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Details of Filing

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

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Important Information

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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 Fortieth Plaintiffs

First Plaintiffs

& Ors

PLAINTIFFS' OUTLINE OF SUBMISSIONS

A. INTRODUCTION

1. These are the submissions of the Plaintiffs, including the First 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 to Fortieth Plaintiffs (the **Virgin Companies**), and the Virgin Companies, with respect to the Interlocutory Process filed by Broad Peak Investment Advisers Pte Ltd and Tor Investment Management (Hong Kong) Ltd (the **Applicants**) on 7 July 2020.

2. The Applicants claim to hold approximately $300m of unsecured notes issued by Virgin Australia Holdings Limited (**VAH**) (admin apt). By the Interlocutory Process the Applicants seek relief, in substance:

   (a) Prayer 4: to extend the time by which the Applicants may apply to seek to vary or discharge Orders 1 to 5 made by the Court on 2 July 2020 (**2 July Orders**) to facilitate the Administrators securing interim funding as part of the sale of the Business to the Purchasers, to 31 July 2020 or 5 business days after the conclusion of the proceedings commenced by the Applicants in the Australian Government Takeovers Panel (**TO Application**) (**Proposed Extension Orders**);

   (b) Prayer 6: to vary the confidentiality orders so that the Applicants (amongst many others) are provided with access to certain confidential material[1] (**Confidential**

[1] That material is listed in paragraph 2 of the 2 July 2020 orders.

Material) relied upon by the Administrators for the purpose of obtaining the 2 July Orders (**Proposed Disclosure Orders**);

(c) Prayer 5: to vary order 7 of the 2 July Orders so that any application by the Administrators in relation to any variation or discharge of the 2 July Orders or otherwise be made on at least 1 business day's notice to the Court and to the Applicants (**Proposed Notification Orders**).

3. The Applicants rely upon two affidavits of their solicitor, Michael Russell Catchpoole, of 6 and 9 July 2020, in support of the application.

4. Each of the orders sought is opposed by the Administrators.

5. In opposing that relief, the Administrators rely upon the Seventh Affidavit of Mr Vaughan Strawbridge of 9 July 2020 (**Seventh Strawbridge Affidavit**), the confidential affidavit of Mr Strawbridge of 9 July 2020 (**Confidential Eighth Strawbridge Affidavit**), and the First to Sixth Strawbridge Affidavits and the Algeri Affidavit previously filed in the proceedings.

6. Five preliminary matters may be noted.

7. *First*, the Applicants have not demonstrated a sufficient interest, within the meaning of Order 7 of the 2 July Orders, to apply to have those orders varied. In their capacity as unsecured creditors, they are not affected by the orders made under s 588FM of the *Corporations Act 2001* (Cth) (**Act**) extending the time for the security interests granted in favour of the Purchasers under the Bain Transaction to be registered (so as to ensure the effectiveness of that security) (the **Section 588FM Order**). The trading liabilities that will be met from the finance facility extended as part of the Bain Transaction (**Facility**) would, in any event, be the subject of the Administrators' right of indemnity and lien, and thus rank ahead of unsecured creditors in the s 556(1) priority waterfall in all instances. Similarly, the Applicants have identified no basis on which Orders 3 and 4 of the 2 July Orders, made pursuant to s 447A of the Act, adversely affect their interests.

8. *Secondly*, to the extent that the Applicants are disappointed bidders or participants in the competitive sales process it would be unorthodox and highly prejudicial to

provide them with the Confidential Material. Such access would put them in a materially different position to all other creditors and other unsuccessful bidders. And no basis has been identified on which the Applicants, or any other unsuccessful bidder, should receive access to such Confidential Material. The Applicants will, of course, in their capacity as, and along with other creditors, be provided with the Administrators' report under s 75-225 of the *Insolvency Practice Rules (Corporations)* prior to the Second Meetings of Creditors of the Virgin Companies. That will provide them with material as to the Bain Transaction and the likely or expected return to creditors. There is no reason to prioritise the interests of the Applicants above those of other creditors or bidders.

9. *Thirdly*, the Proposed Extension Orders and the Proposed Disclosure Orders will cause disruption to, and potentially jeopardise, the orderly sale process that has been implemented by the Administrators for the benefit of all creditors and in conformity with s 435A and the objects of Pt 5.3A of the *Corporations Act*. The Proposed Notification Orders are unnecessary and may impede the orderly sale process. Indeed, the relief sought is likely to have substantive effects and produce an outcome tantamount to that which would be obtained through the grant of an interlocutory injunction, without the Applicants being required to proffer an undertaking as to damages or establish a reasonably arguable case.

10. *Fourthly*, the Court should have regard to the interim and final relief claimed by the Applicants from the Takeovers Panel, in the TO Application, in assessing the relief sought in this application.

11. *Fifthly*, there is a revealing contradiction in the Applicants' contentions. Mr Catchpoole gives evidence — without an identified source of information or belief — that "the Applicants believe that the terms of their proposed DOCA is [sic] likely to provide a substantially better return to creditors than alternative transactions" (at [9], and see also [11]). Yet, the stated object of the application *is to obtain the information that will allow the Applicants* to evaluate the successful Bain Transaction (e.g., MRC-1, p. 313-317, at 316). Unlike Mr Strawbridge, Mr Catchpoole cannot proffer a comparison of the competing bids. It is, in that context, important to recall that, despite the subject matters the Applicants traverse and the allegations they make, no direct challenge is

brought in this application to the Administrators' conduct in entering into the transaction with the Bain entities.

B. THE APPLICANTS LACK SUFFICIENT STANDING

12. Order 7 permits a party "who can demonstrate a sufficient interest" to apply to set aside the 2 July Orders.

13. The Applicants assert that they have an interest in seeking to vary the Section 588FM Order. However, they do not identify the basis of that asserted interest.

14. The Applicants are a selection of the VAH Bondholders and, in that capacity, they are unsecured creditors of some of the Virgin Companies. However, their true complaint stems from the fact that they are disappointed bidders in the sale process conducted by the Administrators. In that sense, they have no relevant interest in varying or setting aside orders that extend the registration date for the security interests granted in connection with the Facility in favour of the successful purchasers.

15. In their capacity as unsecured creditors, the Applicants similarly have no standing. That is for two reasons.

16. *First*, post-administration debts of, or liabilities incurred by, the Virgin Companies that will be met from the Facility would in any event (in the absence of the granting of any security interests) be debts or liabilities for which the Administrators would have a right of indemnity from the assets of the Virgin Companies, both in equity and pursuant to s 443D(a) and (aa) of the Act. Such a right of indemnity is secured by an equitable lien and a statutory lien conferred by s 443F. Importantly, by reason of s 443E(1)(a), the right of indemnity (secured by the lien) has priority over the unsecured debts of the Virgin Companies. As ordinary, non-priority unsecured creditors, the Applicants' debts will always rank behind liabilities incurred by the Administrators in the exercise of their functions (regardless of whether the security interests were granted as part of the Transaction). In that sense, the granting of the security interests and the extension of the registration time does not affect the Applicants' interests as creditors.

17. Secondly, the effect of the Section 588FM Order is to immunise the relevant security interest only against the consequences of what would otherwise be late registration of the interest on the Personal Property Securities Register (**PPSR**): *Re OneSteel Manufacturing Pty Ltd (administrators appointed)* (2017) 93 NSWLR 611; [2017] NSWSC 21 at [69]. An order under s 588FM is directed to whether other creditors suffer prejudice of a very particular kind; i.e., where a secured creditor's failure promptly to effect registration causes prejudice to creditors who have transacted with the company to their detriment, being unaware of the creation of a security interest at that time: *Re Appleyard Capital Pty Ltd* (2014) 101 ACSR 629; [2014] NSWSC 782 at [29]-[30]; *K.J. Renfrey Nominees Pty Ltd (Trustee), in the matter of OneSteel Manufacturing Pty Ltd v OneSteel Manufacturing Pty Ltd* (2017) 120 ACSR 117; [2017] FCA 325 at [28]. Put differently, the issue is whether prejudice is occasioned from the delay in registration of the security interests. The issue is **not** prejudice that is, or may be, occasioned from the making of the order itself: *Re Appleyard* at [30].[2]

18. In the present case, there was no delay in registration — the Purchasers registered their security the next business day after the 2 July Orders were made. The security interests only came into existence on that date and they could not, of course, have been registered before the Administrators were appointed: *Korda, in the matter of Ten Network Holdings Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2017] FCA 1144 at [57]. Similarly, this is not a case where creditors suffered prejudice from transacting with any of the Virgin Companies at a time when they were ignorant of the existence of security interests that had not been lodged on the PPSR.

19. Thus, there can be no prejudice to creditors for the reasons summarised by Greenwood J in *Hill (Administrator) in the matter of Flow Systems Pty Ltd (Administrators Appointed)* [2019] FCA 35 at [66]:

> I accept the submission of the administrators that because the security interest taken by EAWH [the proposed lender] under the general security deed will only be perfected after the registrations made by other secured creditors of the companies, and relief under s 588FM of the act does not affect the priority conferred on a security interest the subject of a particular

[2] Even though the Applicants do not advance any evidence to establish the proposition, mere evidence that the dividend to unsecured creditors may be less may not be enough to establish prejudice: *Mentha, in the matter of Arrium Finance Limited v National Australia Bank Limited* [2017] FCA 818 at [23] (Besanko J).

registration, the making of the orders under s 588FM is not of a nature as to prejudice the position of creditors or shareholders.

C. THE APPLICANTS' TAKEOVER PANEL APPLICATION

20. The apparent basis for the Proposed Extension Orders and the Proposed Disclosure Orders is to assist the Applicants in their TO Application dated 3 July 2020. The TO Application, which is confidential, appears at the exhibit to Mr Catchpoole's 6 July affidavit, MRC-1, at pp. 17 – 41. Two matters can be noted.

21. *First*, it is not uncommon for the Takeovers Panel to decline to accept an application in an insolvency context. For example, in *Kaefer Technologies Limited 02* [2004] ATP 16, the Panel declined to commence proceedings, observing at [7(b)] that the Panel's jurisdiction does not extend to regulating the affairs of companies in administration or conduct of company administrators under Part 5.3A. Any alleged impropriety in the conduct of a company administration is a matter for ASIC and/or the courts. Such an action may be brought by ASIC, in its discretion, or by disaffected shareholders or creditors. It is anticipated that the Takeovers Panel will determine whether to accept the TO Application expeditiously. If they decline to accept the TO Application, the premise for the orders sought by the Applicants will fall away. That indicates that the application is premature.[3]

22. *Secondly*, the Court would have regard to the relief claimed in the TO Application in assessing the relief sought in this application, especially as to and any duplication: see MRC-1, page 22-23. This is still more so where the Applicants made a request under s 70-45 of the *Insolvency Practice Schedule (Corporations)* for copies of the Sale Deed with Bain Capital and any other documents reasonably required to understand the financial and legal consequences of the sale agreement transaction. That request was refused by the Administrator on the basis of confidentiality. No separate challenge has been made by the Applicants to that decision.

D. THE APPLICANTS' PARTICIPATION IN THE SALE PROCESS

23. Aspects of Mr Catchpoole's 6 July affidavit (apparently based on information and belief) do not completely or accurately explain the Applicants' participation in the Sale

[3] See further: *Quantum Graphite Limited (subject to Deed of Company Arrangement)* [2018] ATP 1 at [14]-[15] and *Kaefer Technologies Limited 01* [2004] ATP 8 at [3].

Process. Mr Strawbridge addresses a number of errors in Mr Catchpoole's affidavit in the Confidential Eighth Strawbridge Affidavit at [12]-[16]. Those matters are not developed here, given their confidential nature.

24. Further, Mr Catchpoole's 6 July affidavit frequently does not disclose the basis of his knowledge and belief. No basis is identified for the assertion at [9], that "the Applicants believe that the terms of their proposed DOCA is likely to provide a substantially better return to creditors than alternative transactions". Nor for the assertion at [11], that "The Applicants believe that the Noteholders' offer is likely …to provide a materially superior return to unsecured creditors which would reduce or avoid crystallising their losses during the COVID pandemic."

25. Setting matters of ascription to one side, and as noted in the introduction, it is not at all apparent how the Applicants could cogently form or express these views, given that the stated purpose of the application is to obtain more information about the Bain Transaction: e.g., Catchpoole Affidavit [30]-[31], [37]-[38].

E. PROPOSED EXTENSION ORDERS: IP PRAYER 4

26. Mr Strawbridge identifies his concerns regarding the Proposed Extension Orders in his Seventh Affidavit at [16] - [24].

27. In summary, the Administrators are concerned that the open-ended nature of the Proposed Extension Orders may prevent them from accessing the interim funding negotiated with the Purchasers. That in turn jeopardises the sale to the Purchasers. In circumstances where the Administrators have formed the view that the Bain Transaction presents, consistently with s 435A of the *Corporations Act*, the best outcome for all the creditors of the Virgin Group, the Court should not accede to such orders.

28. The Facility has not yet been drawn down. Bain Capital is unwilling to confirm satisfaction of the condition precedent enabling the Applicants to access to the Facility until the period within which a person has liberty to apply to vary or discharge Order 5 of the 2 July Orders has expired without the 588FM Order being varied or discharged or an application having been made for that purpose. Given the significant quantum of the Facility, it is, in Mr Strawbridge's opinion, reasonable for Bain Capital to adopt this position while their security interests are open to challenge (including the

possibility that the security interests may vest pursuant to s 588FL of the *Corporations Act* if the Section 588FM Order is discharged). In Mr Strawbridge's experience, a purchaser of a business in a voluntary administration would be unwilling to lend such a large sum to a company in external administration without taking appropriate security and being reasonably certain that such security was not open to challenge: Seventh Strawbridge Affidavit [16]-[17].

29. Accordingly, the consequence of the Proposed Extension Order will be that the Company may be unable to access the Facility either indefinitely or at least not until 31 July 2020 (at the earliest, depending on the progress of the Takeovers Panel Application). That frustration or delay in accessing critical finance will cause very significant prejudice to the Virgin Companies and their various stakeholders: Seventh Strawbridge Affidavit [18].

30. The Facility is an integral part of the Transaction. The Administrators may not be able to preserve the Business as a going concern throughout the administration process without being able to access the Facility: Sixth Strawbridge Affidavit [31(b)]-[31(d)]; Seventh Strawbridge Affidavit [19].

31. If the Proposed Extension Order is made (in any form), the Administrators will likely have no choice but immediately to take steps which have the effect of ceasing to trade some or all of the Business. Such a scenario would result in a significantly worse outcome for creditors and other stakeholders (including in respect of the prospects for continued employment of the employees) than a scenario in which the Virgin Companies are recapitalised, or their assets are sold, on a going concern basis as contemplated in the Transaction: Seventh Strawbridge Affidavit [20].

32. Additionally, pursuant to the Transaction Documents, on and from 1 July 2020, Bain Capital effectively assumed economic risk for the financial position of the Virgin Companies. In the opinion of the Administrators, this is a critical element of the Transaction. It preserves the net assets realised before that date for the benefit of creditors while requiring Bain Capital to finance (through the Facility) the continued trading of the Virgin Companies during the remainder of the administration period. Until such time as the Facility can be accessed to address liabilities arising on and from

1 July 2020, the Administrators and the Virgin Companies (and, ultimately, the creditors) continue to bear the financial risk of ongoing trading of the Business on an unfunded basis. Given the magnitude of the day-to-day trading costs and expenses of the Virgin Companies, this is a risk which the Administrators are unable to bear: Seventh Strawbridge Affidavit [21].

33. Further, there is no suggestion by the Applicants that they are seeking to enjoin the sale to the Purchasers. Such an application would, of course, require them to give an undertaking as to damages and demonstrate an arguable case. It is important to recognise that this application could have the effect of frustrating the transaction in a manner equivalent to the grant of an injunction while relieving the Applicants of these financial and forensic burdens.

34. Finally, in considering the significant effect the Proposed Extension Order will have on the sale, the Court should take into account that the interests of the Applicants comprise a small proportion of the unsecured creditors. Mr Catchpoole asserts at [5] of his affidavit that "the Applicants hold approximately $300 m of unsecured notes [in VAH]". There is no documentary support for the assertion made by Mr Catchpoole, presumably on information and belief (although without disclosing the sources of his knowledge). Nevertheless, assuming the amount held is $300m, this represents some 4.4% of the likely value of unsecured creditors as at the appointment date.

F. PROPOSED DISCLOSURE ORDERS: IP PRAYER 6

35. Mr Strawbridge identifies his concerns regarding the Proposed Disclosure Orders in his Seventh Affidavit at [25] to [28].

36. The proposed order seeks to permit disclosure of documents and transaction details, including the financial and economic aspects of a negotiated transaction, to a wide range of parties including other unsuccessful bidders in the Administrators' Sale Process, a number of law firms and unsecured creditors of the Virgin Companies (the **VAH Bondholders**). As at the date of these submissions, despite having been given notice of the 2 July 2020 orders, none of those parties has independently exercised the right or identified sufficient interest to apply to vary or discharge the orders made on 2 July 2020: Seventh Strawbridge Affidavit [26].

37. Mr Strawbridge has given evidence that any widespread disclosure of the details of the Transaction may impair the parties' ability to implement the Transaction in the manner contemplated by the transaction documents which have been negotiated by the Administrators to deliver an outcome which is most beneficial to creditors as a whole. As with any transaction, a number of steps must be taken before the Transaction can complete. These steps include confidential discussions with a range of stakeholders to facilitate the successful completion of Transaction, to maximise the likelihood of the business of the Virgin Companies being successfully conducted in the future, and to maximise the return to creditors: Seventh Strawbridge Affidavit [27].

38. Until these further steps are completed, it is not possible for the Administrators to determine the final estimated outcome for creditors under the Transaction. The proper vehicle for the provision of details of the Transaction with Bain Capital, which will allow the Administrators fully to explain the implications and benefits of the transaction once the contemplated transaction steps have been undertaken, is the Administrators' report to creditors under s 75-225 of the *Insolvency Practice Rules (Corporations)* and the Second Meetings of Creditors of the Virgin Companies: Seventh Strawbridge Affidavit [28].

G. PROPOSED NOTIFICATION ORDERS: IP PRAYER 5

39. Mr Strawbridge identifies the lack of utility of the Proposed Notification Orders in his Seventh Affidavit at [33] to [36].

40. In accordance with Order 6 of the 2 July Orders, the Administrators caused notice of those orders to be given to the Virgin Companies' creditors (including persons or entities claiming to be creditors) by the various email and other notification methods set out in the orders.

41. The Administrators have no present intention to vary the 2 July Orders. The basis for, and the utility of, the Proposed Notification Orders has not been established by the Applicants. This is all the more so in circumstances where the Applicants do not have a sufficient interest to seek to discharge or vary the existing 2 July Orders.

H. MISCELLANEOUS MATTERS

42. Mr Catchpoole notes, in his affidavit of 6 July 2020, at [35], that letters from the solicitors for the Applicants to the solicitors for the Administrators, dated 25 June and 1 July 2020, were not before the Court on the application that led to the making of the 2 July Orders. That correspondence was in the nature of a request under s 70-45 of the *Insolvency Practice Schedule (Corporations)* for copies of the Sale Deed with Bain Capital and any other documents reasonable required to understand the financial and legal consequences of the sale agreement transaction.

43. There is no suggestion in the evidence that, or why, the Applicants are entitled to access the Confidential Information. There is no identification of why this correspondence should have been before the Court. To the extent this suggestion is made, it should be rejected.

44. Mr Strawbridge addresses this matter in his Seventh Affidavit at [29]-[32]. Four points can be noted.

45. *First*, the Applicants have not articulated any cogent basis as to why they would be entitled to access the Confidential Material in their capacity as persons involved in negotiations with the Administrators in proposing an alternative transaction (or otherwise).

46. *Secondly*, following the Administrators' decision to execute the Bain Transaction, and in light of the shortcomings and uncertainty presented by the Applicants' Back-up Recapitalisation Proposal, Mr Strawbridge did not, and does not, consider that the correspondence was relevant to the application made on 2 July 2020. That reasoning is supported by the fact that the Applicants' request did not concern the matters of substance agitated on the 2 July application.

47. *Thirdly*, the orders sought and obtained on 2 July specifically provided, by Order 7, for interested parties to apply to set aside the orders obtained by the Administrators, thereby preserving the position of interested parties.

48. *Fourthly*, if it were the case — which the Administrators' dispute — that the correspondence was relevant to the 2 July application, the Applicants have advanced

no basis as to why the materials, had they been advanced previously and having been advanced now, would direct any different exercise of discretion by the Court under ss 37AF and AG of the *Federal Court of Australia Act 1976* (Cth), where those orders were an incident of the substantive orders sought, and a consequence of the unexceptional obligations of confidence imposed upon the Administrators by the transaction documents. That returns the analysis to the first point, being the absence of any entitlement on the Applicants' part to access the Confidential Material.

I. CONCLUSION

49. The Court should dismiss the Interlocutory Process with costs.

9 July 2020

Ruth C A Higgins SC
David R Sulan
Robert Yezerski
Daniel Krochmalik

Counsel for the Plaintiffs