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IN THE MATTER OF VIRGIN AUSTRALIA HOLDINGS LIMITED (ADMINISTRATORS APPOINTED) ACN 100 686 226 & ORS

FEDERAL COURT OF AUSTRALIA PROCEEDINGS NSD464/2020

Submissions of Broad Peak Investment Advisers Pte Ltd and Tor Investment Management (Hong Kong) Ltd in support of the Interlocutory Application filed 11 August 2020

A. INTRODUCTION

1. By Interlocutory Application filed in Court on 11 August 2020, Broad Peak Investments Advisers Pte Ltd and Tor Investment Management (Hong Kong) Ltd (the **Applicants**) seek orders under to s 447A of the *Corporations Act 2001* (Cth) (**Corporations Act**) and s 90-15 of the *Insolvency Practice Schedule (Corporations)* (**IPSC**):

   (a) providing for the operation of Part 5.3A of the Corporations Act, the IPSC and Division 75 of the *Insolvency Practice Rules (Corporations) 2016* (Cth) (**IPRs**) with respect to the ballot and proxy voting procedures to be put in place for the purpose of the Second Meetings of Creditors of the Virgin Group Companies; and

   (b) appointing a facilitator for the purpose, *inter alia,* of accessing information and stakeholders required to assess the Applicants' proposed deed of company arrangement (**Bondholders' DOCA Proposal**) and preparing a report on that proposal for inclusion in the report to creditors under s 439A of the Corporations Act.

2. As this Court has already confirmed in these proceedings, there is "no doubt" that the Applicants have the ability – and, indeed, are entitled – to propose a DOCA at the second meeting of creditors: *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 5)* [2020] FCA 986 (***Strawbridge (No 5)***) at [24] (Middleton J).

3. The premise on which the Administrators proceed is that they have sold the Virgin Companies, and given the binding agreement with BC Hart Aggregator LP and BC Hart Aggregator (Australia) Pty Ltd (together, **Bain**) already in place, there is no purpose in considering the Bondholders' DOCA Proposal, or allowing creditors to consider or vote on it.

The supposed sale of the airline

4. The Administrators have a broad power of sale over the companies' business and property. That is not in question. However, they have no power to sell the shares in the companies outside of a DOCA, which requires the approval of the creditors at the second meeting. It is apparent that the Administrators have not sold the airline's business or its property, as was within their power. Instead, they have merely agreed to sell some or all of these things, in a confidential agreement.

This agreement, as conceded by the Administrators, remains on foot in an executory form. They will seek to complete that sale of the shares by way of a DOCA. If the Bondholders' DOCA Proposal is successful at the second meeting of creditors, that resolution of the creditors will be a supervening event which makes performance of the backup Bain Asset Sale Agreement illegal.

5. The Bain Agreement will have been discharged by operation of law, viz the operation of Part 5.3A of the *Corporations Act*. The Administrators will be prohibited from performing the Bain Agreement. Instead, by force of ss 444A and 444B of the Corporations Act, the Administrators and the company will be bound to execute the Bondholders' DOCA, and it is that DOCA that will bind the creditors, with no power or discretion remaining in the Administrators to act inconsistently with it.

6. This is trite law of which the Administrators do not seem to take notice or acknowledge. Instead, they deny the supremacy of the meeting of creditors to determine the fate of the company, as required by Part 5.3A: *Lehman Bros Holdings Inc v City of Swan* (2010) 240 CLR 509 (***Lehman***) at 521-522 [31]-[33]. As Gageler J said in *Mighty River International Ltd v Hughes* (2018) 265 CLR 480 (***Mighty River***) at [61]:

   > *Fundamental to the scheme of Pt 5.3A, as recognised in the plurality in Lehman Bros Holdings Inc v City of Swan is the policy of allowing creditors themselves to decide, in accordance with the majoritarian decision-making rules prescribed … in Div 75 of the Insolvency Practice Rules (Corporations) 2016 (Cth), what course of action is in their own best interests.*

7. It is the Administrators and Bain who have subjected the Bain Agreement to the will of the creditors, rather than the Administrators exercising their power of sale in the orthodox manner described in the authorities upon which they rely – namely, to agree to sell and then to complete the sale in accordance with the directions of the Court in advance of the second meeting. That is why it is not for the Applicants to approach the Court to enjoin the confidential Bain Agreement. The creditors will now decide the issue. Having invoked the process for the second meeting of creditors prescribed by Part 5.3A, the Administrators are not permitted to treat the process as a rubber stamp, through which the will of the creditors is supplanted by their own. They may properly exercise their commercial judgement to prefer one proposal over another, and they were permitted to follow the course that they have and take the risk of a competing DOCA being successful – they are not permitted to defeat the right of a creditor to submit their proposal to the will of the creditors.

8. The approach of the Administrators brings to mind the example in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 359 (Mason J) that the parties to the contract and their legal advisers had surprisingly not contemplated that performance of their contract could be impeded, in that case, by the grant of an injunction pursuant to the relevant statute. The astonishment of Mason J was expressly directed to the fact that the parties had not considered the potential intervention of statutory law, and Court orders in accordance with that law, to frustrate the bargain that they had struck. Of course, whether the Bain Agreement will be

frustrated or not by the success of the Bondholders' DOCA is a matter of the terms of the confidential agreement, and the risk allocation between the parties. Supervening illegality has always been an independent discharging factor separate from frustration, as it must be, as parties, regardless of what they have agreed, may not perform an agreement prohibited by operation of law: see the High Court of Australia cases collected in *Cheshire & Fifoot Law of Contract* (11th Australian edn) at [19.15] fn 59; and the speech for the House of Lords of the Lord Chancellor, Viscount Simond, in *Joseph Constantine Steamship Line v Imperial Smelting Corporation* [1942] AC 154 at 163.

The statutory role of the Administrators especially with respect to the second meeting

9. There is a second important issue which bears on the relief sought by the Applicants for an appointment of a facilitator. The Administrators hold a role that involves the statutory conferral of powers, duties, and discretions. In that role, particularly in the conduct of the second meeting, they are treated, in accordance with principles of administrative law, to be acting as decision-makers under statute: see, eg, *Ausino International Pty Ltd v Apex Sports Pty Ltd* (2007) 61 ACSR 532 at [16]; *Phoenix Lacquers & Paints Pty Ltd v Free Wesleyan Church of Tonga in Australia Inc* (2012) 87 ACSR 658 at 669-670 (Black J).

10. Part 5.3A of the *Corporations Act* has conferred powers on the Administrators to destroy, defeat or prejudice the rights, interests and legitimate expectations of the creditors, and therefore the administrative law rules regulate the exercise of those powers and discretions unless they are excluded by plain words, consistently with the terms and structure of the legislation.

11. The difficulty in the present case is that the Administrators have contractually bound themselves to no longer consider many matters which would be considered essential in the conduct of a second meeting. They proclaim that they have fettered the exercise of their powers and discretions, and are bound to see through the Bain Agreement regardless of what circumstances (and the statute) might otherwise require.

12. The Administrators have expressly stated that they cannot "consider" the Bondholders' DOCA proposal. Their evidence makes it clear that they are tied to the fortunes of Bain. In the true administrative law sense, they have committed to pre-judge the outcome. As explained in the body of the submissions below, they have also contracted (extraordinarily) out of other obligations, despite warnings from the Applicants that such a course would be improper.

13. The Administrators are well-entitled to make up their own minds, and express their views to creditors. The statutory scheme does not allow them to make up the minds of creditors, or to mislead them.

14. Moreover, despite the Administrators' acceptance, by their counsel, that the Applicants must be given sufficient information to allow them to put the Bondholders' DOCA Proposal before the second meeting of creditors (see the Affidavit of Cameron John Cheetham affirmed 11 August

2020 (**First Cheetham Affidavit**) at [21]), the Administrators have subsequently refused to provide the Applicants with access to *any* of the information or stakeholders required to finalise the Bondholders' DOCA Proposal, and has indicated publicly that they are contractually precluded from considering that proposal: First Cheetham Affidavit at [31]; Annexure pg 153. There now appears to be a very real risk that the Administrators will be practically unable to summarise and comment upon the Bondholders' DOCA Proposal in their report to creditors in accordance with their duty of impartiality, objectivity and independence. Contractually, that seems to be the effect of their confidential agreement.

15. When the Applicants last became before the Court, Middleton J made the following important observations (at [32]):

> *It is important that proper preparation be made for the meeting of creditors in August 2020. This will obviously require the Administrators to be full and frank with the creditors, and to provide sufficient information to enable the creditors to make an informed decision on the matters for resolution at the meeting of creditors. If a creditor at the meeting needs more time or information to consider their position, this could be a reason to adjourn the meeting of creditors. If sufficient information is not provided which is material to creditors in reaching a decision on a proposed DOCA which is entered into, this could be a ground for the Court later terminating the DOCA. Neither of these scenarios is desirable.*

16. The sentiment expressed by Middleton J is precisely the basis upon which this application has been made. The relief sought does not seek to prioritise the Applicants' interests over those of other creditors, but is merely directed towards ensuring that proper procedures are followed for the fair presentation of the Bondholders' DOCA Proposal to the second meeting of creditors so that creditors are given a proper and informed choice as to the future of the Virgin Companies, and the outcome of the second meeting is not liable to impeachment.

The primary issue before the Court

17. In many respects, there is a great deal of debate on the evidence that need not be resolved by this Court at this point in time.

18. There is an inherent contradiction in the approach of the Administrators. If they are correct in their novel proposition that there is no legal or practical significance in the creditors accepting the Bondholders' DOCA Proposal, then there is no prejudice to the Administrators or Bain in allowing a fair and transparent democratic vote to proceed.

19. On the Administrators' case whether the Bondholders' DOCA Proposal succeeds or not makes no difference. The Administrators' cannot contractually countenance the possibility of the Bondholders' DOCA Proposal failing or succeeding on its own merits, even though their evidence posits a position where they claim to have nothing to fear on the merits.

20. If, however, the Court accedes to the Administrators' request to create novel law by preventing the Applicants from exercising their right to put a DOCA proposal, which, must here happen

through the electoral system which has been devised for the meeting, then if that approach is ultimately found to have been in error, then the consequences for the Applicants, the creditors and the companies will be very severe indeed. In circumstances where the Bondholders' DOCA Proposal provides for the indemnification of the interim funding provided by Bain, there is no risk of relevant prejudice if the voting was to proceed with the Bondholders' DOCA Proposal.

21. It is of particular concern in the present matter that the usual modes of creditors' addressing their rights are not available. Due to the voting scheme necessitated by the matter and COVID-19, there is no way to practically deal with the late notification of the return to creditors expected under the confidential Bain Agreement. Voting will have already commenced, and procedurally it will be highly impractical if not impossible to put forward an alternative DOCA by vote or adjourn the proceedings. Even if an alternative course was presented, the Administrators have fettered their discretion and are bound, regardless of the quality of the offer, to adjourn the meeting because of the Bain Agreement.

22. The only safe course, especially in the absence of any authority or precedent in support of the Administrators' position, is to allow the vote to proceed and the Applicants to have the benefit of the Facilitator. It is a necessary, but perhaps not sufficient course to ameliorate the prejudice of the position taken by the Administrators. The Administrators seem to have, on their own case, repeatedly informed the creditors that any vote for the Bondholders DOCA Proposal would be ineffectual, thereby prejudicing the vote. For present purposes, the democratic process mandated by Pt 5.3A and the decisions of the High Court should proceed as fairly and transparently as is now possible.

B. BACKGROUND

23. The factual background to this application is well understood by the parties and is canvassed in the First Cheetham Affidavit. There are two particular events of relevance to this application which should, however, be highlighted.

24. *First*, since the matter was last before the Court, the Applicants have developed their proposed alternative DOCA which they seek to put to the second meeting of creditors: First Cheetham Affidavit at [12]. The Bondholders' DOCA Proposal anticipates a superior return to unsecured creditors (of between 38 and 67 cents in the dollar), while honouring employee entitlements, flight credits and loyalty program obligations in full, allowing all creditors to participate in the recapitalisation of the airline via a convertible note to be fully underwritten by the Applicants and facilitates the realisation of creditors' debts through the sale of their shares through a book built placement: First Cheetham Affidavit at [13].

25. Moreover, significant support has been expressed for the Bondholders' DOCA Proposal by other noteholders as well as aircraft lessors: First Cheetham Affidavit at [14]-[16].

26. Although the Bondholders' DOCA Proposal was provided to the Administrators on 20 July 2020 (First Cheetham Affidavit at [26]), the Administrators have consistently refused to provide any information or assistance to the Applicants (First Cheetham Affidavit at [22]), despite the apparent acceptance at the hearing of the Bondholders' first application on 10 July 2020 that sufficient information would need to be given to the Applicants to "know what options are available on the table": First Cheetham Affidavit at [21]. Moreover, the Administrators have maintained that the Bondholders DOCA Proposal cannot be considered by the Administrators, nor recommended to creditors, given the binding agreement with BC Hart Aggregator LP and BC Hart Aggregator (Australia) Pty Ltd (together, **Bain**) already in place: First Cheetham Affidavit at [31].

27. *Second,* on 7 August 2020, the Applicants' solicitors were served with the Administrators' Application: First Cheetham Affidavit at [7]. By that application and the accompanying affidavit of David Michael Orr sworn 6 August 2020 (**Orr Affidavit**), the Applicants came to learn that the Administrators proposed to conduct the voting on resolutions put at the second meeting of creditors via Deloitte's Halo Platform. Amongst the various proposed variations to the conventional process set out in the IPRs, proposals of particular note included:

    (a) resolutions would be put to creditors through the Halo Platform as "voting events" on which creditors could vote from the time that the voting event is created (which will be in advance of the second meeting) until the voting event closes, which may be during the meeting: Orr Affidavit at [18] and [22]; and

    (b) once a creditor casts their vote, they cannot amend that vote except by request to the Administrators: Orr Affidavit at [20].

28. In the context of that proposed course, the Applicants hold a genuine and well- founded concerns that the Bondholder's DOCA Proposal will not be included in the ballot papers uploaded to the Halo Platform, the proposed voting procedures will undermine the conventional safeguards which ensure that creditors are fully informed of the various options available before casting their votes, and that the report disseminated by the Administrators under s 439A of the Corporations Act will not fairly, independently or objectively consider the Bondholders' DOCA Proposal: First Cheetham Affidavit at [32]. Mr Strawbridge confirms as much in affidavits sworn 14 August 2020.

29. In addition to the First Cheetham Affidavit, the Applicants rely upon two further affidavits in support of its Interlocutory Application, being the Affidavit of Sandeep Gupta affirmed 15 August 2020 (**Gupta Affidavit**) and the Affidavit of Willie Wong affirmed 15 August 2020 (**Wong Affidavit**).

30. In summary, Mr Gupta and Mr Wong attest to the following factual matters:

    (a) *First*, and in contradistinction to Mr Strawbridge's opinion as to the Applicants' inadequate financial capacity to support the Bondholders' DOCA Proposal, the Applicants have the finances available to commit to the proposed $800 million recapitalisation. Namely:

(i) Broad Peak would not need to liquidate any of its assets in the BP II Fund to support the recapitalisation, and the BP Credit Fund has more than sufficient undrawn committed capital to fund Broad Peak's commitment to the interim funding and recapitalisation components of the proposal to the value of $400 million: Gupta Affidavit at [20]; and

(ii) Tor has sufficient liquid assets on hand to fund a $400 million - $500 million contribution to the recapitalisation proposal: Wong Affidavit at [16].

(b) *Second*, the Applicants' engagement with the Administrators, from the outset, was predicated upon the Applicants preparing a proposal for a recapitalisation of the Virgin Companies, to be effected by way of a DOCA, rather than by participating in the Administrators' sale process: see, eg, Gupta Affidavit at [33], [36], [72]-[73].

(c) *Third*, the Applicants' attempts to develop the Bondholders' DOCA Proposal were substantially hampered by insufficient access to due diligence materials, strictly time-limited meetings with specific individuals from the Virgin Companies' management, and a persistent refusal to permit the Applicants to have access to key stakeholders. Indeed, the current conditionality of the Bondholders' DOCA Proposal is attributable *solely* to the fact that the Administrators had refused to provide the Applicants with the information and stakeholder access required to enable the Applicants to present an unconditional DOCA: Gupta Affidavit at [52], and in this regard a distinction can be made between the access provided to the Bondholders (wish to put a DOCA to protect their existing investment) and the access afforded to Bain (Affidavit of Mark Clifton sworn 15 August 2020 (**Clifton Affidavit**) at [28]); and

(d) *Fourth,* despite the Administrators' approach and attitude to the Applicants throughout the process, significant time and resources have been committed by both Broad Peak and Tor to the development of their proposal, including by engaging senior investment professionals, external professional advisers and solicitors, as well as by leveraging the knowledge acquired through the Applicants' significant pre-investment due diligence associated with its acquisition of approximately $300 million of notes issued in 2019: Gupta Affidavit at [59]-[60].

C. BALLOT AND PROXY VOTING

31. Prayer for relief 3 in the Applicants' Interlocutory Application proposes a process and timetable for:

(a) the notification of competing DOCA proposals to the Administrators;

(b) the publication of competing DOCA proposals, along with explanatory or supporting materials, ahead of any vote or debate upon those proposals;

(c) the debate and discussion amongst creditors of the competing proposals, such as through question and answer sessions or like activities; and

(d) the inclusion of all DOCA proposals on the ballot papers by which creditors will cast their votes.

32. It is important at the outset to understand the context in which that relief is sought. For the first time in these proceedings, the Administrators have disclosed the contractual mechanisms upon which the Sale and Implementation Deed executed with Bain (**Bain SID**) will operate and which have inhibited the stakeholder engagement and access to information required to finalise a non-conditional Bondholders' DOCA Proposal. Importantly, it is apparent that the Administrators' intention is that:

(a) the Bain SID comprises primarily a sale of the assets of the Virgin Companies to Bain, either by way of a DOCA or an asset sale agreement (**ASA**), with the DOCA and ASA being effectively "different pathways to completion of a binding transaction the terms of which have already been agreed": Affidavit of Vaughan Neil Strawbridge sworn 14 August 2020 (**Strawbridge Affidavit**) at [40]-[41];

(b) by reason of the Adjournment Obligation in the Bain SID, it would not in practice be possible for any alternative proposal to be approved by the creditors at the second meetings because, if the Bain DOCA is not approved, the Administrators will be contractually bound to adjourn the second meetings to facilitate a sale by way of the ASA: Strawbridge Affidavit at [54];

(c) the Bondholders' DOCA Proposal could never be implemented as the "assets" of the Virgin Companies which would form part of the estate to be dealt with under that DOCA have already been sold to Bain and are no longer capable of being managed under the DOCA: Strawbridge Affidavit at [56]; and

(d) the Administrators are contractually precluded from giving any consideration to the Bondholders' DOCA Proposal: Strawbridge Affidavit at [60].

33. Irrespective of what Mr Strawbridge may say regarding the contractually binding effect of the Bain SID, the obligations that the Administrators have assumed under that agreement or their exercise of the power of sale, the fact remains that, until the second meeting is convened and creditors vote on their preferred course for the companies, the future of the Virgin Companies post-administration is yet to be determined. By entering into voluntary administration, the Virgin Companies subjected themselves to a regime in which supremacy is to be accorded to the judgment and will of the creditors. As the High Court observed of the Part 5.3A regime in *Lehman* (at [31]):

> *The point to be made about the provisions of the Act and the Regulations regarding creditors' meetings is that they provide that effect is to be given to the will of the*

requisite majority of creditors who vote at the relevant meeting. The provisions may be understood as proceeding from two related premises. First, judgment about what is to happen to the subject company, and, in particular, the judgment about the commercial worth of any proposal for a deed of company arrangement, is committed to the body of all creditors. Secondly, for the making of that decision, it is neither necessary nor appropriate to divide creditors into separate classes. The only substantial qualifications to the generality of these propositions are provided by the conferral on the Court of powers under ss 445D and 600A.

34. Inherent in that proposition is recognition of the fact that, while the Administrators plainly have a discretion as to the way in which the administration is to be conducted, that discretion must always be exercised in a fashion which does not inhibit, truncate or exclude the will of the creditors. It is for that reason that Administrators are subject, for instance, to a duty of independence and impartiality in preparing their report and in making recommendations to creditors (*Molit (No 55) Pty Ltd v Lam Soon Australia Pty Ltd (admin apptd)* (1996) 19 ACSR 160 at 174; *Deputy Commissioner of Taxation v Portinex Pty Ltd* (2000) 34 ACSR 391 at [105] (Austin J)), as it is the Administrators upon whom the creditors rely in informing themselves as to the appropriate choice to make in voting on the course to be adopted for the future of the company.

35. That statement of principle is fortified by the Court's approach to exclusivity clauses in the context of schemes of arrangement. For instance, in *Re Verdant Minerals Ltd* [2019] FCA 556, Moshinsky J identified the following general principles (at [50]) upon which the permissibility of such clauses was to be assessed:

(a) the exclusivity period should be a reasonable period capable of precise ascertainment;

(b) there should be fiduciary carve outs in respect of no-talk and no due diligence arrangements;

(c) the exclusivity arrangements and their effect should be adequately disclosed in the scheme booklet; and

(d) it is desirable that the scheme proponents tender evidence directed to showing that the exclusivity provisions are the result of a normal commercial negotiation.

36. In the context of the Bain SID, cl 3.3 would fall outside the permissible limits of any exclusivity clause by reason of the lack of any fiduciary carve-outs. Such a clause would prevent the approval of a scheme of arrangement (*Re Little World Beverages Ltd* [2012] FCA 1057 at [19]) or give rise to a declaration of unacceptable circumstances (see *Takeovers Panel Guidance Note 7 – Lock Up Devices*). The secrecy attached to cl 3.3 is a further factor that would tend against the permissibility of the arrangements in this particular case. The Administrators themselves recognised the need for a fiduciary carve out in their draft documents (see Exhibit MRC-1 at 73, where the Administrators' proposed version of clause 3.3. is evident).

37. The policy reasons behind the impermissibility of such arrangements are obvious. Exclusivity arrangements have the practical effect of forcing creditors or shareholders to take what they are

given to the exclusion of any better alternatives. The evidence shows that Bain knew and intended that the exclusivity clause would operate in that way so as to allow them to force creditors to agree to new terms and support the Bain DOCA in the absence of any alternative (Clifton Affidavit at [28] – [33], Affidavit of Cameron John Cheetham affirmed 16 August 2020 (**Second Cheetham Affidavit**) at [10]). To the extent that this Court, rather than the Takeovers Panel, has primary carriage of the matter, it is a factor relevant to the question of whether a facilitator should be appointed so as to avoid a continuing contravention of Chapter 6 of the Corporations Act or conduct inconsistent with the objects of Part 5.3A (addressed further below).

38. There is no reason in principle why the same considerations would not apply in the context of an administration and a purported exercise of the power of sale. The reasons of the High Court in *Lehman* (at [31]-[32]) and *Mighty River* (at [36]) indicate that the common premises of a scheme of arrangement and a DOCA provide that the valid operation of the former provides an appropriate comparator for the latter. The consequence of such analysis must be that, whatever the obligations assumed by the Administrators under the Bain SID, those obligations cannot have the effect of preventing the Administrators from considering an economically superior proposal or dealing with alternative proposals in a manner consistent with their ordinary duties, including the duties that they owe to the Virgin Companies themselves. Such conduct would be contrary to the purpose for which the Administrators' powers are conferred by the Corporations Act.

39. Accordingly, one must distinguish this application – being one which is ultimately concerned with the proper procedure to protect and promote the creditors' rights to choose between competing DOCA proposals – from one in which a disgruntled underbidder in a sale process has sought to challenge an asset sale to a competing bidder, being the characterisation which the Administrators have consistently sought to attribute to the Applicants' approaches to the Court. Irrespective of the contention that the Administrators have exercised their power of sale, the fact remains that no sale could proceed upon the adoption of a DOCA by the body of creditors, which the Administrators would be duty-bound to execute: Corporations Act, s 444B(5); *Mighty River International Ltd v Hughes* (2017) 52 WAR 1 at [191] (Buss P) (not disturbed on appeal: *Mighty River International Ltd v Hughes (as deed administrators of Mesa Minerals Ltd)* (2018) 265 CLR 480).

40. Against that framework, the starting point must be a recognition of the fact that the legislative regime for the conduct of the second meeting of creditors prescribes a range of procedural requirements designed to safeguard the interests of the creditors. For instance, pursuant to the IPRs, attendees at the meeting must be permitted to propose any relevant resolutions (r 75-70(1), (2)(b)), reasonable time to debate proposed resolutions or amendments to those resolutions must be allowed (r 75-70(4)), and those resolutions must be put to a vote at the meeting (r 75-70(5)). It is similarly incumbent upon the Administrators to include with the notice of the meeting the details of any proposed DOCA (r 75-225(3)(vii)). Although the Court can make such orders as it thinks fit in relation to the conduct of the administration under IPSC, r 90-15(1) or to modify the operation of Part 5.3A under 447A – including with respect to the conduct of meetings (see, eg,

Eagle, Re Techfront Australia Pty Ltd (admins apptd) [2020] FCA 542) – that power is to be exercised having regard to the objects of Part 5.3A as set out in s 435A and in the interest of the company's creditors as a whole: *Secatore, Re Fletcher Jones and Staff Pty Ltd (admins apptd)* [2011] FCA 1493 at [19], [24] (Gordon J); *Re Mentha* (2010) 82 ACSR 142 at [30] (Gilmour J).

41. Any procedure which would result in the Bondholders' DOCA Proposal being excluded from the resolutions put to the Virgin Companies' creditors or which practically impeded the ability of creditors properly to consider and vote on that competing proposal would be antithetical to the purpose of Part 5.3A in rendering an outcome which is in the best interests of creditors as a whole, including seeking a better return for creditors – an expressed object of the Part. Indeed, the significant support that the Applicants have received from more than 60 bondholder creditors, including major financial institutions, as well as a number of aircraft lessors (First Cheetham Affidavit at [14]-[16]) demonstrates that a large minority of the companies' creditors hold real and substantial views as to the potentially better outcome that might be rendered by the Bondholders' DOCA Proposal. The fact that that their proposal is obviously calculated to improve the return to bondholders *vis-à-vis* the proposed Bain DOCA or asset sale is no answer to the proposition that the contemplated modifications would deprive the entire body of creditors of the opportunity to consider competing alternatives which envisage differing avenues for the future viability of the Virgin Companies.

42. The importance of Court intervention at this critical juncture in the administration to ensure that the second meetings are convened fairly cannot be underestimated. As was acknowledged at the first return of this application on 11 August 2020, irregularity or injustice in the way in which any DOCA is adopted at the second meeting leaves open the prospect of impeachment or termination upon the application of any creditor under s 445D of the Corporations Act, not least because the DOCA is oppressive, unfairly discriminatory or prejudicial to creditors or is otherwise infected by unfairness and injustice so as to warrant termination.

43. The course proposed by the Administrators – without the modifications proposed by the Applicants – raises serious questions as to the potential impeachment of the Bain DOCA or alternative asset sale under the ASA. For instance, notwithstanding that the Administrators purport to be contractually bound not to consider the Bondholders' DOCA Proposal, it is incumbent upon them to include matters in their report to creditors which may reasonably be expected to be material to the creditors' decision at the second meeting. The existence of a competing DOCA and its potential consequences for creditors and the future of the companies is self-evidently a matter of central importance to a creditor's decision whether to adopt the Bain DOCA or to pursue a course which resulted in an asset sale. Its exclusion from the materials provided to creditors would plainly be a matter of significant concern and a potential basis to terminate the DOCA under s 445D(1)(c).

44. Similarly, and potentially of greater concern, the fact that the Administrators have entered into a contractual arrangement by which they seek to ensure that the outcome of the second meeting is, in essence, a foregone conclusion reveals that the second meetings will, in practice, be

perfunctory redundancies where the will of the creditors will be subordinated to that of the Administrators. Indeed, the contractual obligations detailed in the Strawbridge Affidavit and the Confidential Affidavits of Mr Strawbridge confirm that:

(a) despite the statutory entitlement of every creditor to put an alternative DOCA proposal to the body of creditors, the Administrators have adopted a course whereby they are not permitted to include any alternative proposal on the ballot, nor would they seek to do so out of fear that their preferred outcome would not be chosen by the majority of creditors: Strawbridge Affidavit at [62]; and

(b) even if the creditors were able practically to put before the second meetings an alternative DOCA proposal, the Administrators nonetheless intend to convene the meetings in such a way that only the Bain DOCA may be put to creditors, with a decision not to adopt the Bain DOCA resulting in an adjournment of the meeting, rather than an alternative proposal being put: Strawbridge Affidavit at [57].

45. Such circumstances inherently undermine the very process by which the outcome of the Administration is to be procured and exposes the Bain DOCA (if adopted) or any alternative asset sale under the ASA to challenge: *Deputy Commissioner of Taxation v Portinex Pty Ltd* (2000) 34 ACSR 391 at [105] (Austin J).

46. In *McKerlie v Drillsearch Energy Ltd* (2009) 74 NSWLR 673, Barrett J held that a chairperson of a meeting of company directors who agrees to exercise their discretion in a particular way is committing a fraud on the power by using it in a manner contrary to the purpose for which the power is conferred (citing *Lancedale Holdings Pty Ltd v Heath Group Australia Pty Ltd* [1999] NSWSC 609). At [31], Barrett J observed:

> *One aspect of the requirements of good faith and proper purpose is that a decision whether and, if so, how the power should be exercised can only be made upon adequate assessment of the relevant facts as they exist at the time of exercise. An advance agreement or commitment cannot properly be made as to how the power will be exercised at some future time. If the requirements of good faith and proper purpose are not observed, the purported exercise of the power is void. Likewise, any advance agreement or commitment as to the manner of exercise is void.*

47. In *Clarke v Australian Computer Society Incorporated* [2019] FCA 2175 at [183], Wigney J said:

> *The purposes for which the powers are conferred on the meeting chair include the facilitation of debate in relation to the business properly before the meeting: Ryde Ex-Services at [107]; Byng v London Life at 188H. That is because the members who attend a meeting are not only entitled to vote, but are also entitled to hear and be heard in the debate. In that context, it has been said that a chair must "make sure that those who wish to speak at the meeting are given a fair opportunity to do so": Adams International at 283E-F. In Re Direct Acceptance Corporation Ltd [1987] Vic RP 41, 5 ACLC 1037 McLelland J said (at 1,041-1,042):*

> *This was a meeting at which members by themselves their proxies or representatives had a right to attend and in which they had a right to participate, for the purpose of dealing with the proposed resolution which would potentially affect their legal rights. The chairman of such a meeting should not terminate debate on a substantive resolution over objection, unless he is satisfied that there has been a reasonable opportunity for the arguments on each side of the question to be put. The chairman is not bound to accept a motion for the closure of debate unless he is so satisfied. It does not matter that a majority at the meeting may wish to act in a particular way regardless of what might be said by the minority: the latter are nevertheless entitled to a reasonable opportunity to have their points of view ventilated*

48. The foregoing demonstrates that the contractual obligations to which the Administrators have bound themselves necessitate the exercise of their statutory functions in a fashion which is inherently incompatible with – and indeed potentially in breach of – their duties under Part 5.3A, as well as the very purpose of that regime. Putting to one side what the Administrators may say about the superiority or otherwise of the Bondholders' DOCA Proposal to the Bain SID, the consequence of the Administrators' conduct upon an alternative proposal which, if considered, might be considered objectively superior, reveals the fundamentally impermissible effect of the Administrators' contractual obligations. In such a circumstance, the Administrators would be bound to refuse to assist in the finalisation of such a proposal through the facilitation of due diligence or access to stakeholders, to actively exclude any alternative proposal from the ballot or to administer the second meetings to practically prevent the alternative proposal from being put to a vote. It cannot be the case that binding oneself to an outcome which not only carries the risk of generating an inferior outcome for creditors *vis-à-vis* other alternative options, but prohibits the Administrators from assessing whether that risk may indeed arise, is consistent with the objects set out in s 435A.

49. Where the Administrators are presented with a proposed course of action that involves a possible departure from their duties, the proper course is for the Administrators to seek directions and assistance from the Court. The power to seek directions extends to whether it is proper to enter into an agreement on particular or peculiar terms, including a sale agreement (*Re Ansett Australia Ltd and Mentha* (2001) 39 ACSR 355; *Re Keystone Group Holdings* [2016] NSWSC 1604). This did not occur in this case, despite a clear warning from the Applicants' solicitors on 25 June 2020 about some of the matters now causing difficulty (see Exhibit MRC-1 at 297). Now, absent assistance and direction from the Court, the Administrators find themselves in a position where their conduct gives rise to possible grounds to set aside any DOCA presented to the second meeting of creditors.

50. The orders sought by the Applicants are calculated to avoid an outcome which may be liable to impeachment or challenge. They will facilitate:

    (a) the completion and submission of DOCA proposals in advance of voting;

(b) debate and discussion of the competing proposals prior to votes being cast, allowing sufficient information with respect to the Bondholders' DOCA Proposal in particular to be shared and any issues or concerns being sufficiently ventilated, as would typically be the case; and

(c) reporting on the Bondholders' DOCA Proposal in a fashion which is fair, impartial and objective, having regard to the Administrators' statutory duties in this regard.

51. Mr Strawbridge raises a series of justifications for opposing the procedures proposed by the Applicants. Those reasons include:

(a) Mr Strawbridge's opinion that the Bondholders' DOCA Proposal "lacked detail" and has "always been highly conditional": Strawbridge Affidavit at [59];

(b) Mr Strawbridge's concerns as to the viability of the Bondholders' DOCA Proposal, which justifies an exercise of discretion to exclude that proposal from being put to a vote: Strawbridge Affidavit at [60], [63];

(c) the allegedly misleading effect of inclusion of the Bondholders' DOCA Proposal on the ballot, which is said to convey to creditors the false belief that the proposal is viable: Strawbridge Affidavit at [64]; and

(d) the confusion that would be caused by suggesting that the Bain SID is not binding or is liable to being unwound: Strawbridge Affidavit at [65].

52. Each of those justifications for the Administrators' stance cannot be accepted.

53. *First*, the conditionality and asserted lack of detail in the Bondholders' DOCA Proposal is a direct consequence of the contractual conditions of the Bain SID which preclude access by the Bondholders to the stakeholders and information to which Bain has had access in developing the ASA and its own DOCA. As Mr Gupta explains (at [34]-[35] of the Gupta Affidavit), despite having signed the confidentiality agreement required to give the Applicants access to the data room, the Applicants were not granted access to 28 May 2020, and even then the contents of the data room were manifestly insufficient to allow proper due diligence to be conducted, with only nine documents being made available. Moreover, notwithstanding repeated and persistent requests by the Applicants for access to the full data room, the Administrators refused to grant such access: Gupta Affidavit at [37]. Similar requests for permission to speak with key stakeholders were similarly refused, with the Administrators citing the risk of shortlisted bidders walking away from the transaction as the reason for that position: Gupta Affidavit at [41]. Bootstrapping the legitimacy of the Administrators' assessment of the Bondholders' DOCA Proposal by reference to issues which are the direct consequence of the Administrators' own conduct reflects the inherent injustice and oppressiveness of the outcome sought to be achieved through the Bain SID.

54. *Second*, Mr Strawbridge's view of the Bondholders' DOCA Proposal as liable to exposing the Virgin Companies to the risk of failure and in turn liquidation is questionable. It is difficult to accept that such a view may be genuinely held in circumstances where Mr Strawbridge maintains that he is contractually precluded from considering the proposal. However, in any case, that view is premised upon considerations which are irrelevant to the viability of the DOCA or opinions formed on dubious grounds. Namely:

(a) whether the Applicants "have authority to speak for or represent" noteholders (Strawbridge Affidavit at [60(a)]) or whether it is "commercially unrealistic" that they do not seek to control the Virgin Companies (Strawbridge Affidavit at [60(c)]) says nothing about the viability of the Bondholders' DOCA Proposal. Such opinions are immaterial to the merits of the proposal;

(b) ample evidence as to the financial capacity of the Applicants to support and fund the business under the Bondholders' DOCA Proposal was supplied to the Administrators, as acknowledged by Mr Strawbridge in the Strawbridge Affidavit (at [60(b)]). The criticisms of that information detailed in the Confidential Strawbridge Affidavits have never been ventilated to the Applicants: Gupta Affidavit at [13]-[15]. Indeed, the Administrators have chosen to remain in a state of uncertainty as to these matters rather than engaging with the Applicants to satisfy themselves of the accuracy of their concerns. In any case, the evidence of Mr Gupta provides more than adequate comfort to the Court that the Applicants can finance the Bondholders' DOCA Proposal; and

(c) the allegedly speculative nature of the forecasted returns to creditors (Strawbridge Affidavit at [60(d)] has similarly never been conveyed to the Applicants, and is any case reliant upon generic statements as to Mr Strawbridge's "uncertainty" as to the assumptions and valuation methodologies relied upon by the Applicants to model such a return. In the absence of any inquiries being made by the Administrators of the Applicants, those opinions remain as nothing more than unsubstantiated and unexplored uncertainties which may have been capable of resolution had the Administrators not chosen to disregard the Bondholders' DOCA Proposal without granting the Applicants such an opportunity to respond to those uncertainties. Moreover, the evidence of Mr Gupta confirms that Mr Strawbridge's understanding of the valuation methodology employed by the Applicants is fundamentally misconceived, as he fails to appreciate that the Applicants' forecasted recovery to unsecured creditors was determined based on the estimated value of the business at the end of the administration process, rather than value in FY22, being an approach consistent with valuations of all listed airlines: Gupta Affidavit at [75].

55. *Third*, to suggest that inclusion of the Bondholders' DOCA Proposal on the ballot would communicate the (false) impression that the proposal is viable is to ignore the role that the Administrators' report to creditors is intended to play. Putting to one side the veracity of that opinion – which the Applicants do not concede is a fair, accurate or impartial evaluation of the Bondholders' DOCA Proposal – were it truly the Administrators' rational and independent

assessment that the proposal did expose the Virgin Companies to a significant risk of future failure, there is no reason why an expression of opinion to that effect could not be included in the Administrators' report. This reason supplies no justification for an exercise of discretion to deprive creditors of the right to choose and evaluate the proposal for themselves: see (in the context of schemes of arrangement) *Re NRMA Ltd* (2000) 33 ACSR 595 at 605-6; *Re MB Group Plc* [1989] BCLC 672 at 676 (Harman J).

56. *Fourth*, the suggestion that inclusion of the Bondholders' DOCA Proposal would create confusion as to the status of the Bain SID is, with respect, an attempt to legitimise the Administrators' entry into the Bain SID by the terms of the SID itself. As outlined above, however contractually binding the Bain SID may be, the Administrators must take steps to execute whatever DOCA (if any) is selected by the creditors at the second meetings, even if it is inconsistent with the Bain SID. If anything, the Administrators' current approach to the inevitability of the asset sale to Bain is liable to create confusion amongst a body of creditors who are otherwise operating upon the apparently false understanding that their vote at the second meetings will determine the Virgin Companies' future.

57. The only safe course is to facilitate a process which will permit the full and fair consideration of all options available to creditors by putting the Bondholders' DOCA Proposal to a vote. To do otherwise would only expose the Virgin Companies to future uncertainty and instability by leaving the outcome open to challenge.

58. It is convenient at this juncture to raise the great deal of emphasis that the Administrators and Bain have, thus far in the proceedings placed on the "tentative" dicta of Black J in *re Ten Network Holdings Limited (Administrators Appointed) (Receivers and Managers Appointed)* [2017] NSWSC 1247 at [38]-[40], under the heading "*An issue that is not determined by this judgment*".

59. Even if all of the views there were accepted as final, (and putting to one side the existence of the receiver in that case), his Honour's reasoning actually assists the Applicants. His Honour accepted that the creditors could move to adjourn the second meeting if not satisfied, and that the conduct of the meeting in terms of what proposals *they* rather than the Administrators would put, was a matter for them. Here, given the way in which the voting and the meeting is to be conducted pursuant to the s 447A orders made by this Court, and the number and dispersion of creditors (including intermediated creditors) the only way that the creditors can have their say on a real, live offer by the Applicants is for it to be included on the remote, online ballot. Why would it be in anybody's interests, in line with the comments of his Honour at [40], to create a position where the second meeting was adjourned with the consequent risk? The better course is to allow a transparent vote.

D. APPOINTMENT OF A FACILITATOR

60. Prayers for relief 4 through 6 are directed towards the appointment of an independent practitioner (**Facilitator**) who would be given access to documents, information and stakeholders as

reasonably required to inform the Facilitator's assessment of the Bondholders' DOCA Proposal and prepare a limited report on that proposal for inclusion in the Administrators' s 439A report to creditors.

61. It can be readily accepted that administrators are expected to be free of actual or potential conflicts of interest and actual or apparent bias: *Re Recycling Holdings Pty Ltd* (2015) 107 ACSR 406 at [94] (Brereton J). While a lack of independence or bias may supply grounds for removal of an administrator where to do so would be for the better conduct of the administration (see, eg, *Phoenix Lacquers & Paints Pty Ltd v Free Wesleyan Church of Tonga in Australia Inc (admins apptd)* (2012) 87 ACSR 658 at [45] (Black J)), the Courts have fashioned alternative approaches which can safeguard the interests of creditors in the face of any potential conflict, with one such approach being the appointment of a Facilitator. Apart from Middleton J's own acknowledgment of the prospect of such a course being taken in *Strawbridge (No 5)*, the appointment of an independent insolvency practitioner to, amongst other things, prepare a limited report for inclusion in the Administrators' report to creditors under s 439A of the Corporations Act was a course taken by O'Callaghan J in *Korda, Ten Network Holdings Ltd (administrators appointed) (receivers and managers appointed)* (2017) 252 FCR 519. In that case, such a course was ultimately pursued due to real questions as to the actual or apprehended bias of the administrators whom had been appointed, which was capable of being cured by the involvement of an independent third party to report on matters which the creditors could not be confident the administrators would report upon fairly and impartially.

62. The need for a Facilitator in this case flows from the very clear conflict which the Administrators now face between their statutory duties of impartiality, objectivity and independence on the one hand, and their asserted contractual duties to Bain under the Bain SID. The evidence of Mr Cheetham makes clear that the Administrators consider the Bain SID to be "final and binding" and that the terms of the Bain SID prevent the Administrators from acceding to any request for the provision of information or consent to the Applicants' engagement with stakeholders, which is required to finalise the Bondholders' DOCA Proposal: Annexure to First Cheetham Affidavit at pgs 144, 147. It is within that framework that the Administrators consider *any* cooperation with the Applicants to be liable to jeopardise the Bain transaction and expose them to a potential breach of their contractual obligations.

63. Although the Administrators have maintained that they will report upon the Bondholders' DOCA Proposal, that assurance has been given against the Administrators' steadfast and unfaltering stance – reiterated on several occasions before and after receipt of the Applicants' proposal – that the Bain SID will deliver a superior outcome for the company (although, in this respect the Applicants are procedurally disadvantaged in meeting this assertion because they do not know what Bain is proposing to pay to creditors). While it is indeed incumbent upon the Administrators to express a view as to the optimal outcome in their s 439A report (IPRs, r 75-225(3)(b)), it is difficult to see how the view which one can expect to be expressed in the context of this administration could be characterised as fair, impartial and independent when the Administrators

have maintained their view that the Bain SID would realise the best outcome for the companies' creditors, notwithstanding their active refusal to consider the terms of, and potential outcomes achievable under, the Bondholders' DOCA Proposal. Indeed, that refusal makes it implausible that the inquiries which the Administrators are duty-bound to conduct to inform themselves as to the competing advantages and disadvantages of each proposed course (*Linen House Pty Ltd v Rugs Galore Australia Pty Ltd* [1999] VSC 126 at [75]-[79] (Gillard J); *Adelaide Brighton Cement Ltd v Concrete Supply Pty Ltd (subject to a deed of company arrangement) (No 4)* [2019] FCA 1846 at [1207] (Besanko J)) will have been carried out.

64. Moreover, the very fact that the Administrators purport to be contractually precluded from recommending the Bondholders' DOCA Proposal to creditors speaks strongly against the likelihood that any opinion expressed in the s 439A report regarding the competing DOCA proposals is a genuine, objective or critical appraisal of the preferable course. While the Applicants would not go so far as alleging improper or inadequate performance of the Administrators' statutory duties, the Administrators' position as communicated on countless occasions inevitably confirms that its opinion will be the product of nothing more than the confidential obligations imposed upon them by the Bain SID. There is accordingly little confidence that one can have in the adequacy of the Administrators' report with respect to the Bondholders' DOCA Proposal.

65. In addition to the clear conflict of interest inherent in this circumstance, there is a degree of procedural unfairness which flows from the Administrators' incapacity to consider the Bondholders' DOCA Proposal.

66. The appointment of a Facilitator is calculated to resolve the actual or apprehended conflict which would appear to be inherent in the Administrators' current predicament. The Applicants do not intend to find themselves confronted with an application to impugn the outcome of the second meeting by reason of the Administrators' refusal (contrary to their statutory duties) to properly consider and opine on the Bondholders' DOCA Proposal. Indeed, one could reasonably expect that the Administrators would seek to achieve the best outcome for creditors while ensuring that the democratic right of creditors to select their desired path is protected by the promulgation of multiple proposals. The parties appear to be at one as to the undesirability of such an outcome, and accordingly vesting responsibility in an independent third party to facilitate and confer on contentious issues of information sharing and access to relevant stakeholders would appear to be a sensible mechanism to avoid such an outcome.

E. CONCLUSION

67. Accordingly, the Court should grant the relief sought in the Applicants' Interlocutory Application with costs.

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