NOTICE OF FILING

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Details of Filing

Document Lodged:	Outline of Submissions
File Number:	NSD464/2020
File Title:	APPLICATION IN THE MATTER OF VIRGIN AUSTRALIA HOLDINGS LTD (ADMINISTRATORS APPOINTED) ACN 100 686 226 & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

Dated: 17/08/2020 9:02:14 AM AEST Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Vaughan Strawbridge, Salvatore Algeri, John Greig and Richard Hughes, in their capacity as joint and several voluntary administrators of each of Virgin Australia Holdings Ltd (Administrators Appointed) and the Third to Forty-Second Plaintiffs

First Plaintiffs

& Ors

PLAINTIFFS' SUBMISSIONS IN REPLY

1. These submissions reply to the written submissions of Broad Peak and Tor dated 16 August 2020 (**BPT Submissions**) and those of the BondHolder Representative Group (**BHRG**) also dated 16 August 2020 (**BHRG Submissions**).

Matters Broad Peak and Tor do not address

2. Broad Peak and Tor fail to address several matters relevant to the Administrators' exercise of the power of sale. Bain succeeded in an open and public sale process. Broad Peak and Tor appear to accept that they did not engage (either fully, or at all) with that Sale Process. Bain went on economic risk from 1 July 2020; a matter critical to the survival of the Virgin Companies. Broad Peak and Tor's proposal involved no committed funding: VHS-6, Tab 3, COI minutes 1 July 2020, p. 5. The Bain Transaction led to immediate tangible benefits for the Virgin Companies, including: (a) a substantial sum of money being advanced by Bain Capital pending completion; (b) (as noted) Bain Capital taking on the economic risk of the business; and (c) Bain agreeing to make payments for those employees whose employment was made redundant in the interim. The sale has been endorsed by the COI. Indeed, all matters have been overseen by the COI, including the dual completion mechanism either as an asset sale or through a DOCA: VNS-6, Tab 3, COI minutes 1 July 2020, at p. 7.

The assets have been sold and the Applicants' relief is futile

3. Broad Peak and Tor accept that the Administrators had the power to dispose of the assets and business of the Virgin Companies: BPT Submissions, [4]. However, they contend that the Administrators have not exercised the power of sale; essentially, because the sale has

not completed and one mechanism by which completion may occur is through the Bain DOCA: BPT Submissions, [4]. That submission is wrong. The Sale Deed provides for the sale of the assets of the Virgin Companies. There is a binding obligation on the parties to the Sale Deed to enter into the Asset Sale Agreement. If the Bain DOCA is approved by creditors at the Second Meetings then the DOCA operates as an alternative pathway to completion. Either way, the power of sale has been exercised.

4. BPT Submissions, [4]-[5] and [8], contend that if Broad Peak and Tor's proposal is approved at the Second Meetings then "the resolution of the creditors will be a supervening event which makes performance of the backup Bain Asset Sale Agreement illegal" with the consequence that "[t]he Bain Agreement will have been discharged by operation of law". Those submissions are also misplaced.

5. The submission depends on the proposition that Parliament intended an agreement to sell some or all of the property of a company under administration, entered into pursuant to s 437A, to be void (or at least unenforceable) if inconsistent with a later agreement entered into under the DOCA provisions in ss 444A and 444B following its approval by a majority of creditors. That proposition is inconsistent with s 451C, by which any transaction entered into, in good faith, by or with the consent of the administrator, is valid and effectual for the purposes of the Act and not liable to be set aside in any winding up. The proposition is also contrary to authorities which recognise that the exercise of the powers in s 437A may constrain or foreclose the options open to creditors at the second meeting: *Network Ten*, *Keystone* and *Eisa*. If the submission were correct, creditors' options would not be so constrained.

6. The BPT Submissions, like the BHRG Submissions, proceed on the false premise that—merely because one way in which the Bain Transaction may be completed is through the Bain DOCA—the creditors of the Virgin Companies may have a choice between competing DOCA proposals: BPT Submissions, [33], [41]. But the structure of the Sale Deed will not permit that outcome. Rather, if the Bain DOCA is not approved by creditors, then the Administrators are obliged to adjourn the Second Meetings while the Asset Sale Agreement completes. This will occur, by operation of 75-140(1)(b) and 75-140(3) of the *Insolvency Practice Rules (Corporations)* which confers on the Administrators,

as Chairpersons of the Second Meetings, the power to adjourn the Second Meetings for up to 45 business days. The approval of the creditors is not required.[1]

7. Absent applying to set aside the Sale Deed and enjoin its completion in the meantime—a step which Broad Peak and Tor have repeatedly eschewed—Bain Capital will assume ownership of the assets and business of the Virgin Companies.

The "supremacy of the creditors' meeting" does not affect the Bain Transaction

8. Contrary to BPT Submissions, [6], a company's creditors are given a choice among the three options prescribed by s 439C. The creditors do not decide whether a company's assets are to be sold. The fact of an administrator's exercise of the power of sale may operate in practical terms to prevent a DOCA from being promoted that involves the property of the company being included in the deed fund. Authority makes this clear. In *Carter v Global Food Equipment Pty Ltd* (2007) 25 ACLC 1173; [2007] NSWSC 901 White J (as his Honour then was), said this at [13]-[14] (emphasis added):

> Administrators are entitled to sell all or part of a company's assets and business before a second meeting of creditors with a view to maximising the returns to creditors (s 437A(1)). **The matter for decision at the second meeting of creditors under s 439A is not whether the assets or business of the company should be sold and if so, at what price. It is not the creditors' direct function to approve or disapprove of a proposed sale.** The creditors must decide whether the company should remain in administration, whether it should be wound up, or whether any deed of company arrangement which is proposed should be entered into.
>
> However, any proposal for sale of the companies' assets and business could be relevant to the making of the decision required by s 439A. **A sale of the companies' assets or business prior to the meeting could pre-empt a proposal for a deed of company arrangement which might otherwise have been advanced, or it might significantly affect the terms of a proposed deed of company arrangement.** Creditors might make a different decision as to whether the company should be wound up or the administration should be brought to an end if a sale has been effected, than they would make if a sale was still a proposal.

9. Nothing in *Lehman Bros Holdings Inc v City of Swan* (2010) 240 CLR 509 or *Mighty River International Ltd v Hughes* (2018) 265 CLR 480 suggests to the contrary. Those cases did not

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[1] The unilateral adjournment power was created by the amendments to the *Corporations Act 2001* (Cth) and delegated legislation brought about by the passage of the *Insolvency Law Reform Act 2016* (Cth). Prior to 1 September 2017, the power to adjourn required, at least, the consent of the creditors: reg 5.6.18 of the *Corporations Regulations 2001* (Cth) (now repealed).

concern an administrator's power of sale or competing DOCAs. They concerned the form of a DOCA and the extent to which the terms of a DOCA may validly operate.

10. The Bain Transaction is not subject to creditor approval, whether at the Second Meetings or otherwise: *cf* BPT Submissions, [7]. The decision for the creditors is, essentially, whether creditors wish to invoke a mechanism which is available in the context of the options conferred by s 439C by which completion of the sale may occur, with the possibility of an improved estimated return for creditors if that mechanism is adopted.

There is nothing improper about the exercise of the adjournment power

11. The Administrators could have completed, and still could complete in advance of the Second Meetings, the Bain Transaction as a straight asset sale. However, the rationale for the alternative completion mechanism through the Bain DOCA is to improve the estimated return to all creditors, including Broad Peak and Tor.

12. Where no criticism is made of the Administrators' exercise of the power of sale under s 437A, the Administrators' cannot be criticised for agreeing to exercise their power to adjourn the Second Meeting to complete that sale: *cf* BPT Submissions, [44]-[48]. Still more so where the completion mechanism is *designed to generate a better return for creditors*.

The orders now sought are contrary to creditors' interests

13. BPT's Submissions, [22] and [57], suggest that the "safe course" is to facilitate a process permitting all Rival DOCAs to be put to creditors (as it is said at [19] that the Broad Peak and Tor proposal makes "no difference"). In fact, not only would that course be futile, it would also be seriously adverse to the interests of creditors.

14. *First*, as identified in chief at [65], it would be misleading to creditors to provide an illusion of choice between competing DOCA proposals. That is particularly so with respect to the Ballot mechanism orders, which would impermissibly fetter the discretion of the Administrators.

15. *Secondly*, as also explained in chief, it would expose all stakeholders to disruption.

16. *Thirdly*, steps have already been taken, with the input of Bain Capital, to restructure the business: affidavit of Vaughan Neil Strawbridge of 14 August 2020 at [66] - [68]; supplementary confidential affidavit (applicants only) of Vaughan Neil Strawbridge of 16

August 2020 at [20]. That includes, for examples, giving notice to lessors of property not required following the completion of the Bain Transaction.

17. *Fourthly*, if the Court effectively compels the Administrators to put Broad Peak and Tor's proposal to creditors to be voted on first (or simultaneously), it will invite the possibility of the Virgin Companies being bound by two separate contracts containing inconsistent obligations. The potential for destruction of value is significant. That possibility should not be required to be put to creditors as the primary course. By contrast, dismissing Broad Peak and Tor's application will not prevent them from advocating for their DOCA proposal. It will be addressed in the report to creditors. Creditors will not be voting on the Bain DOCA in ignorance of Broad Peak and Tor's DOCA proposal. Broad Peak and Tor's application need not be granted in order for a "fair and transparent democratic vote to proceed" (cf BPT Submissions, [18]).

17 August 2020

Ruth C A Higgins SC
David R Sulan
James J Hutton
Daniel Krochmalik

Counsel for the Plaintiffs