NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 25/04/2020 2:12:26 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

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: 25/04/2020 2:12:44 PM 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.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

In the matters of Virgin Australia Holdings Ltd (Administrators Appointed) & Ors

Federal Court of Australia Proceeding No. NSD 464 of 2020

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 Thirty-Ninth Plaintiffs

First Plaintiffs

& Ors

PLAINTIFFS' OUTLINE OF SUBMISSIONS

A. INTRODUCTION AND OVERVIEW

1. These are the submissions of the Plaintiffs, Vaughan Strawbridge, Salvatore Algeri, John Greig and Richard Hughes of Deloitte (together, **the Administrators**), in their capacity as administrators of each of the Second Plaintiff, Virgin Australia Holdings Ltd (Administrators Appointed) (**Virgin**), and the Third to Thirty-Ninth Plaintiffs, which are various subsidiaries of Virgin (together, **the Virgin Subsidiaries**), with respect to the Originating Process filed on 23 April 2020. Virgin and the Virgin Subsidiaries are, together, referred to as the **Virgin Companies**.

2. Virgin is a public company whose shares are listed on the Australian Securities Exchange. On 20 April 2020, the Administrators were appointed as joint and several administrators of each of Virgin and the Virgin Subsidiaries. However, there are certain other subsidiaries of Virgin (most notably, those associated with the Velocity Frequent Flyer Loyalty Program) that are not in any form of external administration. This application does not concern those entities.

3. Having regard to the significant scale and complexity of the operations of the Virgin Companies, as well as the COVID-19 pandemic, the application primarily seeks orders:

   (a) permitting meetings of the creditors of the Virgin Companies, including the first meeting of creditors scheduled for 30 April 2020 (**First Meeting**), to be conducted exclusively by video-link or telephone (and not in person) and

providing a regime by which creditors are to provide proxies to the Administrators in advance of such meetings;

(b) permitting notices to be sent by email to those creditors for whom the Administrators have email addresses;

(c) for the formation of a single committee of inspection for the Virgin Companies, with the members of the committee of inspection to be selected, ***in the first instance***, by the Administrators from nominations given to them prior to or at the First Meeting and, thereafter, for the Administrators' selection to be ratified by the creditors;

(d) permitting meetings of the committee of inspection to be held exclusively by video-link or telephone (and not in person) and also permitting members of the committee to send and receive notices by email;

(e) permitting the Administrators to have 10 business days to respond to requests for information from creditors (being an increase from the statutory default period of 5 business days); and

(f) for a 4 week extension of the time, in section 443B of the *Corporations Act 2001* (Cth) (**Corporations Act**), in which the Administrators are to give notice to lessors of property leased by the Virgin Companies as to whether to retain or give up possession of that property, together with a corresponding extension of the period in which the Administrators do not have personal liability for obligations under those leases.

B. FACTUAL BACKGROUND

4. The factual background is set out in the affidavit of Vaughan Strawbridge, one of the Administrators, sworn on 23 April 2020 (**Mr Strawbridge's Affidavit**).

5. The Virgin Companies are part of a corporate group comprised of companies incorporated and operating in Australia, New Zealand and Singapore (**Virgin Group**). The Virgin Group operates a domestic and international passenger and cargo airline business, offering a variety of aviation products and services to the Australian aviation market, including corporate, government, leisure, low cost, regional and charter travellers and air freight customers (collectively, **the Business**): Mr Strawbridge's

Affidavit at [13]. It offers airline passenger services under both of the well-known "Virgin" and "Tiger" brands, employs approximately 10,000 employees nationally, and operates a fleet of 144 aircraft: Mr Strawbridge's Affidavit at [13]-[14].

6. The Administrators have currently identified that the Virgin Companies have approximately 10,247 known creditors in total (other than bondholders); however, the Administrators expect that the total number of creditors (other than bondholders) is estimated to be over 12,000: Mr Strawbridge's Affidavit at [47]. The creditors identified thus far comprise the following: Mr Strawbridge's Affidavit at [48]:

   (a) 26 lenders under secured corporate debt and aircraft financing facilities, who are together owed approximately $2,283,639,303;

   (b) unsecured bondholders who are together owed approximately $1,988,250,000;

   (c) 1,070 trade creditors, who are together owed approximately $166,704,085.69;

   (d) 50 aircraft lessors, who are together owed approximately $1,883,914,848;

   (e) 81 landlords, who are together owed approximately $71,209,929; and

   (f) 9,020 employees, who are together owed approximately $450,777,961.

7. The COVID-19 pandemic has led to a substantial downturn in the operations and revenue of the Virgin Companies (and it appears that this may have been the catalyst for the Administrators' appointment).

8. Between 18 March 2020 and 5 April 2020, various steps were taken by Commonwealth, State and Territory Governments that placed severe restrictions on overseas and inter-state travel; and similar restrictions were adopted worldwide to reduce the spread of COVID-19: Mr Strawbridge's Affidavit at [18]-[20].

9. These actions have resulted in a significant reduction in the demand for international and domestic air travel, which is a significant part of the business operations of the Virgin Companies. The COVID-19 pandemic has had a considerable adverse impact on the revenues of the Virgin Companies: Mr Strawbridge's Affidavit at [23].

10. Since the appointment of the Administrators, they have sought to continue to trade the Virgin Companies on a "business as usual" basis, albeit that, due to the travel restrictions arising from COVID-19:

(a) the airline is not operating any international passenger routes and only limited domestic passenger routes;

(b) the business will not be operated at full capacity; and

(c) it is likely that the Virgin Companies will continue to generate losses throughout the administration period whilst these restrictions are in place: Mr Strawbridge's Affidavit at [15] and [25].

11. The Administrators are assessing viable options to continue to keep the business operating and to maximise the prospect of a sale of the business and assets of the Virgin Companies as a going concern (in respect of which substantial positive interest has already been shown by potential purchasers, including sophisticated parties): Mr Strawbridge's Affidavit at [71].

12. It is immediately apparent from Mr Strawbridge's Affidavit that the Virgin Companies make up a very significant enterprise with substantial operations, complex affairs, considerable assets and a very large number and type of creditors; accordingly, the administrations are likely to be sophisticated and complex.

13. In circumstances where the Administrators have only recently been appointed, it is inevitable that the Administrators will have been unable to undertake any detailed review of the operations of the Virgin Companies.

14. In addition, the COVID-19 pandemic has made the Administrators' investigations into the affairs of the Virgin Companies more challenging. For example, because of working from home and social distancing arrangements, liaising with the Virgin Companies' officers and employees has been, and is to be, done by telephone and email: Mr Strawbridge's Affidavit at [24(a)].

15. Moreover, responses to the pandemic have the potential to lead to an additional burden being placed on the Administrators' staff from Deloitte in terms of arranging correspondence to be sent to creditors by post in hard copy: Mr Strawbridge's Affidavit at [24(b)].

16. In this context, it can be understood that it will be necessary for the Plaintiffs to move quickly in circumstances of great complexity, while remaining astute at all times to protecting, and not prejudicing in any way, the interests of creditors.

C. HOLDING MEETINGS BY VIDEO LINK OR TELEPHONE (RATHER THAN IN PERSON) AND SENDING NOTICES BY EMAIL: ORDERS 1-4 OF THE ORIGINATING PROCESS

C.1 Holding meetings by electronic means: Orders 3-4 of the Originating Process

17. The First Meeting is scheduled for Thursday, 30 April 2020: Mr Strawbridge's Affidavit at [27].

18. The Administrators seek orders to enable the First Meeting, and any subsequent meetings of creditors, to be conducted solely by video-link or telephone (rather than in person).

19. The relevant provisions of the *Insolvency Practice Rules (Corporations) 2016* (**Insolvency Practice Rules**), which deal with the manner in which meetings may be held, are as follows:

75-15 How notice of meetings to be given

(1) Notice of a meeting must:

(a) specify the date, time and place of the meeting; and

(b) specify the purpose for which the meeting is being convened; and

(c) state the effect of section 75-85 (entitlement to vote as creditor at meetings of creditors); and

(d) be in the approved form.

75-30 Time and place of meetings

(1) The convenor of a meeting must convene the meeting at the time and place that the convenor thinks are most convenient for the majority of persons entitled to receive notice of the meeting.

(2) Subsection (1) does not prevent a meeting from taking place at separate venues provided that technology is available at the venues to give all persons attending the meeting a reasonable opportunity to participate.

75-35 Notice of electronic facilities for meetings

(1) This section applies if:

(a) facilities for participating in meetings by electronic means are expected to be available at the place where a meeting is to be held; and

(b) the convenor of the meeting considers that, having regard to all the circumstances, it will be appropriate to use those facilities.

(2) The notice of the meeting must:

(a) set out the arrangements for using the facilities

…

75-75 Participating in meetings by electronic means

(1) This section applies if:

(a) facilities for participating in a meeting of creditors by electronic means will be available for the meeting; and
(b) a person, or a person's proxy or attorney, has given the convenor of the meeting a statement in accordance with paragraph 75-35(2)(b).

(2) The convenor of the meeting must take all reasonable steps to ensure that the facilities are available and operating during the meeting.

(3) The person, or the person's proxy or attorney, is responsible for accessing the facilities during the meeting.

(4) A person who, or whose proxy or attorney, participates in the meeting using the facilities is taken to be present in person at the meeting.

20. It can thus be seen that the Insolvency Practice Rules make clear provision for persons to participate at creditors' meetings by electronic means (a term that is undefined, but includes by video-link or telephone). However, what is not clear is whether the meeting can be held ***only*** be electronic means (that is, without being convened and held at a particular physical place as well).

21. In that regard, section 75-15(1)(a) provides one indication that, absent an order from the Court to the contrary, meetings must be conducted at least partly in person at a physical location, as it requires the notice to specify the "place" of the meeting. It might be said that a meeting conducted remotely may still satisfy that requirement, because the "place" of the meeting is where the administrator will be physically located (even if participants are unable to attend that place in person) or, perhaps, that the meeting is held in multiple places where each of the participants is located. However, that question has not been judicially resolved and may place strain upon the construction of the section.

22. In any event, as Farrell J very recently noted when faced with this situation in *Eagle, in the matter of Techfront Australia Pty Limited (administrators appointed)* [2020] FCA 542 at [35], the Administrators should not be left in any doubt as to whether any meeting, conducted entirely remotely, has been validly convened and held. (Otherwise, that might lead to further disputation about the validity of resolutions passed at the meeting and a further application being brought by the Administrators for validating orders under subsection 1322(4) of the Corporations Act, which is best avoided.)

23. In light of the COVID-19 pandemic and the consequent restrictions on public gatherings, there is every reason for the Court to make orders confirming that meetings of creditors can be conducted solely by video-link or telephone. As Perram J

said in *Capic v Ford Motor Company of Australia Limited (Adjournment)* [2020] FCA 486 at [5], "it is apparent that public institutions such as the Court must do all they can to facilitate the continuation of the economy". Similarly, as Lee J observed in *Australian Securities and Investment Commission v GetSwift* [2020] FCA 504 at [7], "The singular circumstances presented by the current health crisis, and the arrangements provided for in the Information Note, reflect the Court's remedial response as an arm of government in continuing to exercise the judicial power of the Commonwealth in circumstances where life cannot go on as usual. Just because one cannot have a hearing conducted in accordance with traditional practices and procedures, does not mean that the Court's judicial function cannot be formed effectively where it is necessary to do so."

24. Moreover, Mr Strawbridge gives evidence at [28]-[32] that: (a) he has previously conducted meetings of creditors that have provided a video or telephone conference service for creditors; (b) the Administrators have already sourced suitable information technology, through Microsoft Teams Live Events, to "live stream" the First Meeting to as many as 20,000 (and, if necessary, 100,000) different creditors; and (c) arrangements have been made to ensure that all creditors have the ability to ask questions at the First Meeting by way of a moderated question and answer function provided as part of the Microsoft Teams Live Events platform.

25. All of that demonstrates that—subject to the issue of the ability of creditors to vote on resolutions put to the meeting (which is dealt with further below)—there is no practical impediment to meetings of creditors (including the First Meeting) being held exclusively by electronic means.

26. An additional order should be made requiring that, in respect of any creditor who wishes to participate in, and vote on, resolutions that are put to creditors at a meeting (to the extent that this may occur at meetings subsequent to the First Meeting), special proxies must be provided to the Administrators no later than the second last business day before the meeting is held (although giving liberty to any creditor providing such a proxy to withdraw those voting instructions in advance of the resolution being passed).

C.2 Notice by email: Orders 1-2 of the Originating Process

27. It is now common-place for orders to be made, including at a very early point in an administration, permitting external administrators to give notices to creditors by email and other electronic publication.

28. In *Re BBY Limited* [2015] NSWSC 974 at [7], Brereton J (as his Honour then was) said:

> Courts have become increasingly willing to make orders such as those sought in this case in respect of the manner in which notices may be given of meetings of creditors of companies under external administration, both to save costs and to save time, and thus to conserve the limited available assets for the benefit of creditors. As Black J has pointed out, most recently in *In the matter of Creative Memories Australia Pty Limited (administrators appointed)* [2013] NSWSC 732 (at [8]), this no doubt reflects, amongst other things, the fact that electronic means of communication are now widely accepted in the investing and commercial communities. There are now many decisions in which the Courts have made orders in respect of meetings of creditors permitting notice to be given by electronic means to those for whom e-mail addresses are available and otherwise by notice, for example, on an administrator's website, or by newspaper advertisement: [see *ABC Learning Centres Ltd (Administrators Appointed) (Receivers & Managers Appointed) ACN 079 736 664 v Honey* [2010] FCA 353; *Silvia, in the matter of FEA Plantations Ltd (Administrators Appointed)* [2010] FCA 468; *Carson, in the matter of Hastie Group Limited* [2012] FCA 626; *Carson, in the matter of Hastie Group Limited (No 2)* [2012] FCA 717; *In the matter of Mothercare Australia Limited (administrators appointed)* [2013] NSWSC 263, [8] (Black J); *In the matter of Creative Memories Australia Pty Limited (administrators appointed)* [2013] NSWSC 732].

29. These remarks were endorsed and similar orders made in *Quinlan, in the matter of Halifax Investment Services Pty Ltd (Administrators Appointed)* [2018] FCA 1891 at [12]-[14] (Yates J) and *Jahani, in the matter of The Ralan Group Pty Ltd (administrators appointed)* [2019] FCA 1446 at [22] (Gleeson J).

30. Mr Strawbridge has explained that: (a) there are an incredibly large number of creditors of the Virgin Companies; and (b) the Administrators have an email address for the vast number of those creditors: Mr Strawbridge’s Affidavit at [49].

31. The Administrators have obtained a quote that indicates that the printing and postage costs of sending notice of the First Meeting in hard copy are over $34,000 (excluding GST): Mr Strawbridge's Affidavit at [58]; Exhibit VNS-1 at Tab 103. Thus, being able to send notices by email will be more administratively straightforward and substantially cheaper for the Administrators, which is a benefit that will ultimately accrue to the creditors of the Virgin Companies.

32. Further, in the circumstances of the restrictions imposed by COVID-19, the Administrators and their staff will face additional difficulties in arranging notices to be printed and posted; also, postal delays and the need to promote hygiene safety provide additional reasons to favour notification by email: Mr Strawbridge's Affidavit at [59].

33. Thus, the proposed orders for notice to be given by email and publication on Deloitte's website fulfil the objective of notifying as many creditors of the Virgin Companies as quickly and cheaply as possible, and conserving the assets of the companies for the benefit of creditors: *Techfront Australia* (above) at [33].

34. Finally, because the notice of the First Meeting has already been sent, only by email, in the case of those creditors for whom the Administrators have an email address, the orders permitting notice by email should be made *nunc pro tunc*.

D COMMITTEE OF INSPECTION: ORDERS 5-6 OF THE ORIGINATING PROCESS

35. The Plaintiffs seek orders that—in place of the ordinary procedure by which the creditors (at the first meeting) vote on the formation of a committee of inspection and the members of the committee—a regime to the following effect be established:

    (a) a single committee of inspection, for all of the Virgin Companies, be formed by order of the Court;

    (b) members of the committee of inspection be selected, ***in the first instance***, by the Administrators from nominations made in advance of, or at, the First Meeting;

    (c) shortly after the First Meeting, a proposal (in accordance with section 75-40 of the *Insolvency Practice Schedule (Corporations) 2016* (**Insolvency Practice Schedule**) and section 75-130 of the Insolvency Practice Rules, as modified in the manner set out in (d) and (e) below) be put to the creditors by notice sent by the

Administrators (and without requiring a further meeting to be held) permitting the creditors to vote "yes" or "no" on the whole composition of the committee proposed by the Administrators (that is, a single vote rather than separate votes on each proposed committee member) (**Proposal**);

(d) the creditors not be permitted to object to the Proposal being determined without a meeting of creditors (as is otherwise provided for by section 75-40(2)(d)(ii) of the Insolvency Practice Schedule);

(e) the time for creditors to respond to notice of the Proposal, as provided for by section 75-130 of the Insolvency Practice Rules, is abridged to 5 business days;

(f) if the Proposal:

(i) is passed by the creditors in accordance with section 75-130 of the Insolvency Practice Rules, then the members of the committee of inspection will be those as selected by the Administrators and referred to in the Proposal; and

(ii) is not passed by the creditors in accordance with section 75-130 of the Insolvency Practice Rules, then the Administrators will consider approaching the Court or convening another meeting of the creditors to clarify who are to be the members of the committee.

36. The rationale for this regime, as supported by the evidence of Mr Strawbridge, is that:

(a) ordinarily, for administrations as large-scale and complex as those of the Virgin Companies, it would be appropriate and prudent for a committee of inspection to be formed at the First Meeting: Mr Strawbridge's Affidavit at [37];

(b) however, in the present case, because of both the COVID-19 restrictions that prevent a physical meeting from being held and the very large number of creditors of the Virgin Companies, there are practical limitations on the Administrators being able to put resolutions to creditors to be voted on at the First Meeting (and, if necessary, for a poll to be taken): Mr Strawbridge's Affidavit at [33] and [41];

(c) the Administrators have sought to investigate options for conducting a poll at the First Meeting; while a survey-type process (by email) may be available, there

are a number of inefficiencies and challenges in relation to the arrangement, including:

(i) the need for extensive manual data input;

(ii) the need to ascertain email addresses for those creditors in respect of whom the Administrators do not currently have such details;

(iii) an inability to deal with complex proofs of debt, such as where a participant at the meeting is a creditor of more than one of the Virgin Companies; and

(iv) a difficulty in maintaining the integrity of any voting process such as ensuring that only creditors or their proxies cast votes,

and the Administrators have not been able to find an information technology system that meets these challenges: Mr Strawbridge's Affidavit at [42]-[43];

(d) thus, a practical alternative must be developed to permit creditors nevertheless to be involved in selecting the members of the committee of inspection.

37. The Court has the power under section 90-15 of the Insolvency Practice Schedule to make orders giving effect to that proposed regime (including to dispense with provisions of the Insolvency Practice Schedule and the Insolvency Practice Rules that use the word "must"). As Farrell J noted in *GDK Projects Pty Ltd, in the matter of Umberto Pty Ltd (in liq) v Umberto Pty Ltd (in liq)* [2018] FCA 541 at [33]: "The power is, in its terms, unconstrained … Despite the breadth of the power conferred by s 90-15(1), it is difficult to envisage circumstances where the power would be exercised if the Court could not be satisfied that it would be just and unless the applicant had demonstrated sufficient utility to the external administration". See also *Re Hawden Property Group Pty Ltd (in liq)* (2018) 125 ACSR 355; [2018] NSWSC 481 at [8] (Gleeson JA).

38. In the circumstances, the proposal for the formation of the committee of inspection (described above) is a practical and efficient manner in which to proceed in the absence of the creditors being able to vote at the First Meeting but which, at the same time, involves the creditors having input as to the members of the committee.

39. It is true that the Administrators will, in the first instance, select the proposed members of the committee of inspection. Importantly, though:

    (a) possible appointees are only those creditors who have sought to be nominated as committee members;

    (b) the Administrators have indicated that they will, in the first instance, select up to 15 or 20 proposed members of the committee of inspection from across the range of different types of creditors of the Virgin Companies including employees, finance lessors, real property landlords, trade creditors , secured creditors, and bondholders: Mr Strawbridge's Affidavit at [44(b)];

    (c) the Administrators' choice of the committee's members is ultimately one that must be ratified by the creditors by way of the Proposal; and

    (d) there is the additional layer of protection provided by the ability of creditors to apply to the Court to vary or discharge the orders.

40. Additionally, the Court can, and should, have regard to the opinion of the Administrators (Mr Strawbridge's Affidavit at [46]) that:

    (a) the best interests of the creditors favour the formation of a committee of inspection;

    (b) the ordinary procedures in which creditors would be able to vote at the meeting on the formation and composition of the committee of inspection, are simply not practicable in the current environment;

    (c) the proposed orders strike the appropriate balance between the prompt formation of a committee and the involvement and oversight of the creditors in selecting the members of the committee.

41. Finally, for the same reasons set out in Section C above, orders should be made:

    (a) permitting meetings of the committee to be held only by video-link or telephone (rather than in person);

    (b) permitting notice of meetings to be given to, or by, members solely by email.

42. Such orders may not be necessary, given that section 80-5(3) of the Insolvency Practice Rules permits the committee to meet at the times and places appointed by its

members. However, there is nothing in that section specifically permitting such committee meetings to be held only by video link or telephone; nor does it specifically permit notice to be given to, or by, members solely by email.

43. Accordingly, as recognised in *Techfront Australia* (above) at [39], orders of this kind should be made to avoid the Administrators and members of the committee being left in any doubt as to the validity of any resolutions passed at meetings convened and held in that manner.

E. EXTENSION OF TIME TO RESPOND TO CREDITORS' ENQUIRIES: ORDER 7 OF THE ORIGINATING PROCESS

44. Sections 70-45 and 70-50 of the Insolvency Practice Schedule permit creditors to request information, reports or documents from external administrators. Section 70-1 of the Insolvency Practice Rules provides that the default position is that the external administrator is to respond to the request within 5 business days.

45. Given the significant number of creditors in the administrations of the Virgin Companies and the potential number of information requests, the Administrators seek an order extending that time to 10 business days.

46. In Mr Strawbridge's experience, external administrators who are given requests for information from creditors sometimes require the input of the officers or employees of the companies that are in external administration, because the answer to the information requested is not readily or easily accessible by the administrators or their own staff: Mr Strawbridge's Affidavit at [75].

47. Given the magnitude of the business operations conducted by the Virgin Companies, and the additional logistical difficulties faced by the Administrators and their staff in liaising with the management team and other employees of the Virgin Companies by reason of the response to the COVID-19 pandemic, it is inevitable that the Administrators are likely to need further time to respond to queries from creditors. As Gleeson J recently remarked in *Bumbak (Administrator), in the matter of Duro Felguera Australia Pty Limited (Administrators Appointed)* [2020] FCA 422 at [35(4)]: "It is reasonable to assume that the current circumstances of the COVID-19 pandemic will affect the timely progress of the administration to some extent."

48. An extension of the time in section 70-1(2)(a) of the Insolvency Practice Rules, from 5 business days to 10 business days, is therefore appropriate.

F. EXTENSION OF THE PERIOD FOR THE ADMINISTRATORS TO GIVE NOTICE TO LESSORS OF PROPERTY: ORDER 8 OF THE ORIGINATING PROCESS

F.1 Principles

49. The principles governing the Court's power to extend time under section 443B of the Corporations Act were very recently summarised by Markovic J in *Strawbridge (Administrator), in the matter of CBCH Group Pty Ltd (Administrators Appointed) (No 2)* [2020] FCA 472, where her Honour said this at [39]:

> Section 447A(1) of the Act also gives the Court ample power to alter the operation of s 443B(2) and (3) of the Act: see *In the matter of Mothercare Australia Limited (administrators appointed)* [2013] NSWSC 263 at [6]. Alternatively, s 443B(8) gives the Court an additional power to alter the operation of s 443B(2) and (3): see *Silvia v FEA Carbon Pty Ltd* (2010) 185 FCR 301 (*Silvia v FEA*) at [13]. The usual rationale behind the extension of the five business day period in s 443B(2) and (3) or the exercise of the power in s 443B(8) is because the administrator has had insufficient time to conduct the necessary investigations to decide whether he or she thinks it best to retain or give up possession of leased property: see *Silvia v FEA* at [12]-[13]. Further it seems that s 443B(8) allows the Court to excuse the administrator from liability to pay rent even after the five business day period has passed (see *Silvia v FEA* at [13]-[14]) or that s 447A enables a court to amend the operation of Pt 5.3A of the Act retrospectively (see *Australasian Memory v Brien* at [26]).

50. In that decision, her Honour went on to note, at [52] and [57], that when considering an extension of this type, it is important to balance the interests of different creditors (particularly in the circumstances of a complex administration).

51. In *Re Mothercare Australia Limited (administrators appointed)* [2013] NSWSC 263, Black J canvassed the rationale for granting an extension of time for administrators to decide whether to give notice to landlords limiting their personal liability, and made the following comments, at [2]-[4]:

> The first issue which arises is the application for an extension of time in order to give any notice to lessors under s 443B(3) of the Corporations Act. That section broadly deals with the circumstances in which an

administrator becomes subject to personal liability for rental or other amounts payable by a company under a lease. In broad terms, the section provides that the administrator is liable for rent payable by a company under administration for the period which begins more than five days after the administration begins, but may avoid that liability by giving notice that specifies the property and states that the company does not propose to exercise its rights in relation to the property. That section will operate in a relatively straightforward manner in circumstances that, for example, a company occupies a single or a small number of properties, and assumes that the administrator will be in a position, by the exercise of appropriate diligence, to form a view as to whether the company should continue to occupy the premises and whether or not to assume personal liability in respect of the premises within that period.

However, a situation may arise where there are obstacles to the administrator forming that view within that period. Such a situation was considered in *Silvia v Fea Carbon Pty Ltd (ACN 009 505 195) (admins apptd) (recs and mgrs apptd)* [2010] FCA 515; (2010) 185 FCR 301, where Finkelstein J noted the policy behind the section and that the section was intended to allow the administrator the opportunity to avoid personal liability for rental payable by giving notice within the five day period, but also recognised the possibility that that period may be too short in a particular case. His Honour noted that the Court can either excuse such liability under s 443B(8) of the Corporations Act or extend the time for investigation under s 447A of the Corporations Act.

The Administrators here seek orders under s 443B(8) of the Corporations Act or alternatively under s 447A which, in effect, extend the time for the giving of notice of an intention not to exercise rights in respect of the relevant properties to 5 March 2013, a month from today. A number of factors relevant to making such an order were identified in *Silvia v Fea Carbon*, including that there may be a large amount of paperwork to review; factual uncertainty in relation to the leases; or the administrators' inability to form a view within the five business days allowed by the section as to whether it was necessary or desirable to exercise rights over the relevant property for the purpose of maximising the chances that some or all of the members of the companies can continue in existence or maximising the return to creditors.

F.2 The extension should be granted

52. In the present case, the Administrators have, understandably enough in the short period since their appointment, been unable to form a view as to whether the Virgin Companies ought to continue to remain in possession of property the subject of leases held by the companies, including both real property leases and chattel leases: Mr Strawbridge's Affidavit at [68]. The purpose of the extension of time is to afford the Administrators additional time in which to make that determination.

53. The starting point is that Mr Strawbridge, a very experienced insolvency practitioner, has deposed that: (a) the Administrators consider that they require further time to consider the ongoing value to the Virgin Companies of the various property the subject of the leasehold interests and, accordingly, they require an extension of the time to give notice to lessors of these assets; and (b) the extension of time is designed to assist in identifying and retaining assets that are necessary to preserve and enhance the value of the Virgin Companies' operations as part of a positive restructure of the business: Mr Strawbridge's Affidavit at [70]-[71].

54. In that regard, the case law recognises the significance of paying heed to an administrator's own considered view of what is in the best interests of creditors: *Re Owen, RiverCity Motorway Pty (Ltd (admins apptd) (recs & mgrs apptd) v Madden (No 4)* (2012) 92 ACSR 255 at [26] (Logan J); *Jahani, in the matter of Northern Energy Corporation Ltd (Administrators Appointed) (No 2)* [2019] FCA 382 at [67] (Farrell J); *Bumbak (Administrator), in the matter of Duro Felguera Australia Pty Limited (Administrators Appointed)* [2020] FCA 422 at [32] (Gleeson J), including with respect to an orders sought extending the time under section 443B in a complex administration: *CBCH Group* (above) at [48]; *Techfront Australia* (above) at [43(2)].

55. Moreover, for the specific reasons that follow, it is appropriate for the extension to be granted (and to relieve the Administrators of personal liability in the interim).

56. *First*, these administrations are plainly incredibly complex. There are a substantial number of leases already identified by the Administrators (over 3,400 registrations on the Personal Property Security Register plus real property leases with approximately 81 landlords): Mr Strawbridge's Affidavit at [65].

57. *Secondly*, much of the leasehold property is varied and unique to the airline industry, consisting of 144 aircraft, other aviation equipment and real property: Mr Strawbridge's Affidavit at [65].

58. *Thirdly*, the quantum of the liabilities associated with the leasehold property is very significant and it will take time to assess the value of these leases: Mr Strawbridge's Affidavit at [67(c)].

59. *Fourthly*, the Administrators remain unsure at this early stage of the administrations as to the precise nature of the property that is the subject of the leases and the obligations associated with the leases: Mr Strawbridge's Affidavit at [67(d)].

60. *Fifthly*, the Administrators' investigations will inevitably be delayed by practical issues stemming from responses to the COVID-19 pandemic: Mr Strawbridge's Affidavit at [67(f)].

61. *Sixthly*, an extension of time will permit the Administrators to retain, for the use of the Virgin Companies, the property that is the subject of the leases for the interim period. This will enable the Administrators to ascertain how essential the goods are to the business conducted by the Virgin Companies and, as Derrington J noted in *Currie, in the matter of The Country Wellness Group* [2018] FCA 1455 at [27], thereby "allow for rational decisions to be made in relation to the various leases".

62. *Seventhly*, as set out above, it is necessary for the Court to have regard to the best interests of the creditors of the Virgin Companies as a whole. Given that an extension of time under section 443B maximises the prospect of preserving (either in whole or in part) the business of the Virgin Companies with a view to a sale or restructure of the business as a going concern, then that is in the creditors' best interests (including those of the lessor creditors as it also increases the prospect that there will remain a counter-party in place with respect to existing leases): *Techfront Australia* (above) at [43(3)].

63. *Eighthly*, to the extent that the lessors are adversely affected, the orders sought are framed in such a way to permit persons who are affected by the orders (such as lessors of the property) to apply to the Court for a variation: *Country Wellness* (above) at [29]; *Techfront Australia* (above) at [43(6)].

64. Accordingly, the Court should extend the time, to 26 May 2020, for the Administrators to give notice to lessors of property leased by the Companies and the personal liability of the Administrators should be excluded during that period.

G. CONCLUSION

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

24 April 2020

Ruth C A Higgins SC

Daniel Krochmalik

Counsel for the Plaintiffs