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TRANSCRIPT OF PROCEEDINGS

O/N H-1255169

FEDERAL COURT OF AUSTRALIA

AUSTRALIAN CAPITAL TERRITORY REGISTRY

MIDDLETON J

No. NSD 464 of 2020

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

No. NSD 714 of 2020

**WELLS FARGO TRUST COMPANY, NATIONAL ASSOCIATION (AS OWNER
TRUSTEE) and ANOTHER
and
VB LEASECO PTY LTD (ADMINISTRATORS APPOINTED) and OTHERS**

CANBERRA

2.15 PM, TUESDAY, 11 AUGUST 2020

**DR R. HIGGINS SC appears with MS KROCHMALIK for the plaintiff in
NSD464/2020**

**MR I. JACKMAN SC appears with MR KOLESKI for the respondents in
NSD464/2020**

MR IZO appears with MR BURNETT for BC Hart Aggregator in NSD464/2020

MR WARD appears with MR SAMBUCCI for the applicants in NSD714/2020

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HIS HONOUR: Before I take appearances, there are procedural orders I need to make in both matters.

5 The Court notes that section 17(1) of the Federal Court of Australia Act 1976 describes that the jurisdiction of the court to testify in open court and section 17(4) allows the public to be excluded if the Court is satisfied their presence will be contrary to the interests of justice.

10 The Court must balance the importance of this matter being heard and determine an open justice. Justice requires this hearing be conducted as soon as reasonably possible and it is not to be delayed indefinitely, pending the end of the current viral pandemic. The best practical arrangements in the circumstances of the pandemic have been put in place to allow interested members of the public or the press to observe or listen to the hearing. These arrangements are identified in below.

15 It will be contrary to the interests of justice for the public to have access to anything other than in accordance with the arrangements identified in the orders below, because the result would be to have the hearing deferred indefinitely.

20 Pursuant to 17(4) of the Act, the Court will order, in these proceedings, the public be excluded from this hearing listed at 2:15 pm on 11 August other than by the following arrangements: Any member of the public is able to join the hearing by the Microsoft Teams platform, by providing an email address to the Associate Justice Middleton as stipulated in the court's notice of proceedings. And (b), any member of
25 the public is able to listen to the hearing by the Microsoft Teams platform by dialling the number and ID allocated to the hearing published on the court list.

30 2. Members of the public who attend the hearing by the methods in paragraph 1 of these orders do so on the condition that they are: (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 with the exception of media representatives; and (c), advised that any failure to observe the conditions (a) and (b) may constitute a
35 contempt of court and be punishable as such.

I will now take appearances in both proceedings. Yes, Dr Higgins.

40 DR R. HIGGINS SC: May it please the Court, in matter 464, I appear with my learned friend MR KROCHMALIK for the plaintiff.

HIS HONOUR: Yes, Mr Jackman.

45 MR I. JACKMAN SC: May it please the Court, in the matter of 464, I appear with my learned friend MR KOLESKI for Investment Advisors and Tor Investment Management Hong Kong.

HIS HONOUR: Yes, Mr Izo.

MR IZO: In the matter 464, I appear Mr Burnett for and BC Hart
Aggregator Australia Proprietary Limited is an interested party

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HIS HONOUR: Thank you. In the other matter, Wells Fargo Mr Ward.

MR WARD: Yes, may it please the Court, I appear for the applicants with my
learned friend, MR SAMBUCCI.

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HIS HONOUR: Thank you very much indeed.

MR: Thank you very much. I appear with my learned friend Ms Glindeman
for the Respondents.

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HIS HONOUR: All right. Now, on my count, there's quite a bit that I have before
me that requires determination. Can I go through what I think there is and then you
can correct me, if anyone is there. I have the matter that seems so long ago was
before me but probably wasn't, which was before us on 30 July and those orders
which were sought by the administrators have not been made. And that was partly
because we adjourned so Mr Lazaridis could confer in relation to a particular order
about creditors and confidentiality.

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And there's a dispute in relation to that, I think, there's an order 6A and there's an
order 6B. So that's on the table. And I think there's also some outstanding matters
that are raised in an email that Mr Lazaridis has sent me which we can discuss. So
that's one matter. Then we have the other interlocutory application by the
administrators, which is returnable today, seeking other orders. And, in that
particular matter, I noticed Mr Turner has sent me an email in relation to certain
matters that may be relevant to that application. Then we have an application in the
administrators proceedings brought, I think the instructing solicitors dealing with
certain arrangements that they want to have made before the meetings. And then we
have the Wells Fargo matter, which hasn't been finalised yet and there are some
disputes about that that I need to determine. So I should tell you, I have not had the
opportunity of reading all of the material that has, really, only come in this morning.
I am sure you understand that. So we will go as far as we can to deal with what we
can deal with and try and work out where the disputation is. But until I get a
complete handle on all the material, obviously I'm not going to be making final
decisions today, unless they're by consent and they're appropriate. So that's what
seems to be on my agenda. Dr Higgins, I will start with you; is that the complete
picture?

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DR HIGGINS: Yes, your Honour. Between 464 and 417, that's my understanding
of all of the issues.

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HIS HONOUR: All right. Mr Jackman, is that - - -

MR JACKMAN: Yes.

HIS HONOUR: - - - pretty much where you land as well?

5 MR JACKMAN: Yes.

HIS HONOUR: All right. Mr Izo?

10 MR IZO: Yes, it is, your Honour. Could I just indicate, if it's possible for me to do
so now, that I'm only here because I have an interest in Mr Jackman's application.
And we only – it's not a criticism, but we only got notice of it about an hour or so
ago. And it's obviously a matter for your Honour, guided by how – as to how your
Honour wants to deal with it, but we would appreciate, if it is an option, an
15 opportunity to get the affidavit and to consider the material before it is finally dealt
with. But I don't know if that's a possibility, but I raise that for consideration.

HIS HONOUR: Well, my initial impression on that is that I won't be dealing with
that today unless someone persuades me that I have to do it because it's a matter of
urgency, and I will give everybody the chance to, including myself – it's not more
20 important, but it is significant – have the opportunity to look at the material and
consider it. So I didn't think a decision had to be made on that today – I will hear
Mr Jackman about that – but it does seem to have some advantage and everybody,
considering the proposal being put, and it may be that there's an element of
agreement about it. I should say, as my initial impression, this is – what's being
25 sought is in line with, basically, my concept of trying to get as much information out
there and doing things before the meeting so everybody is informed. So whether this
is the right mechanism or whether it's the right timing, that may be a matter to
debate, but it seems to me to be working in the right direction. But, anyhow, I
haven't made any judgment about that finally – it's just an impression I have.

30 If I could go to the Wells Fargo – Mr Ward, I'm not sure what the disputation is. I,
actually, was advised that I could, perhaps, put pens down and not write any reasons
and, rightly or wrongly, I took everyone at their word. So I am not up to speed with
where you're at, but you can tell me about that. But, again, if that requires any final
35 determinations today, I do not think I will be in a position to do that without looking
at the material that is in dispute, but I just informed you of that. And, Dr Higgins,
that's my position with Wells Fargo. So we seem to be on the one page as to what's
before us, so I think I will hand over to you, Dr Higgins, and we can proceed as far
as we can and work out what needs to be done. Now, there are some people who
40 may be seeking to address me. Mr Lazarides, you're there, I notice.

MR LAZARIDES: Yes, your Honour, I'm here. Good afternoon.

45 HIS HONOUR: Yes.

MR LAZARIDES: I have read – thank you. Good afternoon to you. I have read
your memorandum and I would like to debate that with yourself and Dr Higgins in

relation to your proposal, 6(b), and that is the only thing, I think, outstanding in relation to the matter that was before me on 30 July. And I would like to finalise that if we can, because those orders should be made as soon as possible.

5 MR LAZARIDES: Yes, your Honour.

HIS HONOUR: And we could, at least, get that off the plate. So I will come back to that. Is Mr Turner here?

10 DR HIGGINS: I understood from Mr Turner's email to your Honour, that he may not be able to appear today.

HIS HONOUR: All right.

15 DR HIGGINS: So that he's not appearing.

HIS HONOUR: I see. Well, with Mr Turner, I have read his email to me dated 11 August at 9.22 am. And the only thing I think that may impact his – what his concern is about mixed messages, but we can make that clear if we have to.

20 Otherwise, I will deal with that if we need to, his email, that is. All right. Over to you, Dr Higgins.

DR HIGGINS: Your Honour, is the convenient course to proceed in the order in which your Honour identified the issues, and that is to begin with the finalisation of the orders of 30 July and the issue that arises to the administration of Mr Lazarides?

25 HIS HONOUR: Yes. I think that is the best way. Let's get that out of the road. And Mr Lazarides can leave, then, if he wishes to.

30 DR HIGGINS: Yes, your Honour. Your Honour should have received the one which – the further submission from the administrators, dated 6 August 2020, which is headed Halo Application Submission as to Additional Order.

35 HIS HONOUR: Just let me – what date was that? Yes.

DR HIGGINS: 6 August - - -

HIS HONOUR: Yes, I have read that.

40 DR HIGGINS: - - - your Honour.

HIS HONOUR: Yes.

45 DR HIGGINS: And your Honour sees the proposed form of our order at paragraph 2.

HIS HONOUR: Yes.

DR HIGGINS: And Mr Lazarides has propounded in his submission of 10 August 2020, which your Honour should have - - -

HIS HONOUR: Yes.

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DR HIGGINS: - - - a different form of order, that is, paragraph 3.

HIS HONOUR: I have that. Why can't we have both orders? 6(b) deals with a situation, I must say that is what I had in mind, that if there was a creditor who notifies that there's a dispute, then that particular person should have all the information that the administrator had to make that decision relating to them, that's all. I didn't think that would be too onerous. I hope this doesn't happen too often. But if it does happen too often, then it's indicates the process is broken, which is another problem. What's wrong with 6(b), Dr Higgins?

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DR HIGGINS: Could your Honour give me a moment to confirm my instructions in respect of the

HIS HONOUR: Yes. Yes.

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DR HIGGINS: Your Honour, could I indicate that the difficulty as we apprehend it is as the scope of operation as this proposed order 6(b). It's unclear as to the class of documents it would comprehend. On its face, it appears to cover any documents which the administrators have regard in adjudicating the claim. And that may touch upon confidential materials which are not in the ordinary course we proposed to our creditors. So the difficulty at the moment is the breadth of their of the order. And that is what we have sought to confine in the form of order we propose at paragraph 2 of our short submission.

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HIS HONOUR: Well, Mr Lazarides idea is it has to be a creditors claim. I'm trying to look for the agreed person who is not if it doesn't get – entitle them to be a creditor, because of a decision of the administrator. So I'm trying to envisage, though – I hope this doesn't happen too often, but it will – it may happen and will probably happen every so on to satisfy. If you make a decision based upon confidential information, one way or the other, eventually, that person is going to be entitled to that information if there's going to be a fight about that person's entitlement. Now, that may be organised through a court and a confidentiality regime. So I'm attracted to 6(b). If the only issue is confidentiality, then we can put some sort of parenthesis to say:

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Promptly provide the entity with all material and information used or relied upon other than that which is confidential in making their decision notification adjudication.

45 And but I would need to have some rider that that confidentiality may have to be waived or – yes, used the word “waived” or overwritten – in an appropriate case. So how do we do that? That's what I had in mind, I must say.

DR HIGGINS: Yes, your Honour. There is, of course, your Honour, already provision for adjudication rights in the IPR.

5 HIS HONOUR: I appreciate that and I was mindful of that. And that's why – that's why you need, with adjudication rights, that tends you need to have this natural justice requirement information to be given one way or the other. It will come out one way or the other. Well, can you just give me an example – your instructors may be able to help you – if the information is that relating to the creditor or the claim creditor, then, by definition, it shouldn't be confidential to that person. This is where we started our discussion earlier. So as a proposition, I don't think that's available; that must be right. So if you do have confidential information, one way or the other, it will have to be given over. I'm not quite sure what the category is. It's confidential information about what else is going on in the administration that impacts upon whether the person is a creditor or not. I just don't and can't envisage there really being a situation where it wouldn't be handed over to the person who is agreed, by definition.

DR HIGGINS: Yes, your Honour. One example, your Honour, may be a circumstance in which an aspect of the ROCAP report that had regard to some of a particular creditor's claim. But the totality of the ROCAP would not be disclosed, because aspects of it might be confidential. So that - - -

25 HIS HONOUR: But you wouldn't have to give the – you wouldn't have to give the totality, would you, it wouldn't be – would it be relevant to the material information used?

DR HIGGINS: So it may be, then, your Honour – and that is another scope of application and operation of the words. It may be that it would be “all material relevantly had regard to” as opposed to “all of the documents or information”, which is apt to encompass the goal of a document and not just the aspect relied upon for the of the creditors.

35 HIS HONOUR: All right. Well, if that's the point you're worried about, I've got no difficulty in obviously only looking at what's relevant to that particular entity, what you take out of the whole document. It's like redacting a larger document dealing with other people. I don't see a problem with that. But isn't that “provide that entity with all material and information used” or “relevantly used” if you want to put in “relied upon in making their decision”? I interpret this to be “all relevant material information used in making the decision in relation to that entity”. That's how I would treat it, I must say. I think Mr Lazarides was – this is what is really his point is, isn't it? That's all he wants if he is going to be the agreed person.

45 MR LAZARIDES: That is correct, your Honour. May I make this observation, your Honour, and to Dr Higgins: I'm grappling with the proposition that just because something is confidential, it's release necessarily follows that it's prejudicial. I would suggest that perhaps the release of confidential information may not be prejudicial. And it wouldn't be prejudicial to a third party, for example,

when, in the situation envisaged by order 6(b) – and I do agree, your Honour, with inserting the words “relevantly”, as you’ve suggested.

5 HIS HONOUR: Well, Dr Higgins, I think this “all relevant material information” – and “relevant” only emphasised the point I’m making; it’s relevant to the entity’s claim in relating to that entity. So if we – the entity with all relevant information – “relevant material information used in relied upon in making their decision not already provided to or by the entity”. I don’t think this is going to cause great grief, in any event. If it does, the law is the law and, in my view, there’s no reason why it
10 shouldn’t be the answer to give natural justice and aggrieved. So we will just have to live with it, I think. Your client will have to live with it, Dr Higgins. I can’t hear you – your response. Maybe because of the fact that there’s nothing worth responding to.

15 DR HIGGINS: Your Honour, no, your Honour, I’d gone on mute. Your Honour, there is a question of the costs in the estate of this process which I ought to bring to your Honour’s consideration and I - - -

20 HIS HONOUR: I understand that, but we can’t disenfranchise people unfairly and feel as though they’re left out and that’s just a cost that will have to be borne. I hope it doesn’t happen very often. If the administrators have a multitude of claims that are made and this doesn’t work, well then, they can come back to me and say we’ve got to do it a different way. But I’d like to see a few examples if that was the case, as to where it’s going wrong, otherwise, I think we should adhere to what I regard as an
25 appropriate mechanism.

DR HIGGINS: Yes, your Honour. Can we - - -

30 HIS HONOUR: All right.

DR HIGGINS: In terms of the final language of the order, your Honour - - -

HIS HONOUR: Yes?

35 DR HIGGINS: Your Honour had contemplated the addition of relevance but there was also some rider in respect of confidential information.

40 HIS HONOUR: Well, I don’t know if that – I did, but I don’t know if that’s really relevant. Because if you work on the basis that you’ve got a whole lot of material that relates to someone out of the entity claiming to be a creditor, which is confidential, on my understanding of how this will operate, you don’t have to disclose that. That’s not something that needs to be disclosed to the applicant or the entity claiming to be a creditor because it’s not relevant to them.

45 DR HIGGINS: It can – your Honour, can I - - -

HIS HONOUR: I understand where you’re going – yes?

DR HIGGINS: Can I postulate one example, your Honour, which might be the case?

HIS HONOUR: Yes.

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DR HIGGINS: Where an individual or entity that was the holder, for example, of United States bonds who had purchased those bonds through another entity, it may be the case that the administrators would adjudicate on the claim on a basis of how the notes are held and that might involve information confidential to a party other than the creditor claiming. It's that kind of circumstances, in particular to the bond holders which I believe is the category in which Mr Lazaridis falls, that another party's confidential information may be the subject matter of the adjudication, but might be something that that third party would not want disclosed to the creditor claimant.

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HIS HONOUR: All right. Well, the answer to that would be that the creditor claimant is entitled to see it. All the question is, is that it has to be a confidentiality regime in relation to him or her seeing it. So - - -

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DR HIGGINS: Your Honour, there may then be quite a substantial cost associated with bond holders, were that to occur. I raise these matters, your Honour, because I think it's appropriate to.

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HIS HONOUR: No, I understand. Well, I think I stand by my decision that this needs to be done. If we have that problem, then as much as the administrators don't want to be wasting time coming back to court more often than they have to and whatever, or the court being involved in unnecessary disputation, it may just be that I will have to arbitrate if there is that particular problem and say that that material can't be given to them. The way it will work isn't it, is that as an aggrieved person, they have a process as you say, to come to the court eventually, don't they, if they're not accepted as a creditor?

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

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HIS HONOUR: So that will happen after you give them the information.

DR HIGGINS: Yes.

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HIS HONOUR: And if you don't give them confidential information because it's confidential, then that will be part of the grievance they have and then you'll have to work out what to do about that. So, what you're worried about then at the moment would be that you're in breach of an order because you've got to provide all the relevant information used to rely upon.

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DR HIGGINS: Quite, your Honour, yes.

HIS HONOUR: All right. I understand that issue.

DR HIGGINS: Yes, your Honour.

5 HIS HONOUR: If I said at the end of the order 6(b), “subject to any confidential material or information relating to third parties”, then the claimant – you would give them all the information other than that. Because then indicate that’s why you’re not giving that, and then the aggrieved person, if they’re not satisfied, would have to go to make an application to the court, which they have in any event if they’re unhappy.

10 DR HIGGINS: Yes, your Honour. That’s – yes, your Honour, and it’s more – it’s consistent with the IPR, so that was - - -

15 HIS HONOUR: It is, yes. Yes. Mr Lazarides, have you followed what I’ve been discussing with Dr Higgins?

MR LAZARIDES: I believe so, your Honour. I was going to suggest having the words at the end “unless the court orders otherwise”.

20 HIS HONOUR: The problem with that – it requires, then, every time when we come back to court on every matter - - -

MR LAZARIDES: Yes.

25 HIS HONOUR: - - - that – and as much as I like coming to court, Mr Lazarides, I would prefer not to come every minute of the day, seven days a week. This – there is a grievance process which a creditor who is dissatisfied can adopt. So if it all turns to that – which one hopes it doesn’t – then this allows the administrator at first instance to claim the confidentiality. If it’s something which the court or whoever adjudicates it says is not correct, it can be undone by the court. So I think that’s –
30 it’s a good compromise.

MR LAZARIDES: I agree, your Honour. Could I have those words again?

35 HIS HONOUR: Yes. So at the end of – in your 6(b), we will add the words in the third-last line “that entity with all relevant material information”. And then at the end of 6(b), we will put “subject to any confidential material or information relating to third parties”.

40 MR LAZARIDES: Thank you, your Honour.

HIS HONOUR: All right. Well, then, Dr Higgins, if we make that 6(b), I’m happy with – 6(a) and 6(b) still sit together, don’t they?

45 DR HIGGINS: I think that’s so, your Honour.

HIS HONOUR: Yes. All right. Well, then, Dr Higgins, I have a proposed order which we were happy to make that order – when I say “we”, I was happy to make that order on 30 July, and the only issue was this issue of - - -

5 DR HIGGINS: Yes, your Honour.

HIS HONOUR: - - - what turned out to be confidentiality. So if you would like to re-engross the order with 6(a) and 6(b) as modified and send that into the court, I will make those orders and I will provide reasons in – separate reasons for why I have
10 made those orders, including a reference to what Mr Lazarides has said, all right?

DR HIGGINS: May it please the court. We will do that this afternoon.

HIS HONOUR: Mr Lazarides, you also in your email to me raise a number of other
15 matters about outstanding requests for information and extending dates in relation to that. That’s – they’re really matters that I will be dealing with and in relation to other proposals that seem to have been made now, so maybe what’s there has been taken over by other events as to what’s going to be happening with informing various
20 people about what’s going to happen at the creditors meeting, and I don’t know if there’s anything there that I need to deal with specifically.

MR LAZARIDES: Yes, your Honour. Could I make this comment in an effort to expedite things: in relation to outstanding requests for information – in particular, the last paragraph in my submission – I would be quite content if Dr Higgins could
25 indicate to the court that their clients undertake to that effect in lieu of an order, if that assists.

HIS HONOUR: Well, my approach to this has been – really, as a basic approach – is that the mechanism in which to inform creditors is the one that I set out in my
30 judgment number 5, which is basically the process of a report and information. And then what I said, though, was I’m encouraging people to try and be full and frank with creditors and provide sufficient information to make – creditors to make an informed decision. But having said that, it was in the process, I think, that we –
35 legislation has set up.

So what – we’ve now got another application to deal with providing further information and that’s a formal process. But I’m not in the administrators’ hands completely but I have to respect what they have to do, and the timing involved, as well as allow the creditors the opportunity to look at the material. Now I think that’s
40 what’s probably anticipated with the application that’s just been made today. So I’m not going to insist or ask for any undertaking at this stage, but I think a process may be put in place where further information can be given. And I’d rather do it in a uniform, proper manner than ad hoc, if you understand what I’m saying.

45 MR LAZARIDES: I’m quite content with that, your Honour.

HIS HONOUR: All right. So I think I've dealt –have I satisfactorily, at least as far as covering your email of 10 August 2020 or your submission, I should say.

5 MR LAZARIDES: In relation to 6A and 6B, yes, your Honour. I'm gathering that my other items are going to be dealt with in these other matters that have come before your Honour.

HIS HONOUR: I think that's probably right, Mr Lazarides, yes.

10 MR LAZARIDES: Thank you, your Honour.

HIS HONOUR: All right. Well, then. So, I take it, Dr Higgins, there's no one else who wants to say anything about the orders in relation to the application of 30 July so if you, as I say, provide those to me, I will make them, and I will deliver reasons
15 in relation to those.

DR HIGGINS: Yes, your Honour.

HIS HONOUR: So that gets rid of item 1, I think, on our agenda.
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DR HIGGINS: Yes, your Honour, and item 2 was the application filed by the administrators in 464 for further release relating to the Halo platform and an extension of the convening period and that's the interlocutory process of 7 August 2020.
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HIS HONOUR: Yes.

DR HIGGINS: And your Honour should also - - -

30 HIS HONOUR: Well, the only - - -

DR HIGGINS: Yes, your Honour?

HIS HONOUR: The only thing I was unsure about that is how that's now impacted
35 by the third item on the agenda, which is the application to have a facilitator, that's a nice way of referring to it, I suppose. I haven't worked out whether they interrelate or whether you can get your orders without impacting upon what I decide on that other matter.

40 DR HIGGINS: Your Honour, my submission in that respect would be, with respect, we agree with your Honour's earlier indication that Mr Jackman's application should be stood over today to allow an opportunity for the parties to consider the material, and an opportunity for my clients and his clients to discuss the substance of relief sought. There are other difficulties with the application which I may come to and
45 that is the matter before your Honour. We do not see, at this point, a difficulty with the grant of relief sought in our interlocutory process of 7 August 2020 insofar as it intersects with Mr Jackman's application.

The relief we seek is important to give technical certainty use of the platform and the procedures to be put in place. If those orders were made and your Honour apprehended any intersection with Mr Jackman's clients' application once it was pressed, they could be varied. But we would seek that those orders be made today
5 and then, once we part, there's an option to discuss that on the evidence the submissions and the like in respect of Mr Jackman's application, if there is an intersection, it can be dealt with then. But we would request that the application that we filed some days ago not be held up today on the basis of the application that we just received.

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HIS HONOUR: All right. Well, maybe the best way to deal with that is to speak to Mr Jackman. Have you had a chance to consider, Mr Jackman, the interrelationship between your application and the orders that are sought today by Dr Higgins?

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MR JACKMAN: Yes, we have. It would be certainly theoretically possible for your Honour to make the orders in Dr Higgins' interlocutory process without considering ours but in our submission, it would be desirable to consider the two together. Can I put several matters to your Honour in terms of that overlap? First of all, if your Honour goes to our application, your Honour has certainly picked up
20 correctly that we seek the appointment of a facilitator, but we also – so that is in paragraph 4 to paragraph 6 about interlocutory process.

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Before one gets to that, paragraph 3 which appears under the subheading Ballots and Proxy Voting – it's our attempt to flesh out a matter which hasn't been confronted
25 directly in Dr Higgins interlocutory process, but is going to have to be confronted. And that is the basic proposition that my clients intend to put forward a rival DOCA. It's accepted by both Dr Higgins and myself that we have a statutory entitlement to do that, and it should be accepted if it hasn't been expressly, that we need to have a meaningful opportunity so that creditors have a genuine choice between the rival
30 deeds of company arrangement.

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It's not a pure matter of form, and to that end, it's essential that the ballot which is going to be made available electronically to creditors has to include our rival DOCA, because the creditors aren't simply going to have a binary choice between the Bain
35 Capital DOCA and nothing else, such as liquidation. There will be two rival DOCAs for them to consider. So order 3 is designed for putting in place a regime which will ensure that the ballot, which is made available to creditors will include our DOCA. And that, in our submission, ought to be considered at the same time as dealing with Dr Higgins' regime, because Dr Higgins' regime is trying to set out a procedure
40 which will be able to cater electronically with the casting of dates before the meeting.

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Now, the timing of this is going to get very tight. On that understanding of the administrative's proposal, the report to creditors is going to be issued on or about 25 August, and online voting is going to be made available at the time that the report to
45 creditors goes out. Separately from that, the U.S. holders are going to be casting votes which will be collated by the trustees for the U.S. holders, and their votes can be cast even before the report to creditors goes out, as they understand it. So

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they're going to be needing – they're going to require a ballot in order to do so, and that ballot is going to have to correspond to the ballot which is made available to all the other creditors – otherwise, there's going to be a complete mismatch in the voting.

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So there has to be a uniformity in the ballot that goes out for this process to work, and our proposal, which may or may not be resisted by the administrator, is that our rival DOCA must be a part of that ballot, in such a way as to provide a fair opportunity for creditors to vote in favour of our DOCA. There's one other matter of potential overlap. If your Honour goes to Dr Higgins' interlocutory process, paragraph 15.

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HIS HONOUR: Yes.

MR JACKMAN: This is in terms of casting votes by the proxy lodgement date, which is five days before the creditor's meeting. And what's proposed in order 15 is that creditors won't be able to change their votes after the proxy lodgement date – five days before the meeting, without the express written consent of the administrators. It's a rather odd order which gives the administrators the power of veto over how creditors are going to vote.

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We can't find any evidence in support of that. The closest the evidence seems to get is in the affidavit of Mr Orr in paragraph 20 where Mr Orr deals with a problem with the Halo platform. Once the vote has been submitted, it can't be amended except by request to the administrators, which means that creditors voting in advance of the meeting are unable to amend their vote unless they submit a request through the Halo platform. For this reason, the administrators seek an order to allow for sufficient time in advance of the second meeting for any such requests to be processed.

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Oddly enough, there doesn't seem to be an order within the meaning of that last sentence. What there is, is a rather more extreme order, paragraph 15 of the orders that are sought, which, as I say, gives the administrators a complete grant of veto over changes to votes and requires not just meeting the requests of creditors but it requires express written consent of the administrators. And that, in our submission, has to be thought through in the context of identifying when the ballot is going to go out, the fact that the ballot will include our rival DOCA and setting up an orderly process by which the rival DOCA will be communicated to creditors.

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So that's why we say – if one puts order 15 to one side, which we will be opposing today, that's why I say, theoretically, your Honour could, as a matter of pure logic, give consideration to Dr Higgins the process. But a far more desirable and orderly approach, in our submission, would be to consider the ballot as a whole as well as considering the furnishing of information through a facilitator our DOCA so that your Honour ensures that creditors have a meaningful and genuine opportunity of considering the rival DOCAs rather than that right of the creditors being reduced to a rather hollow and formalistic matter.

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We don't envisage that it would take the administrators very long to form a view about our proposal. The proposal has been fairly well canvassed in correspondence and we would hope that the court may be able to deal with it either tomorrow or Thursday or, at the latest, on Friday morning. And it doesn't seem to us to occasion
5 any problem for Dr Higgins if the orders which she seeks are considered later this week at the same time as our interlocutory process. May it please the court.

HIS HONOUR: Thank you. One thing that when I have been reading the material before the court, and whilst it's not evidence before me, reading the newspapers, is
10 time really of the essence in a sense that if we need more time to have a more orderly process which will allow for the proper preparation of the meeting of creditors, shouldn't we take that time, instead of – if there is any tightness about schedules and tightness about the way in which everything is operating in the current environment,
15 another two weeks or something to get it all properly done and people feel not disenfranchised and feel properly informed? Why – is there resistance to that or is there something I'm missing? I know - - -

MR JACKMAN: Certainly not from our perspective, your Honour. With respect, it's eminently sensible that time be taken so that there is a proper opportunity for
20 information to be provided and for creditors to make an informed decision between the rival proposals. So we certainly don't resist that and we don't see the need for matters to be finally resolved in the next three or four weeks.

HIS HONOUR: Dr Higgins, I know the legislation and the administrators have to
25 have time limits in relation to meetings and all the rest of it, but I have power to extend times when it's appropriate. We're reaching a stage where everybody now is focusing on the options, and it's a very important stage. And as I said before, I would rather it be done now properly than we have people dissatisfied, either then
30 interrupting the process on the day of the meeting or the DOCAs set aside because people feel as though they're not satisfied with the process, and that is the worst of all worlds. It's better to take time, now. So I just wonder if those instructing administrators may think that, instead of rushing – I don't know what date, was it 4
September you had in mind? Is that the date that had been bandied around?

35 DR HIGGINS: Yes, your Honour, that would be the date of the second meeting if your Honour extended - - -

HIS HONOUR: Yes.

40 DR HIGGINS: - - - the extended the period in accordance with the application before the court today.

HIS HONOUR: Well, I can extend it further, can't I?

45 DR HIGGINS: Yes, your Honour. We don't currently request that, and a question would to arise as to who is funding that extension - - -

HIS HONOUR: I understand.

DR HIGGINS: - - - upon which Mr Izo may wish to be heard. Can I - - -

5 HIS HONOUR: Yes.

DR HIGGINS: Can I indicate this, your Honour: we, of course, wholly endorse your Honour's observation that this should happen in a regular manner that doesn't disenfranchise anybody, and that secures a harmonious outcome. That is, of course, the optimal course. There are questions, of course – I will leave that for Mr Izo to address. My learned friend was asked to address any difficulty that arose from the making, today, of the orders that we seek. The only specific orders to which he referred, as intersecting as I understand it, is order 15. He indicated you would oppose that today; that is the first we have heard of that opposition, having notified them of this process last Thursday.

My learned friend's instructors wrote to us yesterday with a letter and then provided up with their interlocutory application at midday today. As we see it, it does not truly upon the and ought not be allowed to hijack the orders we seek. If my learned friend wants to be heard on 15, he can be heard on 15, of course, but there is, otherwise, no intersection identified and there is a procedure in place that is predicated on the platform about which the administrators need some certainty. There is a question, at the extension of the convening date, where we have made the request we made; we do not seek a further two weeks.

25 Can I briefly identify some other issues that my learned friend raised. He suggested that there was no evidence directed at order 15. Beyond the evidence my learned friend identified, there is also evidence at paragraph 27 to 29 of the first affidavit of Mr Orr of 29 July 2020 that goes to why that order is necessary, and that's material that is on the court website. My learned friend also made a submission friend about US holder, they, of course, were accepted – exempted, rather – from the regime; so that is a point that doesn't go very far.

35 Your Honour, my learned friend has asked to identify into section, with the exception of 15, he did not. We do press for the release we seek. We see no difficulty in it being granted today. The administrators also need to proceed in an orderly manner toward the second meeting. And I should say, your Honour, that my learned friend has attributed to me and endorsed a notion that gives us statutory rights to put an alternative DOCA.

40 We don't agree with that proposition. We do agree with what your Honour observes at paragraph 14 of version 5, the section 439CA of the Act authorises creditors to approve a DOCA which is different from the one accompanying the notice of meeting. But, as I said on the last occasion that my learned friend was present in the proceedings, the administrators have exercised the power of sale, and our learned friends will be required to challenge that sale at some point if they wish to set it aside.

Your Honour, the sure-point is we've seen no reason of substance relief ought not be granted today, on simple extension still stand.

5 HIS HONOUR: If I make all your other orders other than, I don't know if it's still 15 in the proposed minute of order - - -

DR HIGGINS:

10 HIS HONOUR: - - - in that way.

DR HIGGINS: the orders, your Honour.

15 HIS HONOUR: Is it? So that starts with "pursuant to section 9-15 of IPSC in respect of any appointment, proxy or alternative forms"; is that the one I'm looking at?

20 DR HIGGINS: No, your Honour, it should be pursuant to section 90-15 of the IPSC.. The IP operate in relation to the Virgin companies which proxy or attorney. That's the one I understood my learned friend was addressing.

HIS HONOUR: All right. I have that in my form of order as 16, so we will need to make sure that

25 DR HIGGINS: That is your Honour.

HIS HONOUR: Sorry?

30 DR HIGGINS: It's 15 in the interlocutory process and 16 in the orders, your Honour.

35 HIS HONOUR: Well, all right. Well, then that's fine. If I don't make that one but I make every other order, does that make any difference to the administer – does that give them any certainty, because my inclination at the moment is to not deal with this particular order now but to deal with it when I deal with the other – Ms Acton's application.

40 I think it's fair to say that the other orders I don't have any problem with, so that may not be of a great advantage. The reason I say, Dr Higgins, when you think about this practically, if I did make order 16 today, I'm also making orders that if anyone objects to it, they can come back and complain in three days, so Mr Jackman can just come back and - - -

DR HIGGINS: Your Honour - - -

45 HIS HONOUR: - - -

DR HIGGINS: - - - we fully agree with that course. We're content with a circumstance in which your Honour makes all the orders but order 16, and that's stood over to the hearing of my learned friend's interlocutory application.

5 HIS HONOUR: All right. Well, dealing with timing, I can deal with it on Friday. I could deal with – if we make it Wells Fargo too. But I could deal with, Mr Jackman, your application on Friday.

10 MR JACKMAN: That's convenient to me, your Honour. Did your Honour have Friday morning in mind?

HIS HONOUR: Yes, I did. Do you have 10.15?

15 MR JACKMAN: 10.15 is suitable for us, or earlier, if your Honour prefers.

HIS HONOUR: All right. No, 10.15 will be fine, I think. We've got a few issues in Melbourne, as you can probably gather, dealing with court administration. So - - -

20 DR HIGGINS: Your Honour, I apologise on Friday, I'm currently before Lee J for closing submissions in ASIC v GetSwift.

HIS HONOUR: All right. Well, that's an important case. Are you there all day?

25 DR HIGGINS: As things stand, yes, your Honour. The full closing of all and all the defendants is set down for one day, so it will, in fact, be a long day. As in a long sitting I apologise for that inconvenience, your Honour.

30 HIS HONOUR: No, that's all right. I may have trouble dealing with it, then, this week. What about Monday? Is that too late? The 17th, that is.

MR JACKMAN: Not from our point of view, your Honour, although I should foreshadow that we may possibly start running into problems if the meeting is to occur by 4 September, but - - -

35 HIS HONOUR: Yes. I'm mindful of that.

MR JACKMAN: But Monday is certainly convenient from our perspective, your Honour.

40 HIS HONOUR: Dr Higgins, if I did it – this is tight. If I did it Thursday afternoon – but you would probably – you're preparing for your hearing on Friday.

45 DR HIGGINS: Your Honour, I would be happy to accommodate the court, frankly, your Honour, but it might be that it's a little tight for all of the parties to get on responsive material.

HIS HONOUR: Well, that's what I'm worried about.

DR HIGGINS: Also - - -

HIS HONOUR: All right.

5 DR HIGGINS: I'm available on Monday, if that's convenient to your Honour.

HIS HONOUR: All right. And you're available, Mr Jackman, on Monday, I think you said.

10 MR JACKMAN: I'm available Monday and I could also do Thursday afternoon. My preference - - -

HIS HONOUR: All right.

15 MR JACKMAN: - - - is Thursday, if that's possible.

HIS HONOUR: Yes. I'm just a little concerned; there's quite a bit of thinking about the process, putting it all together, and this will be the last chance to get it right as far as the process is concerned and the facilitator. I also want people to try to have
20 the opportunity of getting together and seeing if it can work by agreement. Can we put that – you're in the Wells Fargo matter too, aren't you, Dr Higgins? Yes.

DR HIGGINS: Yes, your Honour. And it may be that that could also be listed on Monday, if that's convenient to my learned friend Mr Ward.
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HIS HONOUR: Mr Ward, how are you placed on Monday?

MR WARD: Just pardon me a moment, your Honour; I will just check. Yes, I can do things on Monday, your Honour, if we can't achieve them this afternoon.
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HIS HONOUR: All right. Let's come back to that. We will put that on the back-burner, timing-wise, for the moment. I will just think about it. All right. So if I proceed, Dr Higgins, to make orders in the terms in which you've sought, in relation, other than order 16 – is anybody – no one is objecting to that, I don't think. That's
35 not your problem, Mr Jackman?

MR JACKMAN: No, we don't object, other than that one order.

HIS HONOUR: All right. Well, Dr Higgins, I've read the material in support of
40 those orders you've sought, and I was satisfied that the orders should be made. In view of the objection to 16, I won't make that order. So you've re-engrossed the orders – today's date, I will make those orders and I will provide reasons for why I've made those orders in due course.

45 DR HIGGINS: May it please the court.

HIS HONOUR: All right. These reasons seem to be adding up all, now.

DR HIGGINS: Your Honour is very prolific.

HIS HONOUR: All right. So that deals with that particular matter, now. Mr
Turner has made a number of comments. I don't think I will respond in open court
5 about them, in the absence of Mr Turner coming to the court. And – the one which
maybe he was concerned about was this issue of mixed messages. But my decision,
which I published, number 5, in the paragraphs that have been referred to, including
paragraph 32, made it clear that another person could be put on the docket. But I
think, after Mr Turner's emails and the – Mr Jackman's application deals with some
10 of the matters that Mr Turner was concerned about. So I won't say any more about
that.

DR HIGGINS: Yes, your Honour. And – if it assists, the administrators are content
to write to Mr Turner and indicate that Mr Jackman's application for reminding
15 me that we want's to be present for that application.

HIS HONOUR: All right. All right. That may be useful, so that he will have the
opportunity of addressing matters once he sees that.

20 DR HIGGINS: Yes, your Honour.

DR HIGGINS: All right. Well, then, we've come to you, Mr Jackman, don't we,
with, the third matter on the agenda.

25 MR JACKMAN: Yes. And that's the matter which will be determined on Monday,
now?

HIS HONOUR: Yes. Yes, that's what I had in mind. I didn't think that we would
do it today. But do we need any directions or anything that deals with that, other
30 than adjourning it? Do we need to have any directions or affidavit materials – I
would – I don't – and submissions. I mean, I would be very helped by having
submissions of the parties.

MR JACKMAN: Yes. Certainly. Can I suggest that any affidavits by the
35 applicants, or Bain Capital, for that matter, be trialled and served by Thursday, at 5
o'clock? And then, any affidavits in reply by us, 5 o'clock Friday? And – it will be
useful if we have an exchange of written submissions on Friday afternoon.

HIS HONOUR: Yes, it would.
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MR JACKMAN: I don't think that – there's probably not time to have a staggered
timetable - - -

HIS HONOUR: No.
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MR JACKMAN: - - - but I think we can cover simultaneous exchange of
submissions of Friday afternoon by 5 o'clock.

MR: Yes.

HIS HONOUR: And that can be given to the court – all right. Well, we’re moving more and more to Monday, I think, as being the appropriate time. So if I revise the order and make a decision – I have a hearing at 10:15, which will go for an hour. So
5 if we say 11:15am, on 17 August, for the application to be adjourned to there for hearing?

MR JACKMAN: Yes.

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DR HIGGINS: Your Honour, can I make one request, in respect to the change – I apologise, your Honour. In respect to the change, if my learned friend could then supply evidence on – by midday on Friday, so that the submissions that are exchanged at 5pm can take into account any reply evidence that is served.

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HIS HONOUR: Well, that might - - -

MR JACKMAN: Yes, we certainly – we can do that.

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HIS HONOUR: All right. All right. Well, look, I’m not going to make any directions or orders. You’ve indicated what I think is an appropriate timetable. It’s to everybody’s interests that I have all the material, so I can digest it and be ready to hear the submissions and try and make a decision as quickly as possible, obviously. So I will leave it to you, but that makes sense to get it to Dr Higgins earlier so the submissions can be fully informed by the material. And then, 11:15 will be the time we will hear it.

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MR JACKMAN: May it please the court.

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HIS HONOUR: All right. So that deals with the third item. So then we now move to Wells Fargo, don’t we?

DR HIGGINS: Yes, your Honour. We move to the separates NSD714/2020.

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HIS HONOUR: All right. Now, I should tell you that I have not had the opportunity of reading the material that has come in at 2:18, at 2:07, 2:04pm, or 1:36 pm. I found – I don’t know where you’re up to. So maybe just tell me how far apart you are, is – what’s the issue I need to determine; is it all about money, or is it about process of how you get the engines back? I just don’t know yet.

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MR WARD: It’s - - -

HIS HONOUR: Look - - -

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MR WARD: - - - yes. It’s a little more sophisticated than either about money or process. The essence of the dispute – there are two issues in relation to the orders and you will appreciate, your Honour, that what we’re trying to do is craft orders to

meet the indication your Honour gave on the last occasion as to what was going to be ordered. The two issues that require the most attention I think are, first, the difference between our proposed schedule 3 which is a relatively – we think a relatively precise formulation of the steps that are going to be taken to return the aircraft engines to the United States. The essential difference seems to me to be our client’s or my client’s version incorporates both by which things have to happen and express references to the provision of records, including the serviceability issues at the end of the process. So that’s the first issue.

10 The alternative that is proposed by the administrators is a much more – it’s the same process but without specificity, if I could put it that way, and doesn’t include the serviceability issues at the end. The second issue is in relation to the of the proposition that rent be paid but some lack of commonality between my client and the administrator as to precisely what your Honour anticipated in relation to the relieving of the obligation to pay rent in two respects. First, in relation to the period in which that relief from the obligation to pay rent would exist. And secondly, on the administrator’s proposed short minutes there would be an extension of the relief beyond the payment of rent to all liability without any restriction to merely being liability under 443B in relation to rent.

20 The administrator’s proposal is that relief from all liability in relation to the aircraft objects and that goes well beyond what was argued and well beyond what is contemplated and well beyond what is permissible by 443B. So there are those two issues.

25 HIS HONOUR: I thought that – I thought on that last issues all liability – wasn’t there some concern the administrators had with sighting certain document to sort of warrant that the engines had never been in fires and things like that and they were concerned they may have a liability there. I thought that was alluded to, I must say, at the last hearing.

30 MR WARD: Both version of short minutes, your Honour, I think now contemplate that those documents will be provided. We understand one of the documents that came in at 2 o’clock this afternoon will now, I understand, that it’s proposed that those documents only be provided following the completion of a ferry flight of the engines to the United States because only at that time will the engines have finished their actual work. That may well be something that’s correct and we’re taking that on board. So we understand that the historical documents will now be all provided. There is still, however, we think, some work to be done for our proposed schedule insofar as it specifies with some precision precisely what steps are going to have be taken both here and in the United States to ensure that the process that Mr Dunbia has put forward involving the ferrying of the engines to the United States on the wing of one of the airplanes. We just want to make sure that that process is, less ambitiously and as precisely as possible, be limited for the least ability for the process of and require further intervention of the court.

HIS HONOUR: All right. So I have what is the applicant's proposed short minutes of order that seems to be marked up with red and blue which was, I think, attached to an email of 11 August at 1.05 pm.

5 MR WARD: Yes, your Honour. The – that is, I think, a mark-up against – I think if I could put it, we bid against ourselves by making a change to paragraph 5 of our proposed orders. But your Honour should also, I think, have my learned friend's version which is more marked up, at least in the version that I have, with quite a lot of red and blue.

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HIS HONOUR: I think that's the one I'm looking at. It has got – so let me just give an example. I'm looking at – let's look at order 4 in that marked-up one.

MR WARD: Yes.

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HIS HONOUR: And in the third line of order 4, it has "accordance with" in blue and - - -

MR WARD: Yes, and then - - -

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HIS HONOUR: - - - "matter" is marked out red, and then "re-deliver proposal". Is that the one?

MR WARD: That's the one, your Honour, and whilst your Honour is looking at
25 paragraph 4, that is the – that's the nub of the first issue to which I refer, being, your Honour, the distinction between the two re-delivery proposals. If your Honour tracks that through, your Honour will see that in this document, schedule 3 is entirely crossed out in red. It's our schedule 3. What is proposed in the blue version, which
30 your Honour has – the administrators' version – is simply that the redelivery occur as paragraph 5 of the second affidavit of Mr Dunbia provides. That is a – Mr Dunbia at paragraph 5 puts forward the proposal, in essence, the engines be flown to the United States under the wing of a 737, that the aircraft be turned around in the United States, two engines be taken off it and left in the United States, two short-term engines be put back on to ferry it back to Australia and then two other engines be put back on it
35 and the other two of our engines be put back on their aircraft to be flown back to America and the last two engines be deposited in America.

We don't have anything with that process. What Mr Dunbia has put in paragraph 5 of his affidavit is relatively general. What we've sought to do is to place what we
40 think is perfectly reasonable specificity around the process, and that's the effect of the mark-up in paragraph

HIS HONOUR: All right. Well, could I tell you this: to the extent to which I have prepared for making orders about process, I had looked at the affidavit of Mr Dunbia
45 of 5 August and it seemed to me that I would rely upon his expertise as a way of facilitating the redelivery proposal. So that's where I would start from, and based upon that evidence, that would be my predisposition to make that order, I must say,

Mr Ward. Now, what I haven't done is cross-checked schedule 3 with paragraph 5 of his affidavit.

MR WARD: Yes.

5

HIS HONOUR: But you tell me that effectively Mr Dunbia is – covers the field, but there could be some specifics that need to be identified. That's really what your submission is, isn't it?

10 MR WARD: Well, it is, your Honour. Mr Dunbia doesn't put any particular timeframes on things; our schedule 3 does. Mr Dunbia doesn't refer to the provision of the records; our schedule 3 does. Mr Dunbia – for example, in our schedule 3, at the end of the process, we are, of course, to be provided with the finished end-of-lease inspection records about – in schedule 3. If your Honour has it out, paragraph
15 5, which is crossed out in red.

HIS HONOUR: Yes.

20 MR WARD: The end-of-lease inspection records, of course, are everything that's required of the engines at the end of the entirety of the process, and that would, of course, include serviceability tags at the end of the process. Mr Dunbia is, of course, silent about that. So we would have no problem with Mr Dunbia's proposal that the aircraft we don't know that it's the most efficient way of doing it, but we're told that's what they want to do and we don't oppose it. What we want to do
25 is make sure that the process is complete.

HIS HONOUR: I understand. And you want a time on it. There should be a time on it. And I did pick up the records weren't included. The records have to be provided and the serviceability tags. All right. Let me think about that. So that's
30 paragraph 4.

MR WARD: So that's on paragraph 4, your Honour. Paragraph 5. There was a version put to us which suggested that we would provide assistance, or reasonable assistance, in relation to this process. We're also to do that. Your Honour has
35 heard the cooperation is an essential part of this process. We've provided a version of words which - - -

HIS HONOUR: The version of words I have is in blue. So that's – you're happy with 5 with the blue. That's your – that's your - - -
40

MR WARD: No, your Honour. Your Honour would have seen there's a later version which we sent through. It's to similar effect, but slightly different wording, your Honour. Our version is:

45 *The applicants will provide assistance that is reasonably necessary in relation to the respondent's obligations under these orders.*

HIS HONOUR: All right. Let me then – maybe – let me just – I see.

MR WARD: I think it was at 2.14 today, your Honour, that version was sent through.

5

HIS HONOUR: Yes. I have that. So you're happy with the applicants to provide such assistance as reasonably necessary in relation to respondent's obligation under these orders.

10 MR WARD: That's right.

HIS HONOUR: All right. So that one was probably one of the least difficult matters to resolve – probably.

15 MR WARD: Yes, your Honour.

HIS HONOUR: All right.

MR WARD: Paragraphs - - -

20

HIS HONOUR: Yes.

MR WARD: paragraph 6, your Honour, is basically the deletion of the proposal. In fact, my learned friend - - -

25

HIS HONOUR: then.

MR WARD: It does, the variation of the version that we pushed, your Honour, in that we – we seek in our proposal in 6 that the respondent does preserve the aircraft in schedule 2 by maintaining the engines in accordance with paragraph 1 of schedule 3, the same or greater expense as was maintained at the date of appointment administrators. Now, we want to ensure that the maintenance carries forward as administration process.

30

35 DR HIGGINS: Your Honour, can I indicate that I'm having some difficulty hearing my learned friend's submissions.

HIS HONOUR: All right.

40 DR HIGGINS: I don't know if your Honour is experiencing that, but there's a lot of - - -

HIS HONOUR: No. No, I haven't. So - - -

45 MR WARD: I'm sorry, your Honour. I'm speaking very close to a microphone

HIS HONOUR: Yes. I'm told it's – your connection is perhaps not completely up to scratch. If that's an unfair thing to say, I don't know, but if you just speak closer to the – Mr Ward, sorry, to the mike, it may help.

5 MR WARD: very hard, your Honour. And I can indicate, I'm sitting in solicitors. So I'm doing my best.

HIS HONOUR: All right. I understand. What I'm saying, I did not follow – I got two version 6s before me. The one – I didn't see, in any of the versions, what you
10 were just reading out, I must say. So - - -

MR WARD: So if your Honour looks at the version most recently, the 2.14 pm.

HIS HONOUR: Yes. Yes. I got 2.14 pm. Yes.
15

MR WARD: The 6A and B, and then both of them conclude with the words “to the same or greater extent as

HIS HONOUR: I see. All right.
20

MR WARD: We think that's reasonable.

HIS HONOUR: All right.

25 MR WARD: We don't have a problem with order 7, subject to a further order of the court.

HIS HONOUR: Yes.

30 MR WARD: And paragraph 8 is a substantial difference paragraph 8 is in relation to the release that your Honour anticipated under 443B. There are two issues. The first is the date on relief been proposed to take effect. We made some short written submissions. We think that perhaps your Honour had in mind that that relief started from the date of the orders on the last occasion, not from 16
35 June because your Honour spoke in terms of not giving effect – any effect to note of 16 June. But that's a matter for your Honour.

HIS HONOUR: But I can – I did say that. And that's the position I'm in. But I can independently grant relief from liability irrespective of notice.
40

MR WARD: That's true, your Honour.

HIS HONOUR: All right.

45 MR WARD: We past your Honour's reasons on the

HIS HONOUR: I understand. So that really makes me at large, based upon the evidence and what the authorities say about relief of liability. So I can pick whatever date I like, based upon the evidence and the relevant discretionary considerations. So I can start back on the 16th because that's the date when I've already given liability exemption up to.

MR WARD: Certainly, your Honour is certainly open to submissions. Yes.

HIS HONOUR: Yes. I understand. All right. And then, the way I was thinking – but I wanted to have more information about this. And I've been given more information. And I want to know how long it would be before anything would even happen. My inclination that, based upon the evidence that I now have as to how long is it going to take, I would excuse from – we will deal with what the liability is. I would excuse from liability up until – I think it's now – was it 15 October? I think that's the date - - -

MR WARD: Yes.

HIS HONOUR: - - - of the administrator's

MR WARD: Yes.

HIS HONOUR: So my

MR WARD: We your Honour. The next question would then be in relation to what are you excusing.

HIS HONOUR: Yes. Yes.

MR WARD: In our submission, that can only be read with certainly even all liability in relation to because there may be liabilities we don't know about.

HIS HONOUR: Yes. But isn't that the reason why – to not excuse liability. But in any event, why do you care about – I can understand you caring about my not excusing from liability for rent. Why do you care about the other liabilities?

MR WARD: Well, one issue that immediately springs to mind, your Honour, is the possibility of unknown maintenance issues that should have been dealt with but have not yet been dealt with. And that may not be known until the time of the final inspection of the engines. The words that arose by my learned friend are simply too broad and fall, in our submission, 443A in any event.

HIS HONOUR: Could I do this? Could I excuse from rent at the moment and then wait until an appropriate when people are more informed about liabilities and then have another bite of the cherry?

MR WARD: Yes. But that would probably fall within the scope of the liberty to apply, in any event, your Honour

5 HIS HONOUR: You don't say I've got no power to excuse all liabilities because that's inappropriate.

MR WARD: I don't think it's inappropriate, but I would like to consider whether your Honour has the power to excuse all liability in the broader sense.

10 HIS HONOUR: Yes. All right.

MR WARD: I don't think I proposition today.

15 HIS HONOUR: No. All right. All right. Let's keep going - - -

MR WARD: That's paragraph 8. That's

HIS HONOUR: Yes.

20 MR WARD: Paragraph 10, there's no particular difficulty in – there's no dispute between us, I think, in relation to 10(a), but my learned friend has sought to insert 10(b) which extends order 8 in relation to something which is entirely fresh, that is a proposal that costs be limited in relation to the provision of the record your Honour has heard so much about and has indicated would order. And then, for the first time, 25 flagging the possibility that orders might be sought in relation to unanticipated costs or remedial work on the to provide the records. This is not something that was argued before your Honour, and all we're doing here is giving effect to your Honour's orders. Now, this is an entirely fresh ground in dispute. It links to what I said a moment ago in order 8.

30 HIS HONOUR: Yes, I see. All right.

MR WARD: So we don't agree to the insertion of 10 order(b). And, of course, in relation to order 11, having been entirely or almost entirely successful on the 31st, 35 your Honour should order that the applicant's costs be paid.

HIS HONOUR: Yes. As to costs, as long as your costs are paid, you don't mind if they're costs to the administration, do you?

40 MR WARD: I think not, your Honour, but could I take that on notice?

45 HIS HONOUR: Yes. I was just thinking, and I will hear argument about this, obviously, but it seems to me that this issue arises and needed a determination, and the issue is one of law, and it hadn't been decided before. I've taken a particular view which I have expressed to everybody. It's all part and parcel of dealing with the assets of a company, and just because of the nature of the assets, certain things have to be done and this litigation arose to clarify that and, in part, the process we're

going through demonstrates once the court has indicated a view then the process is done as in the other instances where protocols have been agreed without a court intervention, so - - -

5 MR WARD: Yes.

HIS HONOUR: - - - I'm – I will hear anyone who says to the contrary, but I know it's a cost to the creditors but there's lots of matter that have to be dealt with this way and it is a cost to the administration, so I'm just thinking that through, but I will hear
10 anybody, including Dr Higgins may not think that's appropriate. I don't know.

MR WARD: Thank you, your Honour. So that's the of the issues between the
.....

15 HIS HONOUR: Yes, it is. All right. All right. Well, Dr Higgins, do you want to just go through those issues if that's convenient, or do you want more time to think about these things?

DR HIGGINS: Your Honour, I'm happy to take your Honour to the short minutes
20 we have proposed. Your Honour will see that we have also sought leave to file an amended interlocutory process, which your Honour should have received, and it is our primary submission in respect of that that that matter probably be stood over to allow your Honour to consider it and to let us be informed of our learned friend's position in respect of it. And if that were to occur, then the matter generally should
25 be stood over and Monday seems an appropriate time. So that would be our primary submission as to how your Honour should immediately dispose of this. I can - - -

HIS HONOUR: I must say, I am minded – I would like more time to consider all the material that has come in, obviously, in a time – which I haven't had a chance to
30 look at. There's no super urgency it be done today.

DR HIGGINS: Yes, your Honour. We consider that's the prudent and appropriate course.

35 HIS HONOUR: Mr Ward, are you available on Monday?

MR WARD: Yes, I am, your Honour.

HIS HONOUR: All right. How long do you think – if we have submissions, Mr
40 Jackman and Dr Higgins, in the Virgin matter, and affidavits, and we're starting at 11:15, do you think we would take more than an hour and a half? Or is it a bit more complicated than that, do you think? I just don't know.

MR JACKMAN: I think an hour and a half would be adequate, given that we will
45 have written submissions in advance.

HIS HONOUR: All right. What I'm thinking of doing is put Mr – puts the Wells Fargo matter on at 2:15. And then, worst comes to worst, if we have to carry over to 2:15 with the Virgin matter, we can do that, and Mr Ward will just have to be patient.

5 MR JACKMAN: Yes. I think the probability is we will be finished by to 2:15, but, otherwise, Mr Ward will no doubt show exemplary patience.

HIS HONOUR: Exactly. All right. All right. Well, Mr Ward, what I'm inclined to do is then, if you're happy, I think everyone seems to be on board with this, we will
10 adjourn your application and the interlocutory application – I haven't looked at this. Dr Higgins, what's your interlocutory application in the Wells Fargo matter?

DR HIGGINS: Your Honour should have received an amended interlocutory process, which asserts a new paragraph 5.
15

HIS HONOUR: And what does that say?

DR HIGGINS: Your Honour, it addresses directions that the administrators seek, as to where the moneys for the will come from. The first respondent is a special
20 partner to with no assets, and the second and fourth respondents have very substantial liabilities to creditors, including, relevantly, employee security creditors, trade creditors, bond holders and the like. So the administrators essentially seek directions from the Court providing assurance that the expenses occurred in complying with any orders that the Court should be delivered forfeiture to Florida or
25 fully encouraged in the course of administration.

HIS HONOUR: Yes. Sorry, I do now recall that. That came in a little while ago, didn't it?

30 DR HIGGINS: It did, your Honour. And there was evidence directed at that application. But that is on offer your Honour would properly want to consider, and my learned friend would want to say something about.

HIS HONOUR: Yes. All right. Well – yes, I do remember it now, thank you. We
35 will adjourn that to the 2:15 on the 17th. All right. Well then, do we need to get there all the ducks in a row for me to know exactly what you're all saying about these things. So, Mr Ward, do you want to put anything further in by way of written submission, or you're happy with what you've told me, and I'll have the transcript.

40 MR WARD: Your Honour, I'm happy with what I've told you. There is – it's frankly possible that I may wish to put on a technical affidavit from one of our people to explain why what we've put in our submission is appropriate and reasonable. But it would be brief and would address Mr Dunbia's - - -

45 HIS HONOUR: All right.

MR WARD: Otherwise – in relation to the question of costs, which, of course, is possibly a substantial, could I just ask this; in relation to the suggestion that the costs be costs of the administration, we're, of course, not participating in the broader administration proceedings, and don't have priority in relation to the asset position of the company, and are running very much on the glimmers of various affidavits in the proceedings, which are bleak, to say the least. That's something about which we may wish to be heard, on Monday, in relation to the proposal.

HIS HONOUR: All right. Well, all I would ask – if you're going to make any submissions about a substantive matter, I would prefer to see them in writing first, so I have some idea of where everybody is coming from. So if you do want to argue those sort of matters, if you put in a submission in by the end of the day on Friday.

MR WARD: Yes, your Honour.

HIS HONOUR: Dr Higgins, you would want to put some material in, presumably, in relation to the matters raised by Mr Ward?

DR HIGGINS: Yes, your Honour. I'm content to do it at the same time.

HIS HONOUR: All right. If we all do it at the same time, then we will all have that work to do. Are there any other procedural orders I need to make in relation to the Wells Fargo matter, by any of you?

MR WARD: No. Could I just raise – your Honour raised at the very beginning, your Honour's position, which was that you had downed tools on the provision of reasons as a result of a party stand-down order. The party have – it come as no surprise; the parties have been in some discussions. They have not resulted in a resolution to date. From my side, your Honour, there is no impediment to your Honour putting pen to paper with reasons. My learned friend may disagree, but we see no impediment to your Honour proceeding down that path .

HIS HONOUR: Yes. All right. The first thing to do, I think, is to work out what orders should be made and then I can go from there.

MR WARD: Thank you, your Honour.

DR HIGGINS: Yes, your Honour.

HIS HONOUR: All right. All right. If there's nothing further, we will adjourn the court.

MATTER ADJOURNED at 3.40 pm UNTIL MONDAY, 17 AUGUST 2020