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Details of Filing

Document Lodged:	Outline of Submissions
File Number:	NSD818/2020
File Title:	IN THE MATTER OF VAH NEWCO NO. 2 PTY LTD (IN LIQUIDATION) ACN 160 881 354 AND VB INVESTCO PTY LTD (IN LIQUIDATION) ACN 101 961 095
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

SEAL OF THE FEDERAL COURT OF AUSTRALIA

Dated: 28/07/2020 9:34:07 PM AEST Registrar

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In the matters of VAH Newco No.2 Pty Ltd (in liquidation) & 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) and VB Investco Pty Ltd (in liquidation)

First Plaintiff

& Ors

PLAINTIFFS' OUTLINE OF SUBMISSIONS

A. INTRODUCTION

1. These are the submissions of the Plaintiffs, including 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 Originating Process filed on 27 July 2020.

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

3. In this application, the Plaintiffs:

   (a) seek leave to appoint the Liquidator, together with the Fourth Plaintiffs, Messrs Algeri, Strawbridge and Greig, who are also partners of Deloitte, as administrators of the Companies (**Proposed Administrators**); and

   (b) seek orders commonly made on applications of this type (known as truncated administration orders or "Day 1" orders) to abridge or dispense with certain parts of the administration process.

4. Each of the Companies was wound up on 26 April 2019, as a members' voluntary winding up and Mr Hughes was appointed as the liquidator. At the time, each was thought to be a dormant entity with no liabilities.

5. Prior to their winding up, the Companies formed part of a corporate group comprised of other companies incorporated and operating in Australia, New Zealand and

Singapore known as the Virgin group of companies (**Virgin Group**): Affidavit of Richard John Hughes affirmed 24 July 2020 (**Hughes Affidavit**) at [5].

6. The Virgin Group is an Australian-based corporate group that operates in the domestic and international passenger and cargo airline business, offering aviation products and services to the Australian aviation market, including corporate, government, leisure, low cost, regional and charter travellers and air freight customers: Hughes Affidavit at [6].

7. A substantial number of the entities in the Virgin Group are currently in administration (**Virgin Companies**), with Messrs Hughes, Algeri, Strawbridge and Greig of Deloitte having been appointed as joint and several administrators of the Virgin Companies (**Deloitte Administrators**) on 20 April 2020 (and in the case of one further company, on 28 April 2020): Hughes Affidavit at [22]-[25]; *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 2)* (2020) 144 ACSR 347; [2020] FCA 717 at [3].

8. The Companies are both, ultimately and through intermediate holding companies, wholly owned subsidiaries of Virgin Australia Holdings Limited (Administrators Appointed) (**VAH**), a public company whose shares are listed on the Australian Securities Exchange and which is the ultimate parent company of the Virgin Group: Hughes Affidavit at [7].

9. On 26 June 2020, in the course of the administration of the Virgin Companies, the Deloitte Administrators entered into a binding agreement with BC Hart Aggregator, L.P. and BC Hart Aggregator (Australia) Pty Ltd, entities associated with Bain Capital Private Equity LP and Bain Capital Credit LP (together, **Bain)**, in which the business and assets of the Virgin Companies were sold (**Bain Transaction**): Hughes Affidavit at [31]-[32]. Subject to the outcome of the second creditors' meeting of the Virgin Companies, is presently envisaged that the Bain Transaction will be completed through a deed of company arrangement: Hughes Affidavit at [33].

10. In circumstances where each of the Companies is presently insolvent and the members voluntary windings up must come to an end, this application is designed to cause the Companies to be placed into administration (with the same administrators for each of the Virgin Companies) and to make the ancillary truncated or Day 1 orders so as to link

the proposed administrations with the existing administrations of the Virgin Companies.

B. FURTHER FACTUAL BACKGROUND

11. On 7 June 2018, Mr Hughes was engaged by the Virgin Group to assist in deregistering or winding up dormant entities or entities with limited or no assets within the Virgin Group: Hughes Affidavit at [10].

12. The Companies were identified as falling into that category and, on 26 April 2019, Mr Hughes was appointed as the liquidator of each of the Companies pursuant to s 491(1) of the Corporations Act by special resolution passed by Virgin Australia Airlines Holdings Pty Ltd, the sole shareholder of each of the Companies: Hughes Affidavit at [12]. Declarations of solvency were signed by the directors: Hughes Affidavit at [11]; Exhibit RJH-1 at Tabs 2 and 3.

13. The Liquidator prepared statutory lodgements and invited proofs of debt to be lodged, but thus far no proofs have been lodged and no claims have been notified: Hughes Affidavit at [16]-[17].

14. While it was initially thought that the Companies were dormant entities with no liabilities, Mr Hughes now understands that:

    (a) VB Investco and VAH Newco 2 is each a party to a deed of cross-guarantee dated 18 June 2007 (**DOCG**), including with certain other companies in the Virgin Group, which provides that upon the winding up of an entity to the DOCG (either in insolvency or as a creditor voluntary winding up), each other entity to the DOCG is liable for its debts: Hughes Affidavit at [19(c)] and [20(c)]; Exhibit RJH-1 at Tabs 14 and 15; and

    (b) VAH Newco 2 is a guarantor of the following notes (**Notes**) issued by VAH: Hughes Affidavit at [20(d)]:

        (i) VAH Unlisted 2018 Notes: AUD$150,000,000 (face value) of 8.25% unsecured Fixed Rate Notes issued by VAH on 30 May 2018 and due for repayment on 30 May 2023;

(ii) VAH Unlisted 2019 Notes: AUD$250,000,000 (face value) of 8.075% unsecured Fixed Rate Notes issued by VAH on 5 March 2019 and due for repayment on 5 March 2024; and

(iii) USD 2016 Senior Notes: USD$350,000,000 (face value) of 7.875% Senior Notes issued by VAH and due for repayment on 15 October 2021.

15. VAH Newco 2 is currently in default of the obligations in the Note Deed Poll dated 17 May 2018 (which governs the VAH Unlisted 2018 Notes and the VAH Unlisted 2019 Notes) and the Indenture dated 17 October 2016 (which governs the USD 2016 Senior Notes) because of the appointment of administrators to the Virgin Companies: Hughes Affidavit at [20(d)].

16. These matters have two consequences. *First*, it means that the Companies have large (albeit likely contingent) liabilities to creditors. *Secondly*, the creditors of the Companies are also creditors of a number of the other Virgin Companies (presently in administration) that are also subject to the DOCG: Hughes Affidavit at [27]-[28].

17. As set out above, in the course of the administration of the Virgin Companies, the Deloitte Administrators undertook a sale process for the Business and assets of the Virgin Companies and, ultimately, entered into a binding agreement with Bain. As noted above, subject to the outcome of the second creditors' meeting of the Virgin Companies, the Administrators believe that the most expeditious and cost effective way to achieve completion of the sale is likely to be through the Deed of Company Arrangement proposal to be advanced by Bain: Hughes Affidavit at [33].

18. Importantly, if administrators are appointed to the Companies, they may be included as part of the Bain deed of company arrangement: Hughes Affidavit at [41].

C. APPOINTMENT OF ADMINISTRATORS UNDER SECTIONS 436B AND 448C AND TRUNCATATION OF THE ADMINISTRATION PROCESS

C.1 Principles

C.1.1 Appointment of a liquidator and his or her partners as administrators

19. A liquidator has the power to appoint an administrator under section 436B of the *Corporations Act 2001* (Cth) (**Corporations Act**).

20. However, where the liquidator wishes relevantly to appoint himself or herself or a partner of his or her firm as the administrator(s), then the Court's leave is required under ss 436B(2)(g) and 448C(1).

21. Because a liquidator is at liberty under s 436B(1) of the Act to appoint another person as administrator without the necessity of leave, the question of whether leave should be granted depends on the whether the person or persons seeking to be appointed are appropriate to be appointed to that office: *John R Turk & Sons (Artarmon) Pty Ltd v Newmont Television Pty Ltd* [1999] NSWSC 622 at [14]. In other words, the principal consideration for the Court is whether the liquidator (or other proposed appointee) is an appropriate person to act as the company's administrator: *Re Cobar Mines Pty Ltd (rec & mgr apptd) (in liq)* (1998) 30 ACSR 125; *Re Nardell Coal Corporation Pty Ltd (rec and mgrs apptd) (in liq)* (2003) 47 ACSR 122.

22. The Court is not unduly constrained in the way it exercises the discretion conferred by s 436B(2): *Taylor, in the matter of Origin Internet Solutions Pty Ltd (in liquidation)* [2004] FCA 382 at [6]; *C.A.R.E. Employment and Training Services Pty Ltd, in the matter of C.A.R.E. Employment and Training Services Pty Ltd* [2020] FCA 374 at [6].

23. In *C.A.R.E. Employment*, McKerracher J noted that:

> [7] In *Origin Internet*, Finkelstein J assessed whether a liquidator was an 'appropriate person' having regard to two factors:
>
> (a) The first was to ask whether there was a conflict of duty or interest if the liquidator were appointed as administrator.
>
> (b) The second was to consider how much work the liquidator had undertaken in connection with the liquidation.
>
> [8] Having found that there was no conflict and that the liquidator had undertaken considerable work, his Honour granted the liquidator leave under s 436B(2) of the Act to appoint himself as an administrator, noting that this would save considerable time, trouble and expense in the administration, thereby benefitting all those affected in the administration.

24. In assessing these matters, it is necessary to consider whether there is any matter such as a conflict of interest, a threat to independence, or anything else offensive to commercial morality in such an appointment: *Palmer and Collis and Terraplanet Limited*

(in liquidation), in the matter of Terraplanet Limited (in liquidation) [2007] FCA 92 at [22]; *Schwarz, in the matter of Gordon Smith Marketing Pty Ltd (Administrator Appointed)* [2016] FCA 1378 at [11]. The test is not a high one: *Cobar Mines* (above) at 126.

25. Relevant considerations include the proposed appointees' familiarity with the business and affairs of the subject companies; the likely reduction in duplication and associated costs where a liquidator is appointed as administrator including where considerable work has already been undertaken; and where continuity of appointees is desirable having regard to ongoing negotiations and/or complex arrangements: *Re Equiticorp Australia Ltd (in liq)* [2020] NSWSC 143 at [23].

26. Provided there is no potential for conflict, where considerable work has already been undertaken, it would be in the interests of creditors to grant leave as it would save considerable time, trouble and expense in the administration: *Origin Internet* at [7]; *Re Delsana Holdings Pty Ltd (in liq)* [2013] FCA 500 at [4]; *Australian Securities and Investments Commission v Diploma Group Limited (No 5)* [2017] FCA 1147 at [58].

C.1.2 Truncation of the administration process

27. Where an administrator is appointed to a company that is already in liquidation, it is commonplace for orders to be made under s 447A of the Corporations Act truncating the administration process, for example:

    (a) to dispense with the first meeting of creditors;

    (b) to dispense with the requirement for a report as to affairs or a report on the company's business, property, affairs and financial circumstances; and

    (c) to permit the second meeting to be held at any time during the convening period,

    see *Peter Ngan re JKB Constructions Pty Ltd* [2006] NSWSC 1040 at [7]; *Re Destra Corporation Limited (Rec & Man Apptd) (in liq)* [2009] FCA 1199 at [5], [24]-[26]; *Re Actively Zoned Pty Ltd (in liq)* [2012] FCA 605; *Diploma Group* (above) at [65]; *Re Equiticorp* (above) at [32]-[40].

28. The rationale for these orders is that it would be:

    (a) superfluous and wasteful to convene the first meeting of creditors and to require the directors to provide reports about the company, given that creditors are aware of the companies' circumstances; and / or

(b) too restrictive to require the second meeting of creditors to be convened on a particular date when the rationale for the appointment of the administrators is to give effect to a proposed restructure,

see *Destra Corporation* (above); *Re Corrimal Leagues Club Ltd (in liq)* [2013] FCA 697 at [26]; *C.A.R.E. Employment* (above) at [20].

29. Finally, the Court has the power under s 482(1) of the Corporations Act to stay the winding up on the appointment of administrators. That may be appropriate where it is designed to facilitate the proposed restructuring transactions and finalise the external administrations (rather than restore the company to ordinary trading operations): *Re Equiticorp* (above) at [53].

C.2 Orders should be made granting leave to appoint the Proposed Administrators and truncating the administrations

C.2.1 Leave to appoint the Deloitte Administrators

30. The members' voluntary winding up of each of the Companies cannot continue given the liabilities of the Companies that have now been identified, with the consequence that the Companies are insolvent.

31. In those circumstances, s 496 of the Corporations Act provides a number of possibilities to the Liquidator, including: calling a meeting of creditors to convert the members' voluntary winding up to a creditors voluntary winding up; applying to the Court to have the Companies wound up in insolvency; or to seek the appointment of administrators.

32. Because of the existing administrations of the other companies in the Virgin Group, and the deed of company arrangement that is to be proposed as the mechanism to complete the Bain Transaction, Mr Hughes proposes to appoint himself and each of the other Deloitte Administrators as the Proposed Administrators of the Companies.

33. In circumstances where the creditors of the Companies are also creditors of a number of the other Virgin Companies (presently in administration), that course will assist in the overall restructure of each of the companies in the Virgin Group. That is consistent with the Court's desire to see that there is some point in the move from winding up to voluntary administration: see *Rupert Co Ltd v Chameleon Mining NL* [2005] NSWSC 719

at [5]; *Corrimal Leagues Club* (above) at [17]. Further, given that each of the Companies has no assets, that course is plainly of benefit to the Companies' creditors.

34. The four Deloitte Administrators are plainly appropriate and experienced persons to act as the Companies' administrators and there are obvious advantages in seeking to appoint them as the Proposed Administrators. That is because they have been intimately involved in the administrations of the Virgin Companies, including: developing an understanding of the assets, liabilities and creditors of the Virgin Companies (which overlap to some degree with the creditors of the Companies); undertaking the sale process culminating in the Bain Transaction; and preparing the proposed report to creditors in advance of the second meetings of creditors: Hughes Affidavit at [39].

35. Further, in light of the inter-connectedness of the companies in the Virgin Group that are in external administration (for example, because of the DOCG), there is every reason to have common administrators for the each of those companies. As Lehane J noted in *Re Chilia Properties Pty Ltd* (1997) 73 FCR 171 at 173 (in a slightly different context, but in remarks that are nevertheless apposite to the current circumstances):

> Section 448C quite plainly contemplates that a person who is a liquidator of a creditor of a company may nevertheless be appointed as administrator of the debtor company […] and it is well established that in the absence of any real, as opposed to theoretical, conflict of interest it is generally desirable that the external administration of a group of companies should be placed in the hands of one administrator.

36. There is no other conflict of interest, threat to independence, or anything else offensive to commercial morality in making such an appointment.

37. Finally, in *Parkes Leagues Club Co-Op Limited* [2004] NSWSC 16 at [5], Hamilton J cited the desirability of continuity of those in charge of the management of the company and the implementation of a DOCA proposal as a reason why a liquidator should generally be given leave to appoint himself as administrator, unless there is some distinct reason as to why that person should not be deemed a suitable person in the circumstances. Those conclusions apply in the present case.

C.2.2 Truncation orders

38. As to the proposed orders dispensing with the requirement to hold the first meetings of creditors:

    (a) the (contingent) creditors of the Companies are also creditors of at least some of the other Virgin Companies presently in administration; thus, the creditors have been provided with notice of the affairs of the Virgin Group and the process of the external administration (including by the issuing of various reports by the administrators) and have had an opportunity to attend the concurrent first meeting of creditors for the Virgin Companies: Hughes Affidavit at [44(a)];

    (b) further, the affairs and future of the Virgin Group (including the Companies) will be identified in detail in the proposed report to creditors in advance of the second meetings; and

    (c) accordingly, there is no reason to require the Proposed Administrators to incur the expense of convening and holding the first meeting of creditors.

39. As to the proposed orders dispensing with the requirement of the directors to provide a report as to the Companies' affairs:

    (a) a single report on company activities and property (**ROCAP**) of the companies that are the subject of the DOCG has already been prepared by the directors of those companies and provided to the Deloitte Administrators in accordance with the Court's prior orders (see *Strawbridge, in the matter of Virgin Australia Holdings Ltd (Administrators Appointed) (No 2)* (2020) 144 ACSR 347; [2020] FCA 717 at [167]-[175]): Hughes Affidavit at [44(b)(i)-(ii)]; Exhibit RJH-1 at Tab 24; and

    (b) the ROCAP adequately reflects the position of each of the Companies' business, property, affairs and financial circumstances, such that a further ROCAP would not be of any assistance in the administration or liquidation of the Companies: Hughes Affidavit at [44(b)(iii)].

40. As to the proposed orders permitting the second meetings of creditors to be held at any time during the convening period, that is plainly necessary to permit the second meetings to be held concurrently with the second meetings of the Virgin Companies: Hughes Affidavit at [44(c)]. This will be of obvious benefit in permitting the future of

the Virgin Group to be decided by creditors of all of the relevant companies in administration at a single occasion.

41. As to the proposed orders staying the windings up:

    (a) there is presently a proposed restructure of the entire Virgin Group (including the Companies) as part of the Bain Transaction;

    (b) a continuation of the liquidations while that occurs would be duplicative and wasteful; and

    (c) the windings up are not terminated at this point, such that the Court retains the discretion to consider (at a later point) whether it is in the creditors' interests that that occur.

42. Finally, the creditors of each of the Companies and the Australian Securities and Investments Commission have been served with the application: Affidavit of Kassandra Suzann Adams sworn on 28 July 2020. 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

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

28 July 2020

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