)); and

(j) the Administrators are to become the Deed Administrators of each of the Bain DOCAs and are to remain in control of the Virgin Companies pending effectuation of the Bain DOCAs.

13. On 4 September 2020, the Second Meetings were held: Third Hughes Affidavit at [21]. At the meetings, the Bain DOCAs were overwhelmingly supported by the creditors of the Virgin Companies: Third Hughes Affidavit at [23]. With respect to the Primary DOCA, in particular, the resolution that the relevant Virgin Companies execute that deed of company arrangement passed with the support of over 95% of creditors by number and over 90% of creditors by value: Third Hughes Affidavit at [24]-[25].

14. On 25 September 2020, each of the Bain DOCAs (including the Primary DOCA) was executed: Third Hughes Affidavit at [27]. On that date:

(a) the administration of each of the Virgin Companies (including VAH Newco 2 and VB Investco) ceased;

(b) each of the Virgin Companies (including VAH Newco 2 and VB Investco) became subject to a deed of company arrangement;

(c) the Administrators became administrators of the various Bain DOCAs (**Deed Administrators**); and

(d) the Deed Administrators remain in control of the Virgin Companies pending completion (see clause 11.4 of the Primary DOCA): Exhibit RJH-2 Tab 8 at p. 31.

15. Steps have been taken towards the satisfaction of the remaining conditions precedent to completion of the transaction and the parties are working towards an effectuation of the Bain DOCAs by late October or early November 2020: Third Hughes Affidavit at [29]-[31].

16. Accordingly, by that time, the restructure of the Virgin Companies as a whole will be complete and full control and ownership of each of the Virgin Companies will be

transferred to Bain. However, in the case of each of VAH Newco 2 and VB Investco, that is subject to the disposition of this application (because these entities are, unlike the other Virgin Companies, also in the course of being wound up).

C. TERMINATION OF THE WINDINGS UP

C.1 Principles

17. The Court has the power to terminate a winding up under section 482(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**) and section 90-15 of the *Insolvency Practice Schedule (Corporations)* (**IPS**). Section 90-15 of the IPS is also relied on because, technically, each of the Companies remains a members voluntary winding up: (see, with respect to the predecessor provision, *McKern v Pacific Edge Corporation Pty Ltd (In Liq)* (2004) 51 ACSR 60; [2004] NSWSC 1150 at [2]-[3]; *Re Annabel Victoria Pty Ltd* [2012] NSWSC 375 at [3]).

18. The principles with respect to the termination of a winding up are well known and are set out in a number of seminal or commonly cited decisions such as *Re Warbler Pty Ltd* (1982) 6 ACLR 526; *Mercy and Sons Pty Ltd v Wanari Pty Ltd* (2000) 35 ACSR 70; [2000] NSWSC 756; and *Re Glass Recycling Pty Ltd* [2014] NSWSC 439 at [15]-[19].

19. However, particular considerations arise in an application to terminate a winding up in the context of an anterior appointment of an administrator to the company with a view to the execution of a deed of company arrangement (as part of a corporate restructuring transaction). These considerations have been principally identified in *Rupert Company Limited v Chameleon Mining NL (in liquidation)* (2006) 24 ACLC 635; [2006] NSWSC 415 (***Chameleon Mining***) and *Palmer and Collis and Terraplanet Limited (in liquidation), in the matter of Terraplanet Limited (in liquidation) (No 2)* [2008] FCA 582 (***Terraplanet***).

20. In *Chameleon Mining*, Austin J expressed the following conclusions as to an application of this type:

> [15] In my opinion the case for termination of the winding up has been made out. In the exercise of its discretion whether to terminate the winding up, the court considers in the interests of creditors (including future creditors), the liquidator, contributories and the public: generally, see *Mercy & Sons Pty Ltd v Wanari Pty Ltd* (2000) 35 ACSR 70, *Re Nardell Coal Corporation Pty Ltd* (2004) 49 ACSR 110, *Sutherland v Rahme Enterprises Pty Ltd* (2003) 46 ACSR 458.

> [16] Here the interests of the company's creditors at the time of Mr Vouris' appointment as administrator had been addressed by the DOCA and the Creditors' Trust, which were approved by the creditors at their meeting. The evidence is that these creditors will receive a substantial distribution from the Trust, whereas if the company had remained in liquidation, they would have received little or no return. There is no significant body of post-administration creditors.
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> [17] The interest of future creditors, if the company were permitted to resume trading and incur future debts, was an important criterion in cases such as *Mercy v Wanari*, *Re Nardell Coal*, *Sutherland v Rahme Enterprises*, *Re Gympie Gold Ltd* (2006) 56 ACSR 690 and *Vero Workers Compensation v Ferretti* [2006] NSWSC 292. In those cases, there was a deed of company arrangement which had not yet been concluded, and there were creditors of the company who would remain as creditors if the winding up was terminated (although the creditors, typically related creditors, were subject to various forms of purported subordination or deferral). Because of the continued existence of substantial debts which might prejudice their prospects of recovery, the court was not satisfied that it was in the interests of future creditors that the winding up be terminated.
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> [18] Here, on the other hand, the effect of the DOCA and the Creditors' Trust is to transfer the creditors' claims to the Trust and release the company from liability to pay those debts. The arrangements appear to me to conform to ASIC's guidelines for creditors' trusts, and ASIC chose not to appear to oppose the application. I can see no reason for regarding the relevant provisions as ineffective. Therefore the concern over the interests of future creditors, if a company with substantial existing debts is permitted to resume trading, is not a relevant concern in the present case. Moreover, creditors whose debts arise in the short term have the protection, such as it is, of Centrebright's letter of 5 April 2006.

21. Similarly, in *Palmer and Collis and Terraplanet Limited (in liquidation), in the matter of Terraplanet Limited (in liquidation) (No 2)* [2008] FCA 582, Lindgren J noted:

> [23] I am satisfied that the DOCA and the Trust satisfy the object of Pt 5.3 of the Act of providing for the business, property and affairs of an insolvent company to be administered in a way that maximises the chances of the company, or as much as possible of its business, continuing in existence, or results in a better return for its creditors and members than would result from an immediate winding up: see s 435A of the Act.

> [24] *Rupert Co v Chameleon Mining* (2006) 24 ACLC 635 presented factual circumstances somewhat similar to those of the present case. Austin J stated in that case (at [15]) that in the exercise of its discretion whether to terminate the winding up, the Court considers the interests of creditors (including future creditors), the liquidator, contributories and the public.
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> [25] In the present case, the application is made by the Liquidators; the existing creditors have voted in favour of the DOCA and the Terraplanet Creditors' Trust; and the contributories (that is, the shareholders) have voted in favour of the various resolutions to implement the recapitalisation proposal.
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> [26] Terraplanet is released from all existing debts under an arrangement that sees existing creditors better off than they would be if the winding up were to proceed to finalisation.
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> [27] This leaves future creditors to be considered. In substance, Terraplanet is to commence its commercial life again. No doubt Dalgety [the proponent of the recapitalisation proposal and the deed of company arrangement] is of the view that its capitalisation of Terraplanet is adequate to enable it to succeed commercially.
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> [28] In the light of the absence of any existing debts and of the recapitalisation of the company, I infer that Terraplanet is solvent. There is no reason to doubt, on the present evidence, that the company will be able to pay debts it will incur as and when they fall due after it recommences business.

22. These principles have been subsequently applied in analogous circumstances in other cases such as *Smith; in the matter of Matrix Metals Limited (in liquidation)* [2011] FCA 1399 (***Matrix Metals***) and *Re Nukleen Int Pty Ltd (in Liquidation) (Subject to A Deed Of Company Arrangement)* [2014] SASC 30.

23. As McKerracher J observed in *Matrix Metals* at [12], there are no fixed or absolute rules prescribing the circumstances which must exist before the Court can make an order terminating the winding up of a company and the matters identified in the extracts from *Chameleon Mining* and *Terraplanet* (set out above) represent a range of discretionary considerations which the Court will usually need to address.

C.2 Orders should be made terminating the winding up of each of the Companies

24. The formal restructuring of the Virgin Companies (including VAH Newco 2 and VB Investco) is close to an end and the termination of the liquidation of each of the

Companies is a necessary step to completing the restructuring and transferring ownership and control of all of the Virgin Companies to Bain.

25. As noted above, resolutions to give effect to the Bain Proposal were overwhelmingly passed by the creditors of the Virgin Companies. The Bain DOCAs (including the Primary DOCA) have been executed and steps are being taken to satisfy the various post-execution conditions in the Bain DOCAs: Third Hughes Affidavit at [29]-[30]. In particular, the Deed Administrators expect to approach the Court in the coming weeks for orders to be made under s 444GA of the Corporations Act for leave to transfer the shares in Virgin Australia Holdings Limited (subject to deed of company arrangement) to Bain (or its nominee).

26. The completion of the transaction with Bain (including the effectuation of the Primary DOCA) is plainly in the interests of the current creditors of the Companies. These (contingent) creditors are, as noted by Middleton J in *VAH (No 1)* at [18], also creditors of other Virgin Companies that are the subject of the Primary DOCA. The critical point is that these creditors stand to receive a substantially greater return from the Primary DOCA and associated Creditors' Trust than from a winding up (or continued winding up) of the Virgin Companies: Third Hughes Affidavit at [17]. Indeed, considering the position of the Companies in insolation, they have no assets of any value and there would be no return to creditors whatsoever generated solely from a continuation of these liquidations: Third Hughes Affidavit at [36].

27. Future creditors of the Companies will also be protected in the event of a termination of the windings up. As a consequence of the restructure, and upon the effectuation of the Primary DOCA, the liabilities of the Companies will be extinguished (see clause 6.4) and converted into a right to claim in the Creditors' Trust (see clause 6.5): Third Hughes Affidavit at [37]; Exhibit RJH-2 Tab 8 at p. 26. And, of course, the Companies will remain part of the larger Virgin Group under new ownership by Bain.

28. There is no other reason not to terminate the windings up. The Liquidator brings the application himself and his costs of the windings up will be costs in the external administrations of the Companies. The shareholder of each of the Companies is another of the Virgin Companies and it will form part of the broader restructured group on

completion of the transaction: Third Hughes Affidavit at [42]-[43]. There are also no issues of "commercial morality" (such as misconduct by the directors) that would count against bringing the liquidations to an end: Third Hughes Affidavit at [35].

29. As set out in the Third Hughes Affidavit at [33] and [38], there are compelling reasons to terminate the windings up at this point rather than awaiting completion of the Primary DOCA:

    (a) *first*, the Companies are not trading or carrying on any business and have not incurred any debts since the commencement of the liquidations (including during the period when the Administrators were also appointed and in office): Third Hughes Affidavit at [38];

    (b) *secondly*, the Deed Administrators remain in control of the Companies pending completion of the Primary DOCA (see clause 11.4): Exhibit RJH-2 Tab 8 at p. 31[1];

    (c) *thirdly*, if the Primary DOCA is not completed, the Companies will be placed into liquidation in a deemed creditors' voluntary winding up (see clause 18.6): Exhibit RJH-2 Tab 8 at p. 36 – this is a step that, in the absence of the appointment of the Administrators and the execution of the Primary DOCA, the Liquidator would in any event have needed to take with respect to the Companies having regard to section 496 of the Corporations Act[2];

    (d) *fourthly*, the premise of the previous orders made by the Court in this proceeding was so that the Companies could be included as part of the Bain DOCAs and to ensure that the external administrations of all of the Virgin Companies could proceed in parallel – that is best achieved by terminating the windings up now so that the external administration of all of the Virgin Companies are simultaneously brought to an end (and Bain assumes full control and ownership of the Virgin Companies) upon the effectuation of the Bain DOCAs; and

    (e) *fifthly*, if the external administrations of all of the Virgin Companies are not brought to an end at the same time, relevant stakeholders may proceed on a

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[1] See *Matrix Metals* at [43(d)], where this was identified as a factor favouring the termination of the winding up prior to the effectuation of the deed of company arrangement.

[2] See *Matrix Metals* at [43(e)], where this was similarly a reason favouring the termination of the winding up prior to the effectuation of the deed of company arrangement.

misapprehension that: the Virgin Companies as a whole remain insolvent; the restructure of the Virgin Companies is not complete; and Bain has not yet taken full control of the group, all of which may potentially have an adverse impact on the ongoing trading operations and business of the Virgin Companies.

30. As Palmer J noted in *Smith and Hayes re Gympie Gold Ltd (in liq)* [2005] NSWSC 1141 at [8], in comments entirely apposite to the present circumstances:

> … It seems to me that if the Deed of Company Arrangement is approved by the creditors and the company and is executed and if the administrators are then able to report to the Court that the Deed of Company Arrangement is progressing satisfactorily and that there is no reason to suppose it will not be brought to successful fruition as contemplated by its terms, then there is a good prospect that the Court would exercise its discretion in favour of granting an early termination of the liquidation.[3]

31. Finally, the creditors of each of the Companies and the Australian Securities and Investments Commission have been notified of the application: Affidavit of Kassandra Suzann Adams sworn 30 September 2020 at [4]. At the time of preparing these submissions, no party has indicated any opposition to the orders or any desire to be heard on the application.

D. CONCLUSION

32. The Court should make orders in the form of the short minutes of order provided together with these submissions.

1 October 2020

Daniel Krochmalik

Counsel for the Plaintiffs

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[3] Admittedly, in *Re Gympie Gold Ltd* (2006) 56 ACSR 690; [2006] NSWSC 97 at [7]-[10], Barrett J (as his Honour then was) explained that, in that case, it was preferable to await the completion of the deed of company arrangement before formally terminating the winding up. However, the circumstances of the current case provide no reason to await that step as there is no prospect of any prejudice to stakeholders in the interim period.