



AUSCRIPT AUSTRALASIA PTY LIMITED

ACN 110 028 825

T: 1800 AUSCRIPT (1800 287 274)

E: clientservices@auscript.com.au

W: www.auscript.com.au

TRANSCRIPT OF PROCEEDINGS

O/N H-1191818

FEDERAL COURT OF AUSTRALIA

VICTORIA REGISTRY

MIDDLETON J

No. NSD 464 of 2020

**APPLICATION IN THE MATTER OF VIRGIN AUSTRALIA HOLDINGS LTD
(ADMINISTRATORS APPOINTED) and OTHERS**

MELBOURNE

10.23 AM, FRIDAY, 24 APRIL 2020

DR R. HIGGINS SC appears with MR FORTUMALIK for the plaintiffs

Copyright in Transcript is owned by the Commonwealth of Australia. Apart from any use permitted under the Copyright Act 1968 you are not permitted to reproduce, adapt, re-transmit or distribute the Transcript material in any form or by any means without seeking prior written approval from the Federal Court of Australia.

THIS PROCEEDING WAS CONDUCTED BY TELEPHONE CONFERENCE

HIS HONOUR: Yes, Dr Higgins.

5

DR R. HIGGINS SC: May it please the court, I appear with my learned friend, Mr Fortumalik for the plaintiffs.

HIS HONOUR: Thank you. Before you commence there are just a number of matters that I need to make clear and an order that needs to be made. So I will just go through those matters now and then we will hear your submissions.

10

DR HIGGINS: Yes, your Honour.

HIS HONOUR: The first is I'm going to make an order pursuant to section 17 subsection 4 of the Federal Court of Australia Act 1976 and before doing so just make it clear that the court notes that section 17(1) of the Federal Court of Australia Act 1976 requires that a jurisdiction of the court be exercised at open court but that section 17 subsection 4 of the Act allows for the public to be excluded if the court is satisfied that their presence would be contrary to the interests of justice. The courts must balance the importance of this matter being heard now and determined in – and in open justice. Justice requires the hearing to be heard now and that it should not be delayed indefinitely pending the end of the current viral pandemic.

20

The best practical arrangements in the circumstances have been put in place to allow interested members of the public and the press to observe or listen to the hearing. These arrangements are identified in paragraph 1 of the orders I propose to make. It would be contrary to the interests of justice for the public to have access to the hearing other than in accordance with the arrangements that are in the order because the result would be to have the hearing deferred indefinitely. Therefore, the court makes the following orders:

25

30

(1) Pursuant to section 17 subsection 4 of the Act the public be excluded from this hearing listed at 10.15 on Friday, 24 April 2020 other than via the following arrangements:

35

a. Any member of the public is able to join the hearing via the Microsoft Teams platform providing an email address to the associate of Middleton J as stipulated in the court notice of proceedings.

40

b. Any member of the public is able to listen to the hearing via the Microsoft Teams platform by dialling the number and ID allocated to the hearing published on the court list.

(2) Members of the public other than the media representatives who attend the hearing via the methods in paragraph (1) of these orders do so on condition that they are:

- 5
- a. permitted to observe and listen to the hearing but are in no circumstances permitted to participate in the hearing;
 - b. prohibited from making any recording or photographic record of the hearing or any part thereof by any means whatsoever; and
 - c. advised that any failure to observe conditions a. and b. may constitute a contempt of court and be punishable as such.

10 The second matter I need to raise is to make a number of disclosures. I have purchased pre-flight tickets from Virgin which are to be – the flight to be taken in July of this year. On the authority of *Community Development Pty Ltd v Engwirda Construction Co* [1969] HCA 47; 120 CLR 455, particularly the statements of Kitto J at page 459 and a later case of *Deputy Commissioner of Taxation v Casualife Furniture International Pty Ltd* [2004] VSC 157; 9 VR 549, a decision of 17 May 15 2004 of Hansen J, relevantly, at paragraph 441 and following, it would appear that I could be a contingent creditor.

20 At the moment, I understand that flight credits are safe but I should firstly disclose that and indicate that if it comes a matter whereby that crystallises in any way then I will abandon that claim so that will solve the problem of my being a contingent creditor or actual creditor if that be the case on the basis of that authority it would seem that I am. Secondly, I do have some Velocity points under the Velocity frequent flyer program, but I don't think that's material but in any event, that 25 company is excised, I think, from the administration.

DR HIGGINS: That's correct, your Honour.

30 HIS HONOUR: And the third thing is that I am a member of the Virgin Club. Again, I don't see that as impacting at all upon anything that will transpire in this case but I thought I should put those matters on the record so that if anything transpires later that becomes litigious with other interested parties that position is on the record. Could I just – the third thing I wanted to mention is that whilst I have been allocated to hear the applications that arise out of the administration everybody 35 should be mindful that this matter is still in the New South Wales registry so to the extent to which it becomes at all relevant we should keep in mind that New South Wales law applies.

40 As I've just indicated, this matter has been allocated to the docket of the National Operations Registrar to be managed by myself therefore, all applications are to be listed before me and communications made with my associate. But depending on how this matter transpires and depending on what applications are made other judges

of this court are obviously available to hear matters after consultation with the Chief Justice if that is appropriate to do so.

5 We cannot anticipate what will occur in the future as far as the course of this
administration but there may be matters involving intellectual property law,
industrial law, competition law, and the Federal Court has many judges who can
assist in determining any disputes that may arise in a particular area of speciality. I
need say no more about that; it will depend upon the nature of any further
10 applications and the circumstances and we will need to be flexible in that regard and,
as you know, the court will be.

15 Could I then just indicate that in view of the public interest in this matter the court
has established an online file into which documents can be placed and will be placed
if the court considers them to be suitable for access by members of the public or
media. So far as the documents that have been filed, unless you tell me otherwise I
see no reason why obviously the originating application, the two affidavits in support
and the submissions made in support of this application today should not be made
publicly available, and they will be put on the court file. This is the only way
20 documents will be viewed by third parties; applications for access to documents at
the court's registry are therefore unnecessary.

25 As I have alluded to already, this proceeding is going to be conducted by remote
access technology and open to the public as I have indicated in my orders. On this
particular day I have allowed the media outlets to record sound and vision for their
own purposes. This may not be the case in all applications depending upon the
nature of them and it will be determined on a case-by-case basis. The court will
subsequently upload a recording of this hearing and it will be put on the court's
online file. And just the other thing I want to mention is that obviously this is going
30 to be a complex administration but as far as the court proceedings are concerned we
should still try and adhere to what the legislation requires in section 37M of the
Federal Court of Australia Act.

35 That is to deal with matters quickly, inexpensively and as efficiently as possible. I
will be expecting the cooperation of any intervenor or interested party to be had with
the administrators and the court and this is mandated in any event by the Federal
Court of Australia Act. Now, Dr Higgins, having made those comments and that
order I should just indicate to you I have had the opportunity of reading your outline
of submissions, I've had an opportunity of reading the minute of order and the two
40 affidavits in the originating process but I will let you, obviously, present what you
wish me to do today in a way in which you think is appropriate.

45 DR HIGGINS: Thank you, your Honour. Can I begin by identifying all of the
materials upon which we rely and certain documents that will need to be provided
from the solicitors. So if I could first identify the originating process that this file is
..... As your Honour appreciates we rely upon an Vaughan Neil Strawbridge
to observe the benefit - - -

HIS HONOUR: Hang on. Stop. Sorry, Dr Higgins, I'm having slight difficulty hearing you in a sense of it just breaking up a little bit. Let's see if we can fix that.

DR HIGGINS: Can your Honour hear me more clearly now?

5

HIS HONOUR: I now can; that's much better.

DR HIGGINS: Thank you, your Honour. I will stay as close to the microphone as I can, your Honour.

10

HIS HONOUR: Thank you.

DR HIGGINS: Where the plaintiffs made an originating process filed on 23 April 2020 in support of that rely upon the affidavit of Vaughan Neil Strawbridge dated 23 April 2020. Your Honour will have observed that is now That the permissibility of that in the present circumstances is contemplated by paragraph 4.2 of the Special Measures Information Note 31 March 2020. But your Honour should also inspecting at 6.59 pm stating that he swears that the contents of his affidavit are true and correct and are particular. Your Honour, may I read that affidavit and tender the exhibit VNS as two volumes?

15

20

HIS HONOUR: Yes. The court will receive that material. Thank you.

DR HIGGINS: been provided with a hard copy of that exhibit because

25

HIS HONOUR: Yes.

DR HIGGINS: Your Honour, there is also a second affidavit of Vaughan Neil Strawbridge of 24 April 2020. Has your Honour been provided with a copy?

30

HIS HONOUR: And you will need to – sorry. Dr Higgins, you will need to keep close to that microphone I'm afraid.

DR HIGGINS: Yes, your Honour. There is also a supplementary affidavit of Vaughan Neil Strawbridge of 24 April 2020, does your Honour have that?

35

HIS HONOUR: I do.

DR HIGGINS: brief addition after it and it will also mean that

40

HIS HONOUR: Yes.

DR HIGGINS: Your Honour should also have received an affidavit of Cassandra Adams dated 24 April 2020.

45

HIS HONOUR: I've just received that, I think.

DR HIGGINS: Yes, your Honour. Thank you. That contains material relevant to the fact that this part of the proceeding is to be conducted ex parte. So it contains materials received from creditors and others that ought be before the court this application.

5

HIS HONOUR: All right.

DR HIGGINS:

10 HIS HONOUR: I may just take the opportunity to have a quick read of that, Dr Higgins. And I'm told here if you have a microphone it will assist. Do you – you must have a microphone there I take it?

15 DR HIGGINS: I do, your Honour. I'm going through the microphone on my computer, but I will try to get a head set to facilitate.

HIS HONOUR: All right. That may be better.

DR HIGGINS: Yes.

20

HIS HONOUR: Whilst you're doing that I will have a read of Ms Adams' affidavit. All right. I've had a look at the relevant parts of that, I think. One issue seems to arise in relation to 443B of the Corporations Act.

25 DR HIGGINS: That is the, your Honour and it will be necessary for the rest of the court to note.

HIS HONOUR: All right. We will come back to that when you deal with that particular topic. Thank you.

30

DR HIGGINS: Your Honour should also recently have received an affidavit of Matthew Carr dated 24 April 2020 which is an affidavit of service.

HIS HONOUR: Yes, I have that.

35

DR HIGGINS: also read that affidavit, your Honour.

HIS HONOUR: Yes, I see. So that's an – yes. Affidavit of service of various people. All right. Thank you.

40

DR HIGGINS: Yes. The two final documents which your Honour has received are the proposed short minutes of order. They conform, subject to certain directions which require the hearing to be conducted 10.15 today.

45 HIS HONOUR: Yes.

DR HIGGINS: And finally, as your Honour has already alluded to, we provided an outline of witness submissions dated 24 April 2020.

HIS HONOUR: Yes.

5

DR HIGGINS: Your Honour has indicated that the court has an opportunity to read the witness evidence.

10 HIS HONOUR: Yes. I think the most efficient way to deal with this at the moment, Dr Higgins, is to, perhaps, deal with the issues that I have need for more assistance on which I will raise with you and, as I have indicated, all this material will be available to the public.

15 DR HIGGINS: Yes, your Honour.

15

20 HIS HONOUR: I have gone through it in preparation for this initial hearing and I will give some reasons for the orders that I make so that it is made clear the way in which I propose to proceed. The first matter that I wanted to deal with was – if you look at your submissions under the issue of holding meetings by electronic means, the orders you seek in 3 and 4 of the originating process – and this deals with the issue of the place of the meeting – and I just wondered whether or not there was a quicker way home to dealing with this particular problem? And let me just explain – I’ve just been given notes about how I’m not to shuffle papers; it makes it hard to hear me.

25

30 Let me just explain my thinking. If the law requires a place then the place would be where the administrators are conducting the meeting themselves, that is, where they are and then everybody comes into that place by the electronic means. So my initial thinking is that there is a place; so the meeting is convened at a time and place. The time being designated, the place being where the administrators would be – their offices presumably – and then we make orders in relation to electronic means.

35 So it – I would, sort of, see it the same way as I see what we’re doing now. The court is sitting in 305 William Street, Melbourne and I am here sitting here conducting a hearing which just happens to be conducted by people at various other places who are connecting into me. So would that work or not, or is that not right?

40 DR HIGGINS: Your Honour, at paragraph 21 of the written submissions we have canvassed a similar construction at section 75.15 subsection 1(a) and the that’s

45 HIS HONOUR: Yes. Well, I thought that’s what you were probably getting to but then when I looked at the orders I wondered if they were unnecessarily complicated. Let me go through – so let’s take 4. So pursuant to the Corporations Act or the IVSC, the first plaintiff be permitted to hold meetings of creditors during the administration of each of the plaintiffs by telephone or audio-visual conference only and in place of a physical meeting. And that’s really what I’m wondering whether

we need to worry about that because the notice can say a time and a place being the offices of the administrators presumably, couldn't it?

DR HIGGINS: Yes, your Honour, it could.

5

HIS HONOUR: And then you have the facility to have everybody come into that meeting by the various ways of it going it. That would mean we get over any problem of people worrying about whether we need a place in various areas that's all.

10

DR HIGGINS: With respect, your Honour, yes. The terms of the proposed order were with an abundance of caution with the option that

HIS HONOUR: I haven't got a copy, have I? I haven't seen a copy of the proposed notice convening the meeting.

15

DR HIGGINS: The notice is in the exhibits to the affidavit, your Honour.

HIS HONOUR: Is it? All right. Well, I haven't gone through all those in sufficient detail obviously. What does that notice say?

20

DR HIGGINS: If your Honour has the – exhibit consent - - -

HIS HONOUR: Yes. I can find it on my – well, what does it – before I go to that, what does it say about where the meeting is to be held?

25

DR HIGGINS: It currently says, your Honour, virtual meeting only in corresponding locations.

HIS HONOUR: Well, I don't think we have to call it a virtual meeting. It's a real meeting at a place where the administrators are situated and then everybody can join electronically at a meeting.

30

DR HIGGINS: Yes, your Honour.

35

HIS HONOUR: And that would solve the problem, wouldn't it?

DR HIGGINS: With respect, yes.

HIS HONOUR: All right. Can I get you to revamp those orders then to deal with it that way?

40

DR HIGGINS: Of course, your Honour. Does your Honour want briefly in the context meeting then - - -

45

HIS HONOUR: Yes. That may be a good idea.

DR HIGGINS: Your Honour will find it behind tab 92 in volume 2.

HIS HONOUR: All right. Just hold on one second.

5 DR HIGGINS: Your Honour should also look at tab 94 which is the initial

HIS HONOUR: Well, if you follow my way of thinking you would have to alter that.

10 DR HIGGINS: Yes, your Honour, I believe that's so. The location is specified as the premise of the administrators if that is

HIS HONOUR: Yes. Well, that's all you've got to do, I think; the rest follows.

15 DR HIGGINS: Yes, your Honour.

HIS HONOUR: All right. Well, I'm happy with that if that's the way you proceed so change the notice accordingly and change the order so that the place will be the physical meeting place and then the other orders facilitate it to be done by joining the meeting in the way in which you have suggested.

20 DR HIGGINS: May it please the court.

HIS HONOUR: All right. So that was the first matter I had concern about. I don't have concern, I must say, about extending times, and then, I think, the main concern is the issue of section 443B.

25 DR HIGGINS: Yes, your Honour, that's so.

30 HIS HONOUR: All right. Well, firstly, I do not have difficulty as a matter of principle in the circumstances of this case in making an order under that provision extending the personal liability aspects of the administrators. The issue seems to be how long and then whether there is a carve out – and I'm just observing what is said in the correspondence that has come – that you've just handed up in the latest affidavit. So would you like to address those issues for me first and see how we go?

35 DR HIGGINS: Yes, your Honour. As your Honour anticipates, there are two issues. There are the terms or conditions on which such an order ought be made in this time period. The application currently seeks that the order be made and subject to conditions. Can I indicate to your Honour by way of background – which your Honour may already appreciate – the aspects in here are objected to convention. That is a convention of the International Insurance equipment.

40 Both the convention and its associated are incorporated into Australian law by international interests and 2013. Part of the number that deals with the moratorium is C. It relevantly provides that upon the occurrence the insolvency the insolvency administrator regulations applicable shall, subject to paragraph

of the no later than the first, the end of the waiting period and the additional creditor be entitled to possession of object at the item of the Australian relevant jurisdiction will apply but all in the insolvency proceeding upon the period for the purposes of article

5

Relevantly, those provisions moratorium in section 443B of the Corporations Act.

10 The first point is therefore that notice is that the plaintiff has the period of 28-day extension which is the equivalent of 35 days from the commencement appointment and is a 60 days under the Convention. So what the plaintiff's intention is that It would appear that there have been difficulty – has revisited to put together this If Virgin especially things that have to do assets particularly. If your Honour brings up the affidavit of

15

HIS HONOUR: Yes.

DR HIGGINS: shorthand to page 21 of the action.

20

HIS HONOUR: Yes.

DR HIGGINS: Your Honour sees there administrator James Alexa.

25

HIS HONOUR: Yes.

DR HIGGINS: And your Honour will also see that at page of the annexure that analysis in respect of the subject matter.

30

HIS HONOUR: Yes.

DR HIGGINS: If your Honour turns through to numbered – to paragraph 6 of that letter - - -

35

HIS HONOUR: Yes.

DR HIGGINS: - - - and number 7 and following, your Honour will see that the absence of an objection to the application with respect on the part of those affected entities is subject to the protocol where specified.

40

HIS HONOUR: I see. So on the basis – there's no objection on the basis of protocol as adhered to – and is the protocol going to be adhered to by your – is that what you're telling me?

45

DR HIGGINS: It is not yet your Honour. We have not yet had an opportunity fully to consider the details of that proposal and protocol and for reasons of exigency we have received that very recently as did the affected entities receive those here. And we can't

HIS HONOUR: Well, let me just see if I can cut through to where we're at. And I understand there's a moving feast in relation to these matters. This order that I'm making in relation to section 443B is subject to variation, is it not?

5 DR HIGGINS: Yes, your Honour, it is.

HIS HONOUR: What I was thinking whilst I was reading this is that if it's still in negotiation mode, if there is an opportunity to vary the order by the interested parties knowing full well that this hearing is on today, and the material and the
10 administrators know that if I do make the order it is subject to variation so they understand that is the position. So it's not unfair to them to give them something that absolutely and take it away from them because they know they haven't got an absolutely.

15 DR HIGGINS: Yes, your Honour.

HIS HONOUR: Then if it turns out that one interested party wants a variation, or a condition put on it by the court then they can approach me at any time; that's what I'm here for. So that's where I'm currently minded to go, I must say, Dr Higgins,
20 and presumably, you're not going to dissuade me from that at this stage.

DR HIGGINS: That was the course I was, with respect, going to propose, your Honour. It is critical from the administration point of view that these orders be made today under section 443B the administrators must make a determination facilitating
25 exercise the rights 27 April.

HIS HONOUR: Yes.

DR HIGGINS: So it is definitely critical that these be made for the administration
30 but, with respect, it is appropriate that the matter be relisted affected party your Honour.

HIS HONOUR: Yes. Well, your paragraph 11 says that any party who has a sufficient interest – and those who have put the protocol forward have a sufficient
35 interest – can apply to discharge the order. I must say, just looking at proposed order 11, I won't put it on three days business notice, I'm really going to put it on one day's business notice. People will have to move quickly, I think, and as will the court. If anyone needs more time then they can always speak to my chambers and say, look, adjourn it over to tomorrow or whatever but three days could be a bit long
40 by the time we get the – people get to the court.

DR HIGGINS: Yes, your Honour, we do.

HIS HONOUR: So I don't think I need to hear any further, Dr Higgins. I am
45 prepared to make the order in the terms in which you seek it for the time you seek it on the basis – and this is – everyone will be able to hear or read what I say – that if

an interested party wishes to vary any of the orders, but that one in particular, they can approach the court and it will be dealt with as soon as possible.

DR HIGGINS: Yes, your Honour.

5

HIS HONOUR: I did not have any difficulty, based upon the material, in making the other orders that you sought. Is there anything that you need to bring to my attention that I need to specifically take notice of that would be something you would normally have to bring to my attention on ex parte application?

10

DR HIGGINS: Your Honour, my understanding is that all the material of that nature is annexed to the affidavit of Ms Adams.

HIS HONOUR: Yes. Yes. And including the declaration of independence?

15

DR HIGGINS: Yes.

HIS HONOUR: Yes. All right. Well, nothing further you wish to say at the moment, Dr Higgins?

20

DR HIGGINS: Subject to receiving instructions to quantum, your Honour, there's nothing further I wanted to say.

HIS HONOUR: Do you need any time for that or you're getting immediate electronic instructions?

25

DR HIGGINS: I am getting immediate electronic instructions but if your Honour would give me five minutes to confirm that consent.

30

HIS HONOUR: I will.

DR HIGGINS: I believe I have nothing further, your Honour.

HIS HONOUR: All right. Well, I propose to make the orders that have been provided subject to the change that you make in relation to – I think it's just 4 and 5 about the place of the meeting. So I don't think it's very hard to change that order: permitted to hold the meeting of creditors by telephone or audio-visual at – and in that set the place down, and then with such arrangements as best, I think, follows.

35

40 DR HIGGINS: Yes, your Honour.

HIS HONOUR: And if you make those arrangements I am happy for that change in order 11 to one business day.

45 DR HIGGINS: Yes, your Honour.

HIS HONOUR: And just for my sake, if you wouldn't mind whilst you're re-engrossing the orders, I think probably in order 2 after Corporations Act there needs a definition of the Corporations Act because we've defined everything else.

5 DR HIGGINS: Yes, your Honour.

HIS HONOUR: And I'm not a great fan of the and/or so if you just look at order 3 you will see, firstly, pursuant to section 447A of the Corporations and – take away further or alternatively – I will rely upon both of those provisions.

10

DR HIGGINS: Yes, your Honour.

HIS HONOUR: The same in order 4; the same in order 5 and the same in order 6. And you will see in order 9 – same in order 7 and the same in order 8, and you will see in order 9 there's the same issue further and alternatively, and there is also pursuant to section 443B subsection 8 and/or – just put and, take away the -or please. Other than that, I propose to make the order in that form so as soon as you can get that to me I will make it and it will be available to the public online immediately so that there will be access to the full terms of the order which are now pronounced.

15
20

DR HIGGINS: able to do that, your Honour.

HIS HONOUR: All right. And as I said, I will provide reasons for the orders which will also be put online for those who are interested to know the full basis of my making those orders but, in summary, it is for the reasons that are set forward in the affidavits of the administrator and in your submissions.

25

DR HIGGINS: May it please the court.

30 HIS HONOUR: All right. If there's nothing more we will now adjourn the court. The court is now adjourned.

MATTER ADJOURNED at 11.00 am ACCORDINGLY